

Financial Counselling Practice Guidance

Integrating financial counselling in a legal setting for
effective collaborative practice

Centre for Innovative Justice

2020



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About the Centre for Innovative Justice

The Centre for Innovative Justice (CIJ) forms part of the Social Innovation Hub (SIH) at RMIT University in Melbourne, Australia. We engage in advocacy and research, knowledge translation, teaching and student supervision to find innovative and workable solutions to complex problems in the justice system.

The CIJ's focus is on identifying alternatives to traditional approaches to criminal justice, civil dispute resolution and legal service provision that address the factors which propel people into contact with the justice system.

We work collaboratively with three co-located community legal centres – the Law and Advocacy Centre for Women (LACW), Youthlaw and the Mental Health Legal Centre. This model allows for an exchange that:

- ensures that CIJ research and advocacy is grounded in practice experience;
- enables our partners to provide legal services and advocacy that is research informed; and
- facilitates the delivery of more holistic support for clients of the legal services via an integrated practice model, with CIJ social workers, a pilot financial counsellor and RMIT clinical placement students from law, social work and financial counselling backgrounds working closely with lawyers to address the underlying causes of offending.

Note: A detailed guidance is currently in development based on the CIJ's extensive experience seconding social workers to supervise social work students in integrated practice settings.

This guidance will complement this higher level guidance, which focuses primarily on the considerations for legal practices which wish to integrate financial counsellors into their organisation, and which also reports on specific lessons from the CIJ's financial counselling pilot operating from August 2019 to June 2020.

Purpose of this Guidance

This document aims to serve as a high-level guide for any organisation seeking to incorporate financial counselling in an integrated Community Legal Centre (CLC) practice. It draws on the Centre for Innovative Justice's (CIJ) experience seconding a financial counsellor to the Mental Health Legal Centre (MHLC) through its Inside Access program. The Inside Access program provides assistance with civil legal issues to women at the Dame Phyllis Frost Centre (DPFC), Victoria's maximum security women's prison.

The CIJ's financial counsellor, funded by the Victorian Responsible Gambling Foundation (VRGF), attended DPFC for a day per week over a ten month period. During this pilot, the financial counsellor provided group information sessions for 148 women, as well as individual appointments and follow up casework to 110 women over the course of 145 appointments (with some women having more than one appointment).

This service focused primarily on women on remand, as remand was identified as a significant service gap. One aim of this pilot was to identify the extent to which gambling-related harm was a co-occurring or driving issue in relation to women's offending. Of the 110 clients that were assisted, 43 (39%) identified that they had experienced gambling-related harm, with 31 of these 43 women (72%) in turn identifying that gambling was directly related to, or the primary driver of, their offending.

While a very specific service and therefore not directly applicable to the delivery of financial counselling services within other integrated CLC settings, the benefits of financial counselling as part of an integrated legal practice were strongly apparent. At the pilot's completion, these benefits were acknowledged when MHLC engaged a financial counsellor within its staff, just as it engaged a social worker on its staff after the CIJ had seconded a social worker to MHLC during an earlier, longer term pilot.

The purpose of this Guidance is therefore to assist other CLCs which may also be keen to harness these benefits for their clients, including addressing their clients' needs in a more holistic way. This Guidance is not intended to be a comprehensive Operating Manual but, rather, to signal some of the issues which CLCs need to bear in mind when embarking on the opportunities that integrated legal, social work and financial counselling practices present. Its focus is therefore intended to have relatively broad application, including at a national level, although a number of references to the Victorian context are included in recognition of the diversity and breadth of the sector in that state.

Integrated Practice

In their *Financial Wellbeing and Capability Activity Discussion Paper*, January 2017, the Financial Rights Legal Centre noted that:

*Financial counselling and legal assistance are closely related, with many financial counsellors performing essential para-legal tasks and/or referring to, or working with, legal assistance services to properly assist their clients.*¹

In National Debt Helpline services across multiple states, integrated practices similarly involve lawyers and financial counsellors working side by side to complement each other. This includes the financial counsellor analysing the client's financial position and negotiating with creditors, while the solicitor may be dealing with a dispute to ensure that the client's overall financial position stabilises.²

Integration of financial counsellors within wider CLC settings, however, is a relatively new development. This is in part because the majority of integrated CLC practices initially focused on incorporating social workers into justice settings or, alternatively, incorporating lawyers within health or social services settings. Many integrated practices, whether Health Justice Partnerships or integrated CLCs, now operate around Australia. The benefits of these multidisciplinary approaches have been well documented, as have some of the challenges which organisations encounter along the way (see Appendices 1, 2 & 3).

These challenges include differing – and sometimes divergent – professional obligations, as well as approaches to file and risk management. Given the additional obligations associated with legal practice and the expectation that this Guidance will be used in the context of CLCs introducing a financial counsellor into their practice, this document is designed to sit within existing organisational policies.

It should be used when a legal practice which has never incorporated a financial counselling component before takes the step to integrate this role. It is important to note here that the integration of a financial counsellor into an organisation will also need to be in line with Financial Counselling Australia's practice standards for agencies employing financial counsellors (Appendix 4).

¹ Financial Rights Legal Centre, (2017) Submission to Financial Wellbeing and Capability Activity Discussion Paper at <https://engage.dss.gov.au/wp-content/uploads/2017/05/Submission-Financial-Rights-FWC-Discussion-Paper.pdf> citing Denis Nelthorpe, 'Financial Counsellors and the Legal System', *Improving Access to Justice*, Consumer Credit Legal Service, p 81.
<https://aic.gov.au/sites/default/files/publications/proceedings/downloads/03-nelthorpe.pdf>

² Financial Rights Legal Centre, above n 1, p 11.

Steps towards integrating financial counselling

Specific requirements of a financial counselling service relevant to CLCs

Specific requirements must be adhered to in order to ensure that a financial counselling service meets the licensing regime of the Australian Securities & Investment Commission (ASIC). ASIC operates two licensing schemes that apply to people and organisations providing advice about financial products or credit, being:

a) Australian financial services licence

Organisations holding an Australian financial services licence are those which provide commercial financial services, such as financial planning. These organisations are:

- able to operate a business giving advice about financial products;
- have obligations under the *Corporations Act 2001* (Cth).

b) Australian credit licence

Organisations holding an Australian credit licence are those which provide credit products, such as banks. These organisations are:

- able to provide credit services.
- have obligations under the *National Consumer Credit Protection Act 2009* (Cth).

Financial counsellors are not the same as financial planners or credit service providers, although they sometimes provide advice about financial products or credit. Importantly, however, financial counsellors are exempt from licensing requirements when their activities are part of a **free, confidential** and **independent** counselling and advocacy service that helps people who are in financial difficulty.

Under Legislative Instrument 2017/792, ASIC provides that financial counselling agencies are exempt from the requirement to hold an Australian financial services licence. This exemption means that financial counsellors can give financial product advice as part of a financial counselling service without a licence, as long as the financial counselling agency:

- does not charge any fees or receive any remuneration arising from the financial counselling service;
- does not run, and is not associated with, a financial services business;
- ensures that its staff do not provide any financial product advice outside the terms of the exemption;
- ensures that its financial counsellors are a member of, or eligible for membership of, a financial counselling association; and
- ensures that its financial counsellors have appropriate training, adequate skills and knowledge.

The *National Consumer Credit Protection Regulations 2010* exempt financial counselling agencies from the requirement to hold a credit licence. This means that financial counsellors can provide advice about credit without a licence, as long as the agency:

- does not charge any fees or receive any remuneration arising from the financial counselling service;
- ensures that the agency and its staff do not provide any other credit activity outside the terms of the exemption;
- ensures that its financial counsellors are a member of, or eligible for membership of, a financial counselling association; and
- ensures that its financial counsellors have appropriate training, adequate skills and knowledge.

The *National Consumer Credit Protection Act 2009* restricts the use of the terms “financial counsellor” and “financial counselling”. Only financial counselling agencies who meet the exemption from an Australian Credit Licence, as described above, can use the restricted terms. The purpose of the restriction is to ensure that Credit Licence holders who are not financial counsellors do not mislead people by representing their services as financial counselling when they are not.

National Standards for Membership and Accreditation

Additional requirements for financial counsellors are listed under the National Standards for Membership and Accreditation (Appendix 5), supported in more detail by requirements of state bodies, such as Financial Counselling Victoria. In general, these include:

- Ensuring that continuing professional development (CPD) for financial counsellors meets 20 points per year. CPD is completed under 3 categories:
 - Technical – e.g. content knowledge relevant to legal issues, banking, fines, dispute resolution, superannuation, hardship, insurance, completion of Statements of Financial Position (Appendix 6)
 - Skills – e.g. counselling, mental health, communication (written, verbal), interviewing, cultural awareness, suicide prevention/training and negotiation
 - Ethics – e.g. conflict of interest, counselling relationship, cultural awareness in relation to the ethics of financial counselling practice, options-client choices; appropriate referral to other services.

Industry rules determine how the various CPD components can be comprised, with details available in the National Standards for Membership and Accreditation (Appendix 5), and in more depth from relevant state bodies.

It is expected that the employing agency pays for annual membership to state peak bodies such as Financial Counselling Victoria and any costs for professional development not provided by those bodies. This includes the financial counsellor attending the annual National Financial Counselling Conference, hosted by Financial Counselling Australia; as well as state conferences, such as that hosted by Financial Counselling Victoria.

Professional supervision

When working as a financial counsellor, practitioners must participate in professional supervision. Professional supervision involves, at a minimum, for staff:

- Employed 0.5 FTE or more – 10 hours per membership year
- Employed less than 0.5 FTE – 6 hours per membership year.

Professional supervision supports the work of the financial counsellor by providing a forum to discuss casework; clinical aspects of the role; and the counsellor's emotional and psychological wellbeing. It should not be confused with line management and must be completed by an individual who is not the financial counsellor's manager. For example, Financial Counselling Victoria's professional supervision policy includes a specific prohibition on line managers acting as professional supervisors.

State bodies also outline who is acceptable as a professional supervisor, with Financial Counselling Victoria keeping a register of approved professional supervisors. Costs of professional supervision should be covered by the financial counsellor's employer – being the relevant legal practice, as envisaged in the context of this Guidance.

Establishing how differing obligations can be managed

The legal obligations between financial counsellors and lawyers often differ. For example, communications between lawyers and their clients are subject to special privilege known as legal professional privilege or client privilege (see Appendix 2 for discussion of these issues). Communications between financial counsellors and their clients are confidential but are not subject to privilege in the same way. For example:

- Like all adults, under the *Children, Youth and Families Act 2005*, financial counsellors are required to report to the police if they have a reasonable belief that a sexual offence against a minor has been committed, unless a reasonable excuse for not reporting applied. A reasonable excuse involves the financial counsellor having a reasonable belief that someone else has reported the offence or, alternatively, that the financial counsellor fears for their own safety or the safety of someone else, if the matter were to be reported. By contrast, lawyers are not bound by the relevant provision in the same way.

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- More broadly, although financial counsellors are not listed as mandatory reporters in relation to matters of wider child abuse under the *Children, Youth and Families Act 2005*, they may report their concerns to the Department of Health & Human Services if they have reasonable grounds that a child is in need of protection.
 - Financial counsellors are bound by confidentiality that can be broken by risk to the client or others, as well as by subpoena. An example of this relates to situations where the client identifies that they are at risk of harm to themselves or another person. A financial counsellor is bound to act on that risk and may be required to report to an external body, such as police.

Financial counsellors are also governed by their own Code of Ethical Practice that needs to be given consideration at the commencement of the integrated practice (Appendix 7).

Keeping separate case files may manage these differing obligations in the event that a financial counsellor must act according to their ethical and professional obligations and where this is in conflict with the professional obligation of their legal colleagues. The CLC may have a process whereby the financial counsellor flags their concerns or decision to report concerns with the Principal Lawyer beforehand.

Establishing frameworks around how each role works together

Consultation will need to occur across all roles in the relevant CLC to establish how each practice will integrate into existing CLC guidelines and frameworks, including the National Association of Community Legal Centre's Risk Management Guide for CLCs (Appendix 8).

As the legal framework is the predominant structure in the organisation (in terms of the integrated practice envisaged by this Guidance), a financial counsellor entering the organisation will need to be aware of relevant requirements and existing practices. In collaboration with the CLC, they should be able to answer the following questions:

- File management
 - Are physical files created or is information stored electronically?
 - What is the process for opening files?
 - What is the process for conflict checking?
 - What is the process for file closure?
- Database usage
 - What database is used (eg: CLASS or a similar system) and will system training therefore be required?
 - Will financial counselling-related information sit within the database?

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- Information Management
 - How are emails and postal communications logged?
 - How are phone calls logged?

Integrated practice referral

Each service involved in the practice is likely to be involved with the same client. The use of an integrated model will enable clients with more complex issues to be seen by practitioners who can consider the wider context of their situation.

A financial counsellor will complete a thorough financial assessment that will provide insight into other service needs, such as legal advice, which may be applicable. This assessment should involve considerations of issues such as the interaction of financial issues with other client vulnerabilities; assessing the validity of debt claims and the likely response of creditors to the client's circumstances; financial risks and obligations; non-legal means for addressing debts; and co-occurrence of other client needs.

Financial counselling and legal practitioners should each advise the client about the integrated service offering and gain consent from the client before making the referral. When the referral is made, it should be 'warm' or 'active', with the client provided information about when they will be contacted if the client cannot see the relevant practitioner immediately. Referrals should be made using a method agreed by the practice, whether that be through a physical form or via email, but must be logged through existing practice procedures.

Frameworks to consider

a) How integrated practice is presented to clients

Use of an integrated model allows clients who have more complex issues to be seen by practitioners in a wider context. Multiple issues can be addressed and assistance provided concurrently in a way that can result in an outcome which is not only better for the client overall, but which is achieved in a faster timeframe.

When referrals are 'warm' between workers within the service, there should be an associated reduction in the number of times that a client will need to retell their story. For example, a client who is meeting with a lawyer might identify that they have a gambling issue which has resulted in a significant amount of debt. This would prompt the lawyer to discuss a referral to the financial counsellor to start to address the debts. The lawyer would advise the client of the availability of a financial counsellor within their service and obtain consent to make a referral. Once the meeting has occurred, the lawyer will advise the financial counsellor of the referral via the agreed pathway (such as email or a paper-based referral form).

b) How client meetings and correspondence are managed

Coordinating meetings so that clients are not making additional appointments is the most effective approach for all parties. Depending on the nature of the issue, the involvement of a lawyer or social worker with a financial counselling client may only involve the financial counsellor seeking a professional opinion or a secondary consult, rather than requiring a separate appointment.

All correspondence should be written by the particular practitioner providing the assistance to the client. All correspondence should nevertheless maintain the requirements relevant to the existing CLC (such as format, letterhead, reference information and mail logging).

c) File management

Financial counsellors will need to adopt the CLC/legal format for file management. This will include file creation, database entry and case note format. File opening and closing processes will be the same as the CLC, although additional fields may need to be added into databases to incorporate financial counselling services into client records and for reporting purposes.

Legal files usually differ significantly from files in a financial counselling agency. For example, most financial counselling files are online and, once the client has completed the intake form and signed an authority, the documents are scanned and the originals shredded. Online copies of all communications are kept and case notes are updated, either via a Customer Relationship Management System or document and kept online. By contrast, the majority of legal practices, including CLCs, continue to operate in a paper-based system, with all documentation required to be kept in a physical file.

d) Information sharing

Client authority needs to be obtained to share information with services operating within the same CLC. This can be verbal and noted on the case note. Signed authorities, however, are required for information sharing outside of the CLC. Financial counsellors may use a range of authority forms depending on the applicable circumstances.

e) Different requirements around mandatory reporting/requests for information

As noted above, financial counsellors are not mandatory reporters, however operate under ethical guidelines and duty of care. Financial counsellors are bound by confidentiality that can be broken by the risk to the client or others and by subpoena. As noted earlier, examples may include if a subpoena is produced, then confidentiality may be broken and the records provided.

f) Other frameworks to consider

Broader obligations, particularly in Victoria, also include obligations under the Multi-Agency Risk Assessment and Management (MARAM) tool for assessment and management of risk of family violence; as well as the Family Violence Information Sharing Scheme. These are mandatory for financial counsellors funded through Consumer Affairs Victoria, and are considered good practice across the Victorian sector.

Managing differing practices

a) Training concerning the differences between each profession

Training either in the form of face to face, or written/online information should be available to explain legal privilege to financial counsellors. Lawyers need to be aware that financial counsellors are bound by confidentiality, but that there are exceptions that allow this confidentiality to be broken.

b) Ensuring that supervision is provided for financial counsellors as per industry practice

As noted earlier, when working as a financial counsellor, practitioners must, at a minimum, participate in professional supervision as follows:

- Employed 0.5 FTE or more – 10 hours per membership year
- Employed less than 0.5 FTE – 6 hours per membership year

The cost of this is paid for by the employing organisation and is completed during the financial counsellor's work hours.

c) Policies and guidelines around challenges that may arise and escalation of a process within the organisation

The Principal Solicitor is responsible for the risk management of the organisation and for overseeing the legal practice to ensure that all relevant professional obligations are met. If there is no other management structure, such as a General Manager or Managing Lawyer, then all challenges which arise in the course of the integrated practice would be raised with the Principal Solicitor.

The financial counselling service will require integration into the CLC's policies and guidelines. This is to address challenges that may arise in tension with the requirements of Financial Counselling Australia's Standards for agencies employing financial counsellors (Appendix 4), to which all agencies employing financial counsellors must adhere. A checklist associated with these Standards has also been developed to assist agencies when undertaking this process (Appendix 9).

Creating a culture which supports positive client outcomes

More broadly, the CIJ's experience points to the need to develop a supportive culture as a foundation for any effective integrated practice, rather than a foundation based largely on process and compliance. This involves clear articulation of the benefits of integrating non-legal services into a legal practice – recognising that it improves legal and wider client outcomes, as well as the practice knowledge of all participating professionals.

It also involves a championing of the role of the non-legal service by the legal practice, especially by senior positions in the agency such as the Principal Solicitor or Managing Lawyer. It also involves ensuring that risk management does not place too much focus on the challenges at the intersection of different disciplines at the expense of client access and outcomes.

Financial Counselling services with justice-involved clients

Financial issues and associated challenges for justice-involved clients

Integrated practice with justice-involved clients understandably carries additional complexities. While legal practitioners may be assisting clients with a range of criminal and civil issues, including while a client is in custody or on a community-based Corrections Order, co-occurring issues for these clients are highly likely to include:

- housing insecurity or homelessness;
- family violence or experience of other forms of victimisation;
- child removal or other Child Protection involvement;
- alcohol and other drug (AOD) and mental health issues; and, of course,
- various forms of debt.

Debt for justice-involved clients can include:

- debt to pay-day lenders;
- debt to utilities companies;
- rental arrears or property damage in the context of tenancy;
- vehicle repossession;
- Centrelink debt;
- credit card/bank debt; and
- various forms of fines and infringements.

Crucially, it can also include debt incurred in the context of gambling, an issue which is harder for any service to address where this is debt to an individual or 'loan shark', but which is important to identify in the context of the client's overall financial status.

Lawyers will work to address many of the legal issues associated with these debts, while social workers in an integrated practice may focus on supporting a client's associated needs such as housing, AOD, mental health and reunification with their children. Many of these financial issues cannot be addressed through legal mechanisms, while issues such as housing supports may not be able to be addressed until financial issues are cleared.

Financial counsellors are therefore a particularly crucial part of the equation for clients who are justice-involved, especially for those who are in custody. This is in part because of the practical limitations on the number of phone contacts a client can have with any individual or service while in custody; the fact that the National Debt Helpline only provides information, rather than direct service delivery; and the lack of access to internet in custody to update their Centrelink or credit status.

Once able to identify the various forms of debt or credit problems which a client may have, financial counsellors are able to help clients to understand more of the issues relating to their debts and the actions which need to be taken. This could be in the form of advocating for an account to be held while the client is on remand, through to requesting a debt to be waived due to the client's specific circumstances. In these contexts, the financial counsellor will advocate to utilities companies, credit providers, payday lenders and housing entities; update the client's Centrelink status with their consent; and have debts 'held' or waived so that the client does not emerge from custody with the debt increased. Where clients have debt to individual businesses, a financial counsellor may need to identify the policies most relevant to their client's situation.

Leveraging the benefits of financial counsellors for justice-involved clients

A number of steps are critical to ensuring that justice-involved clients can benefit from access to a financial counsellor amongst the other services they may be receiving. This includes ensuring that practitioners across the other disciplines within an integrated practice – as well as the staff of any custodial setting relevant in that context – are aware of the value of early triage and referral, as well as the value of longer term engagement. This requires a clear understanding of roles across the integrated practice, as well as awareness raising for services which may be likely to refer clients.

For example, the CIJ observed multi-directional benefits gleaned from group-based information sessions provided to women entering custody, to which they were referred through increasing awareness amongst staff at DPFC. Sessions were designed to help women to identify financial/debt related issues early and, just as importantly, to debunk any misconceptions which women may have had about this debt. Important to note, financial literacy workshops for women preparing to leave custody are equally crucial, so that they are better equipped to manage their own finances upon release. The scope of the CIJ's pilot, however, did not allow for provision of workshops of this kind.

Beyond the immediate experience of the CIJ's pilot, we note that the opportunity to receive financial counselling assistance should ideally become part of a prison's orientation and exit programs. This can enable people entering and exiting custody to start to address their financial issues at a much earlier point, rather than wait for them to self-refer.

Awareness of the service and referrals from and to other services delivering programs into prisons is equally vital. Where formal coordination networks and referrals can be established, clients are more likely to access the services which they need and do so in a more timely fashion. Just as crucial as coordination with agencies delivering services into prisons is coordination with external agencies, including Victoria Legal Aid. In particular, during the period of the pilot, the CIJ's financial counsellor began to explore the potential for Victoria Legal Aid's Prisoner Helpline to start to provide financial counselling, as well as legal advice, through warm and direct referrals.

Other opportunities lie in a justice-involved client's capacity to work off fines, either while in the community or on remand via a Work and Development Permit (WDP). The CIJ understands that, at the time of writing, Fines Victoria are currently piloting a program enabling women who are at DPFC on remand to work off fines via a WDP and encourages this to be expanded across other custodial settings.

Continuity of care – particularly in relation to disclosing certain issues

Finally, while the CIJ's financial counselling pilot proved to be a highly valuable initiative, the demand it experienced from women at DPFC demonstrated that financial counselling should become an ongoing fixture in custodial environments, ideally supported by core Corrections funding.

In particular, the CIJ's pilot demonstrated that rapport often needs to be developed with clients over a long period of time in order for them to feel safe disclosing certain issues or to feel confident that the practitioner is actually going to follow through and achieve tangible outcomes. This is particularly the case for justice-involved clients, who have likely been let down consistently by other services over a lifetime.

Continuity of service is therefore crucial to establishing trust – not only with clients, but also with associated support staff. This is especially the case when it comes to clients disclosing gambling-related harm, because of the associated stigma, as well as the fact that many clients do not initially identify gambling as a priority area to address amongst other co-occurring issues. These challenges are discussed in a 2017 report by the CIJ, *Compulsion, Convergence or Crime? Criminal justice system contact as a form of gambling harm* (Appendix 10).

These challenges are also discussed in an associated 2020 Issues Paper by the CIJ (Appendix 11). This paper highlights recent relevant research and the intersection of gambling and offending in the context of the ongoing economic impacts of COVID-19, as well as the likelihood that these impacts will compound gambling problems across the Victorian and wider Australian community over the longer term.

In the more immediate context of the CIJ's pilot, however, 39% of financial counselling clients seen within the ten month pilot period were identified as having experienced gambling harm, with gambling then being the primary driver of their offending for 72% of this sub-group of clients. It is therefore more important than ever to find ways to identify gambling as a co-occurring issue within offender cohorts and, equally, for this to prompt referrals to therapeutic gambling counselling for clients entering and exiting custody.

Advocates for system reform

In addition to direct service delivery, therefore, financial counsellors can play a vital role in advocating for wider system and service reform, including in collaboration with community-based lawyers. Reforms resulting from collaborations of this kind over the course of the financial counselling sector's growth in recent decades include the development of hardship policies in various industries; as well as credit law and regulation reform.

The activities of Financial Counselling Victoria, in particular, include a range of formal advocacy groups and regionally based peer networks. At the time of writing, these focus on specific areas for reform, such as Gambling; Bankruptcy; Utilities and Centrelink issues. Financial Counselling Victoria also participates with the Federation of Community Legal Centres and Victoria Legal Aid in an Infringements Working Group and a Prisons Working Group to share practice insights and identify priority areas for advocacy. The CIJ's financial counsellor was involved in the Gambling and Prisons Working Groups during the life of the pilot, with participation enabling direct practice experience to be shared.

This means that, as well as improving client outcomes and cementing the inclusion of financial counselling in the MHLC's core service offering to women at DPFC, the CIJ's pilot also contributed to wider systemic advocacy efforts. In multiple ways, therefore, it is the CIJ's hope that its financial counselling pilot has highlighted the intersection of debt, including gambling-related debt, and the needs of criminalised women. Equally, it is the CIJ's hope that this Guidance and the findings from its pilot will prompt more legal services to venture into the highly valuable territory of integrating legal, social work and financial counselling practice – ultimately improving outcomes for practitioners and clients alike.

List of Appendices

Appendix 1 – Health Justice Partnerships Toolkit

Appendix 2 – Integrated Practice Toolkit – privilege and mandatory reporting

Appendix 3 – Social security rights lawyers and financial counselling pilot – an evaluation

Appendix 4 – Standards for agencies employing financial counsellors

Appendix 5 – National Standards for Membership and Accreditation

Appendix 6 – Statement of Financial Position

Appendix 7 – Australian Financial Counselling Code of Ethical Practice

Appendix 8 – National Association of Community Legal Centres Risk Management Guide

Appendix 9 – Checklist – Agency Practice Standards

Appendix 10 – *Compulsion, convergence or crime? Criminal justice system contact as a form of gambling harm*

Appendix 11 – *Unstacking the odds: Towards positive interventions at the intersection of gambling and crime*



starting a
health justice
partnership:
toolkit

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acknowledgements

The Health Justice Partnership Toolkit (HJP Toolkit) aims to guide individuals and organisations in providing legal assistance in health and welfare settings. The idea for the project commenced in 2013.

The medical-legal partnership movement has been growing in the United States since 1993, and helped catalyze the development of Health Justice Partnerships (HJP) in Australia.

Much of the framework for this toolkit was inspired and guided by the U.S. Medical-Legal Partnership Toolkit and other resources developed by the National Center for Medical-Legal Partnership at the George Washington University (NCMLP).

This toolkit has also benefited from learnings shared by the U.S. medical-legal partnership community in literature and at NCMLP's annual Summit¹.

Consistent with the HJP philosophy of collaboration and consultation, the final product has been born from a collaboration of many people's efforts. This first version has resulted from a number of people contributing their ideas, experience and case studies.

We acknowledge Dr Fiona Lander (doctor and lawyer) for creating the initial draft of the HJP Toolkit in 2014 and providing a thorough analysis of the literature on the U.S. position and the U.S. Medical-Legal Partnership Toolkit. Since Dr Lander started the project, there have been major contributions added to the HJP Toolkit under the leadership of Melissa Hardham (HJP Network member and lawyer).

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Case studies are an essential component of the HJP Toolkit. Many HJPs from around Australia have contributed their stories and experiences.

These case studies serve as practical examples and invite opportunities for conversation and networking. We are therefore grateful to the many contributors including Dr Margaret Camilleri and Alison Ollerenshaw (Federation University), Christina Burke (Eastern Community Legal Centre), Tania Wolff (First Step Legal), Christine Newman (Centre for Population Health), Faith Hawthorne (Justice Connect), Maureen Convey (cohealth), Cameron Lavery (Homeless Persons' Legal Clinic), Karen William (Health Advocacy Legal Clinic), Meredith Osborne (Legal Aid NSW), Joanne Shulman (Redfern Legal).

There are a number of resources referred to in the HJP Toolkit including the Legal Health Check developed by the Queensland Public Interest Law Clearing House Inc (QPILCH). We thank Sue Garlick for her advice regarding this resource and for sharing her knowledge about the development of HJPs in Queensland.

Finally, we thank all of the inspirational people who have committed their time to developing HJPs and for creating tools and resources that will contribute to the overall success of this approach to addressing unmet need.

introduction

Disability and chronic illness are associated with increased rates of multiple and significant legal issues. Research conducted by the Law and Justice Foundation of New South Wales found age, illness, disability and family status were the strongest independent predictors of legal problem prevalence in Australia².

Individuals with a chronic illness or disability were more than twice as likely to experience legal problems and those problems were more likely to be on the serious end of the spectrum. In particular, chronic illness or disability were significant predictors of every major category of legal problem studied.

The Foundation's research also indicates that a person's experience of chronic illness and disability is determined by both their biological aspects and the social environment³. People with chronic illness or disability are more likely to experience disadvantage and social exclusion, and are vulnerable to a wide range of legal problems with lower rates of resolution.

This suggests that the association between chronic illness/disability and legal problems may be bi-directional. For example, long-term incapacity can cause unemployment, family breakdown and debt problems and conversely the experience of these problems can also cause or exacerbate mental or physical illness. It makes intuitive sense that a person's medical and legal issues have

some connection in certain circumstances. Unfortunately, there is a paucity of research to inform us of the nature of this association and thus understanding is limited and difficult to measure.

Since individuals with chronic illness or disability have an "increased likelihood of

HJPs recognise that an individual's issues are not always two-dimensional

having multiple, complex and interconnected legal and non-legal needs⁴ it follows that there may be enhanced benefits in developing integrated service models where health, welfare and legal services work together to improve health, social and justice outcomes.

In response to this pattern of vulnerability, in the United States of America (USA) Medical-Legal Partnerships (MLPs) have emerged as an increasingly popular approach to care. MLPs in the USA have matured and currently operate in 276 healthcare institutions in 36 states⁵. HJPs are still relatively new to Australia but fast evolving.



In 2012, the Health Justice Partnerships Network⁶ (formerly Advocacy Health Alliance Network) hosted the Advocacy Health Alliance Symposium⁷. The purpose was to introduce and promote the MLP (HJP) concept⁸ to an Australian audience. Since the Symposium many HJPs have formed and the interest in this area is growing.

The HJP Toolkit has been created as a general guide to lawyers, health and welfare practitioners interested in setting up a HJP. The HJP Toolkit introduces the concept and provides a step-by-step guide for establishing a HJP, drawing upon recent Australian experiences. Case studies have been included to provide practical examples for each step and contact details are offered to invite conversations between those who are in the embryonic stages of setting up a HJP and those who have implemented a partnership.

We encourage users to provide feedback and further case studies to expand the scope of learning and development for the next edition. The majority of contributors to the HJP Toolkit have legal backgrounds. We welcome input from those who provide health and welfare services. We will continue to develop the HJP Toolkit as we learn more from the expanding HJP network.

Melissa Hardham

On behalf of the Health Justice Partnerships Network



health justice partnerships

What is a Health Justice Partnership?

Although HJPs take many forms, essentially they are partnerships between members of the legal, health and welfare professions and are intended to create a more effective, supportive and multidimensional approach to problem solving for those whose issues are many and interconnected. HJPs have also been referred to as advocacy health alliances⁹, medical legal partnerships¹⁰, and multidisciplinary practices¹¹.

Beyond service provision, HJPs also see it as their role to advocate on issues that have a noticeable impact on their patients/clients groups and some offer educational resources on particular issues¹². Practitioners working collaboratively often have greater potential to identify and respond to matters that require changes to policy and practice.

Although HJPs are reasonably new to Australia, some health, welfare and community legal centres have long recognised the benefit of working collaboratively to create better outcomes for their clients¹³.

Health Justice Partnerships – meeting complex needs

Ordinarily, individuals are more likely to approach health and welfare practitioners with their social problems, than lawyers¹⁴. In the event that the health and welfare practitioners recognise that their patient has a legal problem and advises them to seek out a lawyer, patients are sometimes reluctant or unable to take the next step and seek legal assistance.

An integrated service model is able to meet immediate health, legal and social needs through patient/client-centred services that utilise effective referral pathways for those with complex interrelated legal and non-legal needs.

These improvements in service delivery are likely to produce better outcomes for individuals and remove many of the impediments to accessing legal assistance.



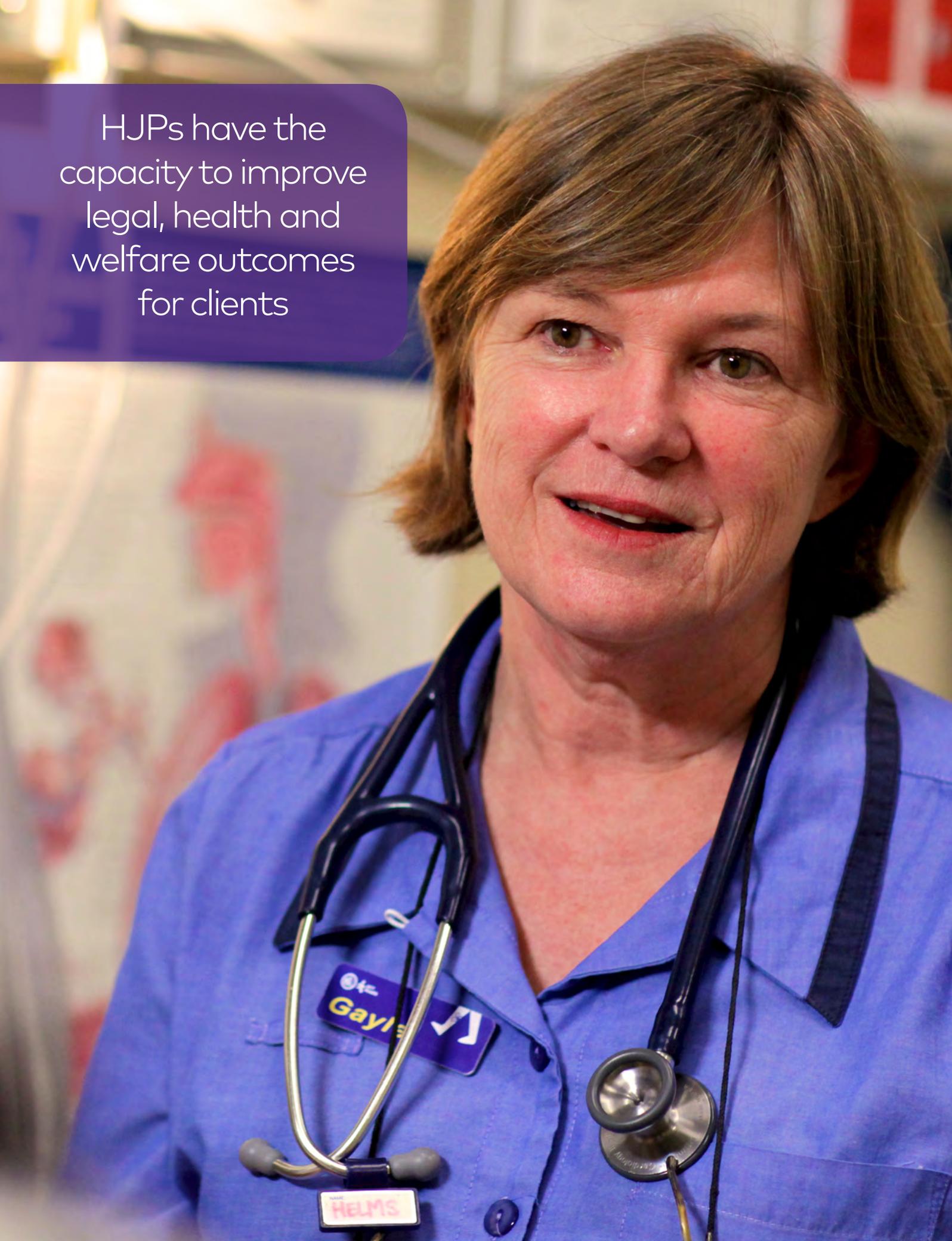
Health Justice Partnerships – adding value

The potential benefits to HJPs include:

- A patient/client centred delivery model founded on greater understanding of the patients'/clients' issues
- Improved health, welfare and legal outcomes
- Collaborative approach to problem-solving in an environment in which the patient/client feels comprehensively supported
- Proactive referrals enabling issues to be dealt with expeditiously
- Practitioners' development and training opportunities through increased "cross-professional awareness"
- Greater potential for systemic policy change.



HJPs have the capacity to improve legal, health and welfare outcomes for clients



creating a partnership in 12 easy steps

The following steps are informed by the experiences of Australian HJPs, and may assist you in the development of your partnership. The steps are modelled on the U.S. Medical-Legal Partnership Toolkit (created by the National Center for Medical-Legal Partnership at the George Washington University)¹⁵.

Step	Action	Time Frame
Step 1	<p>Community consultation</p> <p>Conduct consultations with target populations to assist with the formation of a clear understanding of the unmet legal, health and welfare needs and the best approaches by which to address these needs.</p>	Initial stages with regular review
Step 2	<p>Choosing the right partner</p> <p>Select an appropriate partner/s to assist to service the identified unmet needs. It's important to take the time to get this step right. Research and careful consideration at this embryonic stage will heighten the likelihood that the partnership is successful and enduring.</p>	Initial stages
Step 3	<p>A common vision</p> <p>Health, welfare and legal partners set the vision, values and objectives together and collaborate on decisions as to how much scope the partnership will aim to achieve. This process also enables partner expectations to be clarified.</p>	Initial stages with regular review
Step 4	<p>Leaders and champions</p> <p>HJP champions are likely to self select and adopt leadership roles, however it is important that persons capable of making decisions on behalf of each partner organisation be actively involved in the planning and implementation of the HJP.</p>	Initial stages and ongoing
Step 5	<p>Effective communication and co-location</p> <p>Co-location assists in the development of relationships. It fosters confidence between practitioners of different expertise who are inexperienced in working together and may even view each other as historical adversaries. It facilitates communication and builds efficient processes in the interests of patients/clients.</p>	Ongoing

Step	Action	Time Frame
Step 6	<p>Resource management</p> <p>Resource mapping that takes account of available financial, administrative, information technology and human resources, will assist in ensuring that commitments do not exceed available resources. The development of clear patient/client intake processes will also assist. Pathways for involvement of senior students, volunteers and pro bono assistance should be considered with availability of appropriate training and supervision.</p>	Initial stages and ongoing
Step 7	<p>Training and capacity building/practitioner development</p> <p>Training and other opportunities to exchange ideas and information should ideally be available to staff so they have a clear understanding of the vision, values, objectives of the HJP and are able to identify and respond to issues that arise.</p>	Initial stages and ongoing
Step 8	<p>Referral process</p> <p>These processes should be designed so as to demand as little of the patient/client as possible. Referral processes should be understood and agreed by each partner and ensure that practitioners are afforded the information they need to provide an expeditious and sensitive service to the patient/client, while observing relevant legal and ethical requirements.</p>	Initial stages and ongoing
Step 9	<p>Privacy and boundaries</p> <p>Protocols need to be constructed regarding information security, referral and intake processes, reporting back to the referring practitioner and generally how information is to be shared and managed. Most public Australian institutions have privacy guidelines and these can be easily adapted for HJPs.</p>	Initial stages and ongoing
Step 10	<p>Communication and feedback</p> <p>Feedback from patients/clients, board members, management, staff and external stakeholders is essential to ensure the model realises its potential, remains sustainable and problems are identified and addressed.</p>	Ongoing
Step 11	<p>Community education</p> <p>Over time, common themes and issues may arise which can lead to opportunities for community education for groups served by the HJP and the broader community.</p>	Ongoing
Step 12	<p>Monitoring and evaluation</p> <p>Monitoring and evaluation of the model assists to understand the impact and overall value. It also enables continuous learning and improvement of the services, promotes the benefits of this type of partnership, and potentially attracts funding opportunities.</p>	Ongoing

step 1: community consultation

Conducting preliminary research on the characteristics of the population to be served and their unmet health, welfare and legal needs provides useful information for partners during the formative stages of a HJP.

Sometimes reliable data will already exist. If not, effort should be made to obtain it so that services are designed in ways that best serve those in greatest need, within available resources.

Just as many people do not realise they have a health problem until it is too late, some people do not recognise that they have a legal problem until it escalates. Thus, in meetings, surveys or interviews, the language used should be problem based rather than using legal terminology.

For example, consider asking if there are any outstanding fines or Court matters coming up, or whether there is an issue with the condition of a rental property or problems with paying rent.



Case Study 1

RedLink is an integrated service hub located in the heart of Redfern public housing estate, easily recognised by five distinctive high-rise towers. With around 1500 tenancies, the estate is one of the most concentrated areas of public housing and social disadvantage in the Sydney district. Through consultations with the Redfern community and Neighbourhood Advisory Board it became clear that many people living on the estate were not utilising existing local services located nearby (including health services, a community legal centre and Legal Aid office).

Too frequently, individuals engaged only at crisis point when their tenancy was at risk of termination. The barriers to accessing local services were varied and included fragmentation across the service system and lack of integrated planning for clients with very complex needs. During consultations, the community asked for services to be delivered directly onto the estate.

RedLink provides health, housing, legal, and wellbeing programs onsite from a refurbished space, using shared assessment, referral and pathway tools. A weekly RedLink Law Clinic is provided jointly by Legal Aid NSW and Redfern Legal Centre. Integral to RedLink's success has been intensive collaboration with the community, as equal partners, at all stages of development.

The model is truly flexible and embraces new ways of thinking and working together on hard community problems, such as intergenerational disadvantage, social isolation, poor nutrition and drug and alcohol misuse. While there are agreed goals, principles and directions, all participants are willing to try innovative ways of doing things and have contributed to service design from the outset.

For further information contact:

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step 2: choosing the right partner

How do you choose the right partner?

Many factors will influence this decision including:

- The purpose of the HJP
- The needs of the target group
- The compatibility between the vision, purpose and core components of the potential partner organisation and your organisation
- Shared goals and objectives for the partnership
- The level of commitment and resources partners are willing to contribute
- Funding arrangements
- Potential impediments and/or limitations
- The likelihood of 'top down, bottom up' support

Learning about partners

Each partner should learn as much as they can about how partner organisation and staff operate. Some areas to consider are:

- The reputation of the partnering organisations' strengths and weaknesses
- Identification of staff who will champion the HJP
- Support for the partnership by organisation leadership (board, executive and senior management)
- Strategic and business plans (short and long term)
- Governance procedures and requirements
- Capacity and willingness to engender commitment to the partnership among staff
- Potential allocation of resources
- Staff readiness and enthusiasm for the partnership

Other Stakeholders

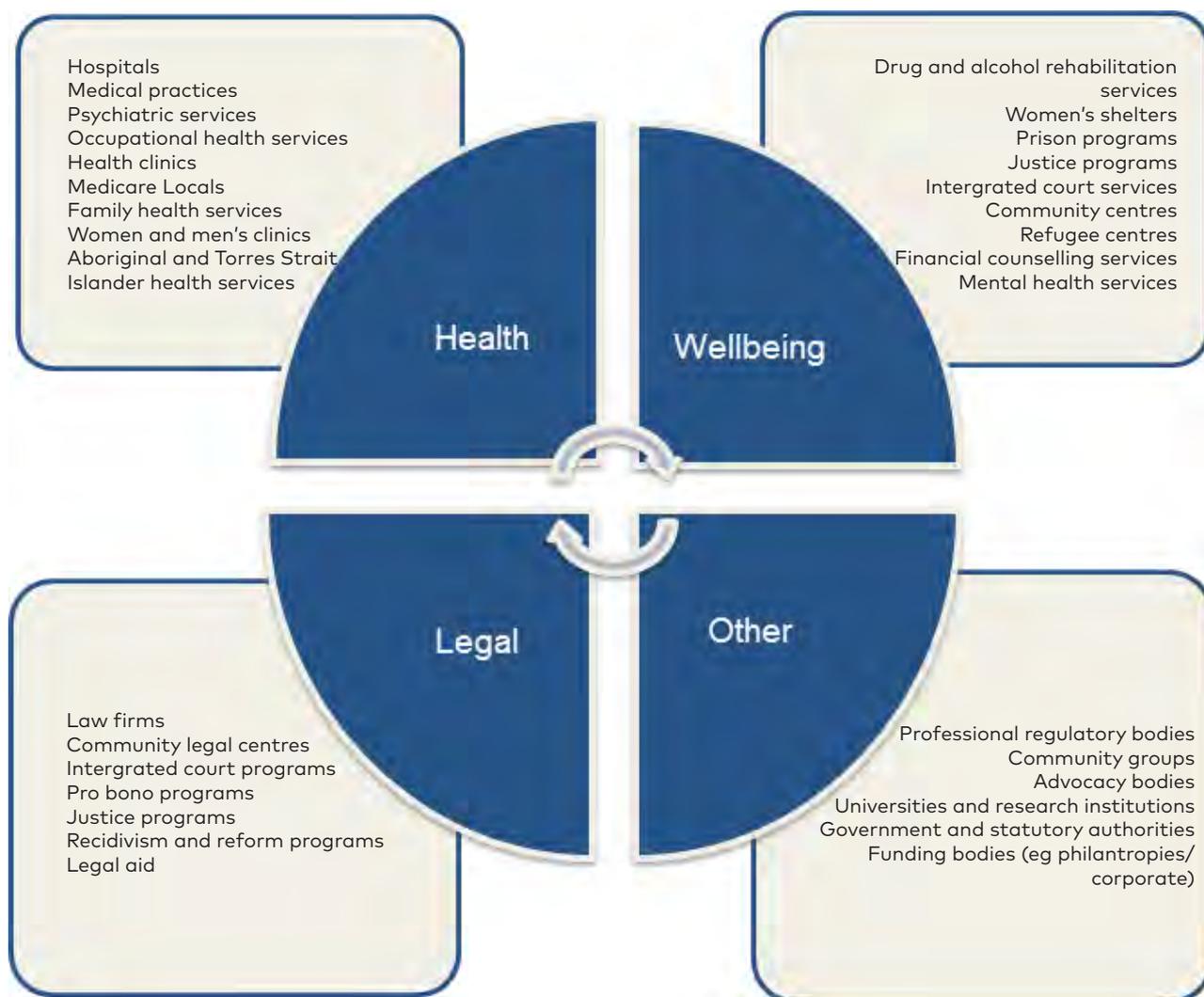
You may choose to involve universities and research institutions to assist with monitoring and evaluation. Other potential stakeholders include government departments, statutory authorities, court integrated programs, community services, police and prosecutorial bodies.

However, be sure to choose wisely as there may be reticence from the patients/clients if stakeholders are controversial or have not enjoyed a positive relationship with this particular group. This will depend largely on the nature of the service.



where to start?

This diagram presents examples of potential partners¹⁶ - remembering that the key focus must always be the group the HJP seeks to serve.



step 3: a common vision

What are the vision, values and objectives?

HJPs seek to improve the overall health and welfare of the people they aim to assist. In order to do this effectively HJP collaborators need to identify their vision, values and objectives. Representatives of each partner should participate in this process. Some factors to consider when determining these matters will include:

- The target populations
- The added value to be derived through partnering
- How the practice might operate
- The outcomes sought
- Potential barriers to working together

Defining the scope of the service

It is advisable to define the scope of the service at the early stages of development. Partners must clearly identify the populations they will serve and the nature of the services to be provided.

For example patients/clients may be subject to means testing, target groups may be identified (homeless persons, people suffering from substance abuse issues, children, women), or the HJP may limit itself to dealing with single issues, a combination of issues or provision of a comprehensive service.

It may be beneficial to start with narrow parameters. These can be broadened when the partnership has developed a working understanding of available resources and effective time management.

The HJP may begin by making referrals to external services and build more comprehensive in-house services as the partnership evolves.

The priorities and parameters of the HJP should be clear, predictable and transparent, so that staff and the individuals accessing the service understand them.

Avoid overpromising – failure to live up to the expectations that have been created can have an impact on patient/client trust in the HJP.

Case Study 2

Population Health Services staff from the Western Sydney Local Health District (WSLHD) attended a Health/Justice Forum where the relationship between the experience of chronic disease and legal issues was discussed. These staff became the organisation's HJP champions.

Legal Aid staff were subsequently invited to present at the WSLHD Population Health Leadership Group Meeting, which includes senior representation from the Executive, Mental Health, Drug Health, Aboriginal Health, Multicultural Health, Medicare Local, Community Health, Service Planning, Sexual Health, Oral Health, Health Protection and Health Promotion. The Group endorsed the establishment of a HJP and resolved to set up a working group to scope the possibilities.

The Working Group has convened and developed a manageable work plan that includes two projects. Population Health has committed 'in-kind hours' of a project officer one day per week to coordinate the planning, implementation and evaluation of their first project in partnership with Legal Aid. As a result of the newly formed partnership, Legal Aid was invited to attend the WSLHD Integrated Care Strategic Planning Day.

For further information contact

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health.nsw.gov.au

Case Study 3

The "Justice and Health Come Together in North West Melbourne" project (the Project) is a HJP between cohealth (a large community health organization) and Justice Connect Seniors Law (Seniors Law). Under the Project, funded by the Legal Services Board, a full time Seniors Law lawyer is based at cohealth 4 days a week, as an integral part of the interdisciplinary team. Prior to this, Justice Connect Seniors Law had worked closely with cohealth delivering a Seniors Law clinic at their Footscray site for 5 years prior to the Project.

As a result of this ongoing collaboration, the partners had identified shared values and a mutual commitment to improving health and social outcomes for older people. This provided a sound basis for making a joint application for funding for the Project. Following receipt of the grant, representatives of the parties, together with key stakeholders, including the Board and LaTrobe University, met to refine the shared vision, objectives, evaluation strategies and outcomes for the project.

For further information contact:

Faith Hawthorne, Seniors Law Lawyer, Justice Connect Seniors Law
faith.hawthorne@justiceconnect.org.au | (03) 8636 4416 or
Maureen Convey, Senior Manager, Aged & Chronic Diseases Outer West, cohealth
maureen.convey@cohealth.org.au | (03) 9334 6667

step 4: leadership & champions

Buy-in from leadership

In order to maximise the potential for success, it is important secure support from the senior leadership of all partnering organisations. General enthusiasm will not usually be enough - a real commitment from the people able to make binding decisions for the organisations is essential. Commitment at this level also sends a clear message to staff that this initiative has support, which is necessary if changes to practice are to succeed.

Bedding-in the concept at senior leadership levels

It is advisable to establish some form of HJP Advisory Group or Committee comprising senior representatives from each of the partnering organisation. Others regarded as having useful expertise might also be invited. The HJP should be integrated into the operation of each partner. It may be useful for the committee of the HJP to provide regular reports on its progress to partner board and executive meetings and offer training to interested staff.

Case Study 4

The Central Highlands HJP is a partnership between Ballarat Community Health, Central Highlands Community Legal Centre and Federation University Australia. The Central Highlands HJP will provide a program for early intervention for disadvantaged young people experiencing multiple health and legal issues in the Central Highlands region of Victoria.

The initial idea for a HJP for youth arose in response to the high level of youth disadvantage in the region as compared to the rest of the state. Few young people in the region were accessing legal services in a timely way or at all, resulting in the limited ability to find legal remedies.

Partner organisations met in early 2014 to discuss a funding application to the Legal Services Board. Key objectives were discussed and agreed ensuring that forward planning could progress. Victoria Legal Aid (Ballarat Office) (VLA Ballarat) has also been involved in the project (as an interested agency, not a partner). VLA Ballarat offers extensive expertise and experience in dealing with the downstream legal issues experienced by young people.

A steering group comprising each of the partner organisations and VLA Ballarat was established to guide the project through its earliest establishment phases, and beyond. The group meets monthly to discuss key areas of the project's development. Establishing regular steering committee meetings has facilitated the transparency of the program's development and maximised the consensus of each organisation in relation to the project; this has been a widely successful process.

For further information contact

Dr Margaret Camilleri, Lecturer Criminal Justice, Federation University Australia
m.camilleri@federation.edu.au | (03) 5327 6947 | federation.edu.au

Case Study 5

The Acting on the Warning Signs project (the Project) is a HJP between the Royal Women's Hospital (the Women's) and Inner Melbourne Community Legal (IMCL). An IMCL lawyer visits the Women's five times per fortnight to provide free legal advice to patients. The Project is fortunate to have significant support from the Executive at the Women's. The governance structure for the Project includes an Executive Sponsor who is the Executive Director of Clinical Operations at the Women's.

There is a steering committee made up of members from the Women's and IMCL. Members from the Women's include the Chief Social Worker, the Manager of Clinical Education, the Manager of Strategy and Planning and the Project Manager for Preventing Violence Against Women. From IMCL, the steering committee includes the CEO and the Senior Project Manager.

For further information contact:

Linda Gyorki, Senior Project Manager and Lawyer, Inner Melbourne Community Legal
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step 5: communication & co-location

Effective communication

Usually, the more engaged and communicative service providers are with each other, the greater the likelihood that the HJP will succeed. True integration of health, welfare and legal services involves effort, time and cost.

At one end of the spectrum, a health service may simply refer patients for legal assistance. At the opposite end, services will partner in a co-located setting with co-case management. In some HJPs this will also include cross referrals from lawyers who recognise that their client has a health or welfare problem that requires attention (eg a mental health issue that has become evident).

A cooperative approach by health, welfare and legal services will enable patients'/ clients' problems to be managed more comprehensively – but in doing so there are legal obligations that must be considered (see "Step 9: Privacy and boundaries" below).

Decisions relating to co-location

There are significant benefits resulting from co-location. These include:

- Convenience to patients/clients
- Immediate access to services that patients/clients might otherwise not attend
- Comprehensive response to patient/client concerns that reduces the anxiety they may experience about outstanding problems
- Better understanding and improved working relationships between practitioners from different disciplines.

The main barriers to co-location tend to be cost and space. Some services have found that it is easier at first to be located off-site and accept referrals, subsequently moving to an integrated model in response to demand.

Case Study 6

The Bendigo HJP lawyers are based on-site at BCHS Kangaroo Flat. Working on-site means that communication, collaboration and trust develop. Secondary consults occur daily and may include topics such as parental responsibility or explanations regarding Court orders and legal processes.

The HJP lawyers do not attend on-site team meetings as clients and their children are discussed in a manner that would not be of assistance to a lawyer nor appropriate. However, with client permission, coordinated legal support is provided and sometimes extends to a counselor or family support worker supporting a client at their appointment with the legal advisor.

For further information contact

Nickie King, Health-Justice Partnership Lawyer, Bendigo HJP (Loddon Campaspe Community Legal Centre, Bendigo Community Health Services)
nickie@lcllc.org.au | (03) 5444 4364 | www.lcllc.org.au

step 6: resource management

Determining available resources

Consideration should be given to available resources during the planning, implementation and expansion stages. This includes:

- Human resources
- Financial resources
- Office space
- Equipment and stationery
- IT and information storage systems
- Websites and social media

A review conducted shortly after the commencement of a new HJP is helpful to access how the organisation is managing and accommodating the increased staff and (possibly) increased patient/client numbers. Further audits should be carried out at regular intervals.

Funding

Securing foundation and ongoing funding for the HJP is critical to sustainability. Anticipating long-term funding needs and tailoring monitoring and evaluation to ensure data is available to justify funding requests (see Step 12), are two of the biggest challenges.

It is useful to maintain a list of potential funding sources and to keep this up to date. New funding avenues might emerge for the HJP, which were not available to the individual partners (for example, the Legal Services Board, Major Grants 2014, Justice and Health Partnerships).

Applying for grants that extend over three or more years will be more stable than short-term grants. In addition, diversifying funding sources so that there are several different grants will ensure that if one source ceases to provide funding, the HJP will continue.

Students, volunteers and pro bono assistance

Student volunteers and secondees from the health, welfare and legal professions can be a valuable resource. Consideration ought to be given to their training and supervision. Involving students and emerging practitioners at these early stages in their career broadens the learning and reach of the HJP concept.

Case Study 7

All resources for the Central Highlands HJP have been carefully considered by all partner organisations throughout the development of the project proposal, and since the project's official commencement in February 2015.

In-kind support for the project is apparent through the support received across the partner organisations and in facilitating client referrals to the service; there is also a commitment to evaluation across both agencies. BA (Criminal Justice) students from FedUni will be involved in administering surveys, and FedUni staff will conduct the evaluation.

For further information contact:

Dr Margaret Camilleri, Lecturer Criminal Justice, Federation University
m.camilleri@federation.edu.au | (03) 5327 6947 | federation.edu.au

Case Study 8

QPILCH supervises and trains pro bono lawyers to provide services at their Mental Health Civil Law Clinics, located at two community-based mental health support agencies. The fortnightly clinics offer legal casework and supported referrals for the areas of law indicated in their Mental Health Legal Health Check.

Workers at the agencies receive regular training in the use of the Legal Health Check, so that referrals to the visiting lawyers are appropriate. The lawyers are provided with a room at the services, and staff at the Centre manage the bookings for the clinic. Where a client needs more urgent assistance, the workers contact QPILCH to arrange alternatives.

For further information contact

Cameron Lavery, Coordinator, Homeless Persons' Legal Clinic
hplc@qpilch.org.au | (07) 3846 6317

Case Study 9

QPILCH has developed the Health Advocacy Legal Clinic. The Clinic commenced in mid 2014 as a joint project of QPILCH, the University of Queensland, the Queensland University of Technology and Griffith University. Supervised students who come from different disciplines including law, social work and medicine provide multidisciplinary services to in-patients at St Vincent's Hospital, Kangeroo Point.

The focus is currently on guardianship, advanced care planning and mental health legal issues. A legal supervisor and the students have a room with access to a telephone and computer at the hospital. The students work closely with clinical staff to optimise appropriate service delivery.

For further information contact:

Karen Williams, Supervisor, Health Advocacy Legal Clinic
E halc@qpilch.org.au | (07) 3846 6317

step 7: training and capacity building

Get everyone on the bus

Providing training about HJPs helps to develop knowledge and collaboration. Capability building enables all practitioners to understand the cyclic and mutually reinforcing nature of health, social and legal problems.

Awareness is increased about the ways in which patients/clients experience their problems and how addressing each concurrently has the potential to produce enhanced patient/client outcomes. Given what are undoubtedly heavy staff caseloads, training should be delivered in ways that maximises the possibility of participation.

Screening tools

Screening tools can aid health and welfare practitioners to identify the legal needs of patients. A useful tool is the Legal Health Check produced by QPILCH with accompanying tutorials and other resources developed in partnership with the National Association of Community Legal Centres. [See below and visit legalhealthcheck.org.au/legalhealthcheck/].

The National Center for Medical-Legal Partnership at the George Washington University (NCMLP) developed the trademarked I-HELP® acronym to understand the most common civil legal problems that affect health -- income and insurance, housing and utilities, education and employment, legal status and personal safety and stability.

In the United States, it is used to train health care providers on the connection between civil legal problems and health. NCMLP has also used it to develop tools that hospitals and health centers can use to screen patients for civil legal needs and connect them to appropriate medical-legal partnership resources.

Recommended areas of training

Consider ongoing training in the following areas:

- Screening tools / legal needs surveys
- HJPs – risks and benefits
- Referral processes
- Understanding the roles and responsibilities of practitioners within the partnership and how they assist people accessing the HJP
- Privacy, other laws and ethical requirements
- Professional obligations and standards of the different professional disciplines involved (eg doctors, lawyers, psychologists, nurses, social workers, psychiatrists)
- Policies and procedures to manage conflicts

Case Study 10

The Acting on the Warning Signs project between the Royal Women's Hospital (the Women's) and Inner Melbourne Community Legal (IMCL) includes three components: a generalist on-site legal service, training and evaluation. The on-site legal service provides legal advice to patients on a range of areas of law and a lawyer is on-site five times per fortnight. The training to hospital staff focuses on family violence.

Two training modules have been developed. The first module runs for a day and includes presentations by clinicians, social workers, lawyers, Victoria Police and others. The second training module is 90-minutes and aimed at doctors. This module has received RANZCOG accreditation from a number of medical colleges so that participants can receive professional development points. Since August 2012, the Project has provided training to 235 hospital staff including 39 doctors. In addition to this formal training, the Project Manager has attended may unit and staff meetings to talk to clinicians about the legal service and the referral process.

For further information contact

Linda Gyorki, Senior Project Manager and Lawyer, Inner Melbourne Community Legal
linda.gyorki@imcl.org.au | (03) 9328 1885

Case Study 11

Before community lawyers from the Eastern Community Legal Centre were embedded into local health centres, they ran training for the health practitioners on:

- Lawyers' professional obligations to clients
- The lawyers' role (what level of assistance; types of legal matters)
- The legal system's response to family violence
- The non-legal supports around family violence

The training sessions were designed to ensure that when the community lawyers and health practitioners started working together everyone understood the vision, goals and parameters of the Project. Of crucial importance was the role of the lawyer working in the health practitioners' workspace and the issues to be addressed through the partnership. However, the sessions also served to build and enhance relationships of trust between health practitioners and lawyers.

For further information contact:

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Case Study 12

A HJP between Redfern Legal Service and the Royal Prince Alfred Hospital provided initial training on identifying legal issues for social workers at the Royal Prince Alfred Hospital. During the training it was recognised that there could be improvements in the referral pathway from social workers to the legal arm of the domestic violence team. They are now running training for social workers on domestic violence referral pathways.

For further information contact

Joanna Shulman, CEO, Redfern Legal Centre
joanna@rlc.org.au | (02) 9698 7277

Resources

QPILCH, on behalf of the National Association of Community Legal Centres, has produced the "Legal Health Check" on-line training program for non-legal practitioners which includes:

- An overview of what legal issues are useful to target and why
- What to consider in establishing a referral pathway to lawyers and
- What legal issues a partnership wants to focus on to align with the priorities of the client and the non-legal professionals.

See training videos 1 to 4:

legalhealthcheck.org.au/legalhealthcheck/lhc-tutorial.html

See also a resource on the website, entitled Tips to Create a LHC pathway:

legalhealthcheck.org.au/legalhealthcheck/resources.html#collapseFour

The on-line training, legal health checks, posters and postcards can assist with maintaining knowledge across an organisation as to why it may be helpful to address a patient's legal issues. See for example:

legalhealthcheck.org.au/legalhealthcheck/resources.html#collapseTwo

For further information contact

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Incorporated
deputy@qpilch.org.au | (07) 3846 6317

Case Study 13

The Central Highlands HJP has organised several information sessions about the HJP project and the role of its staff. The focus of the sessions includes giving a background to the HJP, identifying legal issues (through the use of the Legal Health Check) and referral pathways to the solicitor. Ongoing assessment of the HJP includes conversations with staff at various intervals throughout the project, the referral process and the impact (both positive and negative) that the project has had on the practice.

For further information contact:

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step 8: the referral process

Managing referrals

There are several aspects of the referral process to consider:

- Who first sees the patient/client?
- Who will be responsible for determining whether the matter should be referred?
- How will matters be transferred from one practitioner to another?
- How will client information be captured in a confidential and constructive way?

When determining which staff will be responsible for referrals, consider their knowledge and skill sets. In the Australia health and welfare setting, referral will usually be from social workers, nursing or medical staff. Irrespective of the area of the HJP that will be responsible for referrals, it is essential that those staff receive training about the referral process, criteria, and relevant policies and procedures.

Conflict checks

A conflict check is a method used to ensure that conflicts of interests do not exist between an organisation's existing patient/client and a potential new client. Consider if and how the conflict checks will be conducted and who is responsible for performing them.

This should be incorporated into the initial intake processes to ensure that the patient/client is not denied access to legal services at a later stage when the conflict is finally discovered. Be clear about the reasons for service limitations. Rather than simply refusing to see the client, consider referring the client.

Case Study 14

A HJP between Redfern Legal Service and the Royal Prince Alfred Hospital are in the process of providing training to over 100 Royal Prince Alfred Hospital staff on Identifying legal issues. They have also developed a Referral Pad for health practitioners to use to enable efficient legal referrals for patients.

For further information contact:

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joanna@rlc.org.au | (02) 9698 7277

Case Study 15

The Bendigo HJP, between the Loddon Campaspe Community Legal Centre and Bendigo Community Health Services, is targeted at families and their children. Referrals to HJP lawyers occur through existing health service providers at Kangaroo Flat.

Health workers have completed training in identifying issues that may be capable of legal resolution and when such an issue is identified, the health worker will attend in person, email or call the on-site HJP service. If possible, and provided it is a matter that meets the criterion, the HJP will consult with the client immediately. If not, a booking will be made to see the client as soon as possible.

For further information contact

Nickie King, Health-Justice Partnership Lawyer, Bendigo HJP (Loddon Campaspe Community Legal Centre, Bendigo Community Health Services)
nickie@lcclc.org.au | (03) 5444 4364 | lcclc.org.au

Case Study 16

First Step Legal (FSL) is co-located with a clinic that serves people with addictions. Conflict checks are performed at the initial intake stage. In the event that a conflict is discovered, the client is referred to another suitable organisation at the earliest opportunity.

Referrals are made by the treating health practitioner when a patient/client is actively engaged in treatment and has disclosed a potential legal concern. Being co-located, the referral process is simple, comprising of an initial, general, de-identified discussion between the lawyer and the clinician.

Then, if appropriate, a meeting is arranged with the patient/client. This can often occur on the same day. The referring health practitioner physically accompanies and introduces the client to the lawyer, facilitating an important confidence and trust-generating component of the ensuing triangular model of care. FSL is a predominantly criminal law practice with expanded services in infringements, tenancy issues, debt and family law. If FSL cannot manage the matter directly in-house, further referrals to external agencies are facilitated.

For further information contact:

Tania Wolff, Principal Lawyer, First Step Legal
taniawolff@yahoo.com | (03) 9537 3177

step 9: privacy & boundaries

Issues particular to HJPs

All people are entitled to have their rights to confidentiality and privacy respected. This is especially so for individuals who suffer disadvantages and are experiencing health, legal and other issues. Their rights must not be sacrificed even if it may make assisting them easier.

Implementation of clear written policies and procedures will assist staff in knowing what is permissible when patient/client information is sought. Precedents such as authorities and consent forms will be helpful.

Guiding staff to limit information exchange to only that which is consented to, makes it more likely that these issues will be properly managed. Document security may also need attention. Educating staff about the importance of protecting privacy further assists to ensure compliance.

Incorporating distinguishable physical features for co-located HJPs, such as a separate name for the legal service and secured office space will remind staff of the need to protect patient/client information and reinforce the distinction between the various services.

Professional standards and legal obligations

Clear communication among the practitioners regarding practice standards and obligations for all disciplines involved in the partnership aids parties to understand the limitations under which each group operates.

The scope and breadth of the services provided should always accord with the terms of professional insurance. If there is a risk that practitioners will pursue HJP activities that are not covered by insurance, then current policies should be reviewed and amended where required.

Mandatory reporting

Particular challenges exist in navigating relationships between health, welfare and legal practitioners when issues arise requiring mandatory reporting by healthcare staff, or when professional privilege is threatened. Mandatory reporting is an issue that has the potential to create significant conflict between practitioners.

It is advisable that partners develop an understanding of the mandatory requirements relevant to each discipline and agree on the best way to manage these issues before casework commences.

Case Study 17

Operating from within a drug and alcohol rehabilitation clinic, First Step Legal (FSL) is acutely aware of patient/client vulnerability. The need to ensure respect for the rights and privacy of patient/clients is paramount. From the initial consultation, and throughout the service delivery, there is a focus on ensuring that these matters are understood and protected.

Fundamental to the HJP however, is information sharing between health and legal services. The policies, precedents and authorities pertaining to shared information were drafted by specialised, external lawyers in plain, simple English, and are explained in person to each patient/client. Issues such as mental illness and intellectual disability, prevalent among patients/clients, are always taken into consideration with careful explanation to ensure our patients/clients are in a position to give genuine informed consent.

For further information contact:

Tania Wolff, Principal Lawyer, First Step Legal
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Resources:

Peter Noble provides a list of common issues reported from MLPs in USA and HJPs in Australia in 'Advocacy-Health Alliance – Better Health Through Medical –Legal Partnership', (Final Report, Clayton Utz Foundation Fellowship, August 2012) at pages 18 and 22 respectively.

lcllc.org.au/programs/advocacy-health-alliance/

See also Linda Gyorki's commentary in "Breaking Down the Silos: Overcoming the Practical and Ethical Barriers of Integrating Legal Assistance into a Healthcare Setting" Churchill Fellow 2013 at p.76-80.

imcl.org.au/images/stories/docs/breaking_down_the_silos_l_gyorki_2013.pdf

step 10: communication & feedback

Feedback on effectiveness

Effective communication and feedback mechanisms provide a means by which staff can voice concerns and problems can be circumvented. It is also important for the HJP staff and users to have a sense that the HJP is working and that they are given the opportunity to celebrate successes.

Complaint and communication channels should be introduced in the initial stages of the partnership along with staff and user surveys. These surveys should also be administered at regular intervals thereafter. The information collected can be shared with the HJP staff, champions and executive members.

The partnership should be viewed as a long-term commitment with time allocated at board and senior management meetings for a review of the program implementation.

Case Study 18

At First Step, patients/clients are invited to participate in surveys to report on their experience with the program including health, welfare and legal service provision. In addition, staff are encouraged to provide feedback about their experience working within a HJP and discuss any concerns and challenges with the senior management team. The HJP is now in its 8th year. Much of the success to date can be attributed to the clear channels of communication and value attached to the HJP model.

For further information contact:

Tania Wolff, Principal Lawyer, First Step Legal
taniawolff@yahoo.com | (03) 9537 3177

Resources:

Vichealth has a useful tool for measuring the phases of emerging partnerships and collaborations:
vichealth.vic.gov.au/media-and-resources/publications/the-partnerships-analysis-tool

step 11: community education

Community education regarding HJPs

HJPs are a comparatively new service model in Australia. Opportunities should be taken to publicise their existence, why they are needed, the settings in which they operate, their similarities and differences, the experiences of staff, and, most importantly, what is being achieved for patients/clients.

Community education opportunities may be formal and target specialist professional groups (conferences, journal publications) and informal (social media, community gatherings, current affairs programs). As the HJP model becomes better known and understood, practitioners and the public are likely to achieve greater levels of comfort with the idea of multidisciplinary service provision.

Community education regarding common themes

HJPs are uniquely placed in their capacity to reach audiences across multiple disciplines. Where common themes arise, community educational sessions serve to reach a larger group and potentially operate to circumvent similar issues and problems occurring.

This may involve an area of education regarding an issue that is common to many of the patients/clients within the HJP. It may also occur when there are repeat issues across a group of HJPs.

Case Study 19

Inner Melbourne Community Legal (IMCL) has established a HJP with the Royal Children's Hospital (RCH) called Connecting the Dots. A forum was held in the main auditorium of the RCH for all staff, patients and their families in February 2015. The Executive Director of Legal and Information Services at the RCH formally opened the forum.

A presentation by the Senior Project Manager and Lawyer about the on-site legal service and the importance of HJPs then followed. Finally, a lawyer from IMCL presented a session entitled "Juggling work and illness – your legal rights at work when caring for a sick child".

This provided important background information to patients and their families about their leave entitlements, protection from discrimination and unlawful termination, the right to request flexible work arrangements and the government payments available for carers, parents and sick or disabled children.

For further information contact:

Linda Gyorki, Senior Project Manager and Lawyer, Inner Melbourne Community Legal
linda.gyorki@imcl.org.au | (03) 9328 1885

step 12: evaluation & impact

There are many forms of evaluation. The type of evaluation chosen will depend on why it is being done and the constraints that may exist (financial, time, data, environmental). Formative evaluation can help to clarify why the HJP is needed, improve its design as it is being introduced, and ensure it is operating optimally.

Summative evaluation assesses whether the HJP is meeting its goals, the impact it has had, and what should be changed. Evaluation is useful to assist with securing long-term funding, but it is also vital as a tool to determine if the HJP is delivering a consistently high quality service to patients/clients.

Evaluation may adopt qualitative methods (such as participant observation, interviews and focus groups) or quantitative methods, which seek to better understand phenomena through mathematical methods, commonly statistical analysis.

Qualitative approaches are best used when a rich description of a phenomenon is sought. Quantitative approaches are applied when the intent is to test a hypothesis or to draw conclusions that are applicable to the population under study or compare one population to another (e.g. outcomes for patients/clients of a HJP as compared with

outcomes for otherwise matched individuals who have sought assistance from a doctor and lawyer independently).

Evaluation may use a mixed methods approach drawing on the strengths of each. If evaluation is introduced when a HJP commences it becomes possible to collect baseline data and compare this with data collected when the HJP has been operating for a while. This allows claims to be made about differences that are attributable to the HJP.

Since there are many types of qualitative and quantitative methods and study designs, clarifying why particular methods and study designs are being selected will ensure the validity of findings and the comparative costs associated with the options they present.

The proposed methodology should be articulated by the evaluator and understood by the commissioning body to achieve rigour and clarity of purpose. If evaluations are to be conducted by HJP staff it is important that the methods and study design chosen are not overly burdensome.

Case Study 20

The Central Highlands HJP will conduct research across the life cycle of the partnership, from mid-2015 to end of 2016. Key stakeholders from the partner agencies, and clients accessing the program, will be invited to participate in this research, including:

- Members of the governance committee,
- Staff who facilitate the access to the HJP
- The lawyer providing the legal services for the project
- Clients (aged 16 – 25 yrs) who have been referred to services

Data will be collected at multiple time points using mixed methods (surveys and interviews). Access to de-identified secondary client characteristic (including demographic, health and legal factors) collected by the project partner agencies will also inform the research. It is anticipated the data collected through this research will provide the basis from which to evaluate the project and how it meets the health and legal needs for disadvantaged young people.

This information will also enable the program to be reviewed over time and assist the service to respond effectively through its feedback/evaluation mechanisms.

For further information contact

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m.camilleri@federation.edu.au | (03) 5327 6947

Case Study 21

A HJP in Bendigo involving Bendigo Community Health Services and Loddon Campaspe Community Legal Centre engaged Dr Curran of ANU in July 2015 to measure the impact of the service and to establish measures for social determinants of health that many other jurisdictions have lamented lack any concrete measurement. The research evaluation has expert advice from Professor Mary Anne Noone (La Trobe) and Dr Alex Philips (Evaluation and Development Coordinator).

Dr Curran is using an action research collaborative approach where clients/patients and staff are involved in the design of the approach informed by international research and Dr Curran's experience, adopting a model of continuous development, reflection and improvement. The evaluation has been embedded in the service from the start to enable comparisons over the life of the project.

For further information contact:

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A key component of HJPs is their capacity to advocate for policy change

system improvement & policy development

A key component of HJPs is their advocacy role. Health, welfare and legal practitioners jointly and consciously seek to identify patterns of need within the communities they serve and lobby for improvements to law, policy and service provision.

By creating a clear vision, values, and objectives and staying abreast of relevant policies and reform agendas, each HJP can contribute to these broader conversations.

HJPs should develop an understanding of the social and political context in which they operate and may collaborate with others who have similar goals to share learnings and strengthen their collective voice.

The development of networks, committees and (eventually) national representative bodies will only enhance opportunities to influence the decision makers.

Health, welfare and legal practitioners can seek to change policies and practices that are detrimental to their patients/clients' health and legal status through supporting law and policy to promote health and wellbeing, and opposing that which has the potential to harm health.

HJP practitioners are uniquely placed to identify patterns of unmet need, and lobby for changes accordingly. Research, monitoring and evaluation can provide the evidence for the recommendations and this emerging movement has the potential to be a voice that represents the views of practitioners from many disciplines.

Case Study 22

Patients seen by Inner Melbourne Community Legal (IMCL) at the Royal Women's Hospital (the Women's) commonly raise questions about birth certificates. There can often be confusion and anxiety regarding whether victim/survivors of family violence are required to provide details of their child's father in a situation where they may have fears for their safety. It is critical that if confusion or anxiety arises in relation to the birth certificate that women are provided an opportunity to seek legal advice.

IMCL supports the right of a child to know both of their parents. However, in the work that they do, there is an awareness of many situations in which to simply list the father on the birth registration statement without providing further support and information to the mother would place women and/or their children at serious risk of harm. In 2013, IMCL submitted a report on this topic to the Victorian Law Reform Commission (VLRC) with the VLRC adopting several of its recommendations.

For further information contact:

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linda.gyorki@imcl.org.au | (03) 9328 1885

Case Study 23

By working collaboratively with non-legal support workers at homeless services, the QPILCH Homeless Persons' Legal Clinic identified that fines were creating significant pressure for our mutual patients/clients. Patients/clients were at risk of being arrested and jailed for non-payment, some were required to pay installments of over half their weekly income benefit, many were unaware of how much was owed and felt powerless about the debt, and the State Penalties Enforcement Registry (SPER) gave inadequate consideration to the circumstances of homelessness.

Research indicated that the average SPER debt of a homeless person was almost \$6,000.00. A further problem was that only 8% of the patients/clients asked for assistance with this problem, so trained workers and lawyers accessed a Legal Health Check to ask patient/clients if they wanted help - 65% said "yes". QPILCH has hosted forums, written reports and been able to drive systemic changes on fines debts over a number of years, with SPER now offering better outcomes, more support and engaging more actively with homeless services.

For further information contact:

Sue Garlick, Deputy Director, Queensland Public Interest Law Clearing House
Incorporated
deputy@qpilch.org.au | (07) 3846 6317

Case Study 24

A majority of matters referred to the Bendigo HJP are for parents involved with the Department of Health and Human Services (DoHHS). The Bendigo HJP regularly assists parents who wish to review DoHHS case planning decisions. They also support parents at case planning meetings and negotiations with the Department.

Unfortunately this is an area that is not well supported by grants of legal aid funding and parents often reach the service feeling like there is nothing more that they can do to get their children home. As a result of this work in pre-order negotiation, the Bendigo HJP has recently contributed to a submission prepared by the Office of the Public Advocate around parents with a disability and child protection.

For further information contact:

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transforming health & legal services

Changing culture

An important aspect of HJPs is the opportunity to educate the health, welfare and legal professions regarding their potential to improve outcomes for patients/clients. 'The whole is greater than the sum of its parts' (Aristotle).

There is an almost reflexive mistrust that can exist between professional groups, particularly when one of those groups consists of lawyers! HJPs can ameliorate this over time, by fostering an environment that meets the needs of patients/clients through practitioners working together.

The mutual respect for each practitioner contribution that may develop through greater exposure to what they do, can promote a shared culture that has the interests of patients/clients at its heart. This enables comprehensive understanding of the constellation of issues faced people who are disadvantaged.

Health, welfare and legal service delivery tends to be reactive rather seeking to preempt problems, particularly those that are not ordinarily within a service's area of expertise. The HJPs model naturally lends itself to more proactive methods of service delivery.

Case Study 25

The HJP between Redfern Legal Centre and Royal Prince Alfred has worked with antenatal staff to identify pregnant women early in the pregnancy that may have involvement with Family and Community Services (FACS) in Sydney. The service works collaboratively with social work staff, midwives, obstetricians and drug health nurses to encourage vulnerable parents to engage early in legal advice.

The solicitor attends the antenatal clinic and sees parents at the time of their antenatal visits, identifies issues in child protection and advocates for the parent with FACS to develop a plan to overcome concerns prior to the birth of the baby. It's this pre-emptive initiative that transforms the practice method from an historically reactionary model to a more proactive response.

For further information contact:

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resources & endnotes

Australian resources

justiceconnect.org.au/what-we-do/what-we-are-working/health-justice-partnerships

International resources

medical-legalpartnership.org

Endnotes

1. For more information on the U.S. medical-legal partnership approach, visit: medical-legalpartnership.org
2. Coumarelos, C, Macourt, D, People, J, MacDonald, HM, Wei, Z, Iriana, R & Ramsey, S (2012) Legal Australia-Wide Survey: legal need in Australia, Law and Justice Foundation of NSW, Sydney. Available from: lawfoundation.net.au/ljf/app/&id=FC6F890AA7D0835ACA257A90008300DB
3. Coumarelos, C., Wei, Z., & Zhou, A.Z. (2006). Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas. Volume 3: March 2006 [Internet]. NSW (AUST [Cited 2015 May 7]. Available from: [lawfoundation.net.au/ljf/site/articleIDs/B9662F72F04ECB17CA25713E001D6BBA/\\$file/Justice_Made_to_Measure.pdf](http://lawfoundation.net.au/ljf/site/articleIDs/B9662F72F04ECB17CA25713E001D6BBA/$file/Justice_Made_to_Measure.pdf)
4. Coumarelos, C. & Wei, Z (2009). The legal needs of people with different types of chronic illness of disability, Justice issues paper 11, Law and Justice Foundation of NSW, Sydney at p.24 available from: lawfoundation.net.au/report/justiceissues11
5. medical-legalpartnership.org
6. The HJP Network comprises of Deborah Di Natale (Chair) Dan Nicholson, David Hillard, Kate Gillingham, Khoi CaoLam, Linda Gyorki, Mary-Anne Noone, Melissa Hardham, Nickie King, Nicole Woodrow, Peter Noble, Stan Winford, Weif Yee
7. Advocacy Health Alliance Symposium Report, March 2013
8. The term Medical-Legal Partnerships is used in the USA to describe an integrated approach to the provision of health and legal services that enables sharing of information and problem solving among legal and health teams assisting vulnerable people. The terms used in Australia include advocacy health alliances, health justice partnerships and, in some cases, multidisciplinary services.
9. This was the term adopted in Australia in 2012 when the Advocacy Health Alliance Network commenced. However, more recently 'Health Justice Partnerships' became the preferred reference and the Advocacy Health Alliance Network has been rebranded to the Health Justice Partnerships Network. See also Peter Noble's Clayton Utz Foundation Fellowship Final Report "Advocacy-Health Alliance: Better Health Through Medical-Legal Partnership" (2012) at p.7
10. This term is commonly used in the USA
11. Noble P, op. cit. at p.19-23

12. Lawton E et al 'Medical-Legal Partnership: A New Standard of Care for Vulnerable Populations' 74 in Tyler ET et al (eds) (2011) *Poverty, Health and Law: Readings and cases for medical legal partnership*, Carolina Academic Press, North Carolina.
13. Noble P, op. cit. at p.20. Some examples include the Northern Australian Aboriginal Justice Agency Throughcare Project (NT), Bama Services Support and Wellbeing Program (Qld), Youth Advocacy Centre Incorporated (Qld)
14. Coumarelos C, et al, op. cit. at p.xvi-ii; see also Peter Noble, op. cit. at p.23. Legal problems may also be identified through a health and wellbeing programs within an employment relationship, as is the case at Bama Services. The Bama Services Support and Wellbeing Program is often the first point of contact for identification of legal and other issues.
15. To view the U.S. Medical-Legal Partnership Toolkit developed by the National Centre for Medical-Legal Partnerships at the George Washington University, go to medical-legalpartnership.org/national-center
16. This diagram is a modified version of the diagram that appeared in the first edition of the U.S. Medical-Legal Partnership Toolkit



The Health Justice Partnerships Network is a collaboration of dedicated not-for-profit organisations across the healthcare, access to justice and academic sectors. For more information, please contact:

Justice Connect

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03 8636 4400

INTEGRATED PRACTICE TOOLKIT

A GUIDE TO HELP UNDERSTAND PRIVILEGE AND MANDATORY REPORTING IN INTEGRATED PRACTICES

SEPTEMBER 2018



FEDERATION
OF COMMUNITY LEGAL CENTRES VIC.

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Disclaimer: The information in this guide is current June 2018 but it may change without notice. The information in this guide is in the nature of general comment only and does not constitute, and is not a substitute for, legal advice. Users of this guide should not act on any material or information in the guide without obtaining legal advice relevant to their own particular issue. The Federation of Community Legal Centres (Vic) Inc and the persons involved in researching, drafting and editing this guide expressly disclaim any liability to any person or entity in respect of any action taken or not taken in reliance on its contents.

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BACKGROUND

Integrated models of legal and non-legal services are increasingly being used to address the needs of clients of community legal centres (**CLCs**). Models of integrated service are an innovative response to evidence that legal issues rarely exist in a vacuum and often result in, or arise from, a mixture of problems related to health, housing, finances, mental health, employment, education and family. 'Integration' can take different forms including co-location, multi-disciplinary teams or partnerships with other community services.

Models of integrated service include, but are not limited to:

- 1 a CLC that also employs one or more social workers;
- 2 CLCs that are based within a health or other non-legal setting; or
- 3 social service organisations that employ a lawyer within their service.

The level of integration varies. For example, in some instances social workers may attend initial appointments with the client and the lawyer. File management processes also differ between organisations.

Two issues that are commonly raised when contemplating if and how to integrate services are legal professional privilege and mandatory reporting obligations.

These issues can be particularly important in integrated practices, including when establishing and implementing policies and protocols for:

- communicating with clients about different roles and obligations within integrated practices;
- meetings and correspondence with clients;
- file management practices;
- making decisions about when a non-legal expert within an integrated practice might report child abuse or neglect; and
- responding to requests for information or subpoenas, including in relation to family law, family violence, child protection or criminal proceedings.

The Integrated Legal and Social Support Network¹, a working group of the Federation of Community Legal Centres, has developed this Integrated Practice Toolkit (**Toolkit**) as a framework for understanding and minimising risks related to legal professional privilege and mandatory reporting in the context of integrated service models. The Toolkit is a practical, practice-based guide that supports legal and non-legal staff to understand and navigate these frameworks:

- Part 1 provides information on the application of legal professional privilege when delivering integrated services.
- Part 2 provides information on mandatory reporting and other reporting obligations in Victoria, as they apply to social workers and legal practitioners.

The Toolkit focusses particularly on social workers, however integrated models can include a variety of community and health professionals to whom privilege and mandatory reporting considerations apply. Due to the diversity of professionals working within these practices, the language of non-legal expert or non-legal staff is used throughout this document to describe all professionals, aside from lawyers, who may work in integrated practices. This guide is not intended to cover all aspects of any one particular integrated service model, and individual CLCs will still need to obtain their own independent legal advice in relation to the integrated service models they intend to operate.

Importantly, if, for example, a CLC is subpoenaed in legal proceedings (e.g. family law or child protection) regarding a client or former client, the advice and representation of an experienced lawyer or pro bono counsel should be sought, including in relation to whether a claim of legal professional privilege can be made (see part 1.4). Ultimately, it will be up to the Court to decide whether legal professional privilege applies.

Furthermore, in response to the findings of Victoria's Royal Commission into Family Violence, a family violence information sharing scheme has been created by Part 5A of the *Family Violence Protection Act 2008* (Vic). The scheme began on 26 February 2018, and it authorises a select group of prescribed information sharing entities (**ISEs**) to share information between themselves for family violence risk assessment and risk management. CLCs are not ISEs and are not covered by the scheme (CLCs that are auspiced by an ISE should seek separate advice). Social workers who are funded to deliver specialist family violence services under a State contract (e.g. by the Department of Health and Human

¹ A network of social workers and lawyers working in integrated practice models in community legal centers in Victoria

Services (**DHHS**) and in some cases the Department of Justice and Regulation (**DOJR**) are subject to the information sharing scheme. This does not affect legal professional privilege or the mandatory reporting obligations discussed in this guide, but it does create an additional regime for information sharing that CLCs need to be aware of.²

² Detailed information about this regime is available at: State Government of Victoria, *Information Sharing and Risk Management* (<https://www.vic.gov.au/familyviolence/family-safety-victoria/information-sharing-and-risk-management.html>).

PART 1: LEGAL PROFESSIONAL PRIVILEGE

1. What is legal professional privilege?

Confidential communications between a lawyer and their client for the purpose of providing legal advice or preparing for anticipated litigation are protected by legal professional privilege (sometimes also referred to as client legal privilege). Among other things, legal professional privilege operates as an exception to the otherwise compulsory disclosure of documents in legal proceedings. For example, if subpoenaed material is produced to the Court and the Court accepts a claim of privilege, that material will not be disclosed to the party that issued the subpoena.

For the purpose of legal professional privilege, communications with paralegals or other non-legal staff employed by a legal practice, are covered to the extent that these professionals are acting in the course of a lawyer-client relationship.

The purpose of legal professional privilege is to ensure that a client can give full and frank information to their lawyer for the purpose of enabling an effective lawyer-client relationship, without fear that this information might be used against the client in the future. It must always be kept in mind that legal professional privilege only applies to communications that are fairly referable to that lawyer-client relationship.

There are two distinct limbs of legal professional privilege:

- 1 advice privilege; and
- 2 litigation privilege.

It is important to note that legal professional privilege is a complex area of law. This Toolkit is aimed at providing general commentary on the application of legal professional privilege; it is not a comprehensive summary of the law in this area and should not be relied on as a guarantee that a claim of privilege will be successful in Court. It is recommended that you seek legal advice in relation to the particular circumstances you face.

Advice privilege

Advice privilege covers communications between a client and their lawyer that are confidential and made for the dominant purpose of giving or receiving legal advice.

It may not cover communications between a lawyer and some third parties, for instance a lawyer's communications with a case worker. Advice privilege will depend on the particular facts of each case, the dominant purpose of the communication, and particularly, the nature of the function performed by the third party.

EXAMPLES WHERE PRIVILEGE MAY BE ARGUABLE:

- A client asks a lawyer for advice on credit and debt negotiations (where there are no court proceedings initiated or threatened).
- A lawyer gives a client advice on a tenancy matter relating to rent or repairs (where there has not been a Notice to Vacate issued).

Litigation privilege

Litigation privilege is a broader form of legal professional privilege that arises where litigation is reasonably anticipated or already on foot. It covers communications between:

- a lawyer and a client;
- the client's lawyer and third parties; and
- the client and third parties,

that are confidential and where the dominant purpose of the communication is to prepare for litigation or anticipated litigation.

EXAMPLES WHERE PRIVILEGE MAY BE ARGUABLE:

- A lawyer gives a client advice on a tenancy matter at VCAT, for instance where a Notice to Vacate has been issued.

- A lawyer contacts a doctor for a letter of support in an infringements application.
- A client contacts their social worker and asks them to prepare a document for their lawyer to be used for an upcoming Court matter.

Identifying privilege: the “dominant purpose” test

Legal professional privilege only attaches to confidential communications that are made “for the dominant purpose” of providing legal advice or preparing for actual or anticipated litigation.

The dominant purpose has been described as the “ruling, prevailing or most influential” purpose of the communication.

If the communication is made for the purpose of legal advice or preparing for litigation and also for other non-legal purposes, and all these purposes are of equal weight, then the communication will not be privileged.

The following is a guide only and should not be understood to be conclusive in any particular case. Whether or not legal professional privilege is arguable in relation to a communication depends on all of the circumstances of a particular case, and not on general categories.

Privilege MAY be arguable

Instructions taken by a lawyer from a client for the purpose of providing legal advice, or in relation to an upcoming matter in a tribunal or court.

Advice provided by a lawyer to a client on a legal matter.

Discussions between a client and a paralegal or an employee of the legal practice who is subject to confidentiality obligations, provided that the communication is for one of the dominant purposes.

A draft letter of support from a doctor obtained by a lawyer to support a client's infringement application (until it is used in Court).

Discussions between a lawyer and a third party (e.g. a caseworker or a psychologist) to establish whether a client has capacity to give instructions in relation to an upcoming hearing.

Unlikely to be privileged

Discussions with a case worker to locate a client.

Communications that are not confidential:
(i) communications with “the other side”; or
(ii) communications with a public body (e.g. Victoria Police, DHHS).

Discussions between a lawyer and a client's relative (except, for example, where for the purpose of obtaining instructions).

Discussions about a client's general well-being (e.g. suicidality, health) (unless that question is relevant to any legal case, or for the purpose of giving or receiving instructions to provide legal advice).

Submissions to a tribunal or court (although draft submissions remain privileged).

Waiving privilege

Once privilege has been established, it will remain unless it is waived. Waiver can be express or implied and may occur if the privileged communication is re-communicated to a third party.³

Waiver will **not** occur if the information is re-communicated to a third party in a manner that is not inconsistent with the privilege being maintained, that is:

- 1 the re-communication is for a **specific and limited purpose**; and
- 2 the **confidential nature** of the material being re-communicated is maintained (i.e. the third party keeps the information confidential).

It is important that both of these elements are maintained in order to avoid waiver.

Whether privilege will be waived in a particular situation is a complex question. Re-communication of privileged communications should therefore be avoided where possible.

2. Privilege and mandatory reporting

Privilege is an exception to mandatory reporting obligations in relation to child sexual offences (section 7(b) of the *Crimes Act 1958* (Vic)). See Part 2 of this Toolkit for further information on mandatory reporting obligations.

3. Privilege in practice

This section considers some typical examples of where CLCs are likely to encounter issues in relation to privilege.

The column ‘is privilege likely to be arguable?’ is a guide only. In practice, the Court will ultimately make the decision as to whether a communication is privileged.

³ Although not a privilege per se, practitioners should also be mindful of the potential risk of relinquishing the confidential communications protection under the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) where a social worker/counsellor is providing counselling to a client who discloses, within the context of that relationship, that he or she has been sexually assaulted (*Evidence (Miscellaneous Provisions) Act 1958* (Vic) ss32B & C). The provision protects oral and written communications made in confidence, by a person who alleges she or he has been sexually assaulted to a counsellor, from being used as evidence in court proceedings. If the counsellor has given the lawyer access to the contents of the counselling notes to assist with preparation of legal documents, this can potentially relinquish the protection of the provision. However, there may be a separate basis for legal professional privilege attaching to the document in any event. The situations where this issue may arise include criminal or civil proceedings, and family law or child protection proceedings, where allegations of sexual assault are in issue.

Triage

EXAMPLE

IS PRIVILEGE LIKELY TO BE ARGUABLE?

A paralegal's written summary of a client's legal issues, prepared to pass on to the responsible lawyer.

- **Yes.**
- Communications between a client and employees of a legal practice (other than lawyers) who are bound by confidentiality obligations may attract privilege, provided the communication is prepared for a relevant dominant purpose.
- Privilege will attach to the summary to the extent that it records communications for a relevant dominant purpose, regardless of whether the paralegal maintains a separate file or uses the main legal file.

Ahead of a client meeting, a social worker receives a copy of the summary prepared by the paralegal (subject to privilege).

- **Possibly.**
- Privilege may be arguable if:
 - the paralegal's summary was prepared in a confidential manner for the specific and limited purpose of taking instructions for use in the lawyer-client relationship;
 - the summary is provided to a social worker in a confidential manner for the same specific and limited purpose; and
 - the summary is not otherwise used in any manner inconsistent with this purpose.
- Special care (including training and clear procedures) should be taken to avoid an inadvertent waiver of privilege, and the summary should not be treated as a general reference that is available to service providers acting for the client.

Practical Tips

- Record paralegal notes in the main legal file. This will make it easier to assert legal professional privilege.
- To minimise the impact on the client if privilege over paralegal notes is later challenged, be cautious about what is included in the initial summary and avoid recording any impressions, judgements or advice (e.g. possible weaknesses in the client's case).

Client meetings

EXAMPLE

IS PRIVILEGE LIKELY TO BE ARGUABLE?

<p>Communications between a client and a lawyer in a meeting, where a social worker is present.</p>	<ul style="list-style-type: none">• Yes.• Communications between a client and a lawyer can attract privilege, regardless of whether a non-lawyer is present at the meeting, provided the communication is made for a relevant dominant purpose (i.e. legal advice or anticipated litigation) and the non-lawyer is subject to an appropriate confidentiality obligation
<p>Notes of the meeting taken by the social worker as an "aide memoire".</p>	<ul style="list-style-type: none">• Possibly.• To the extent that the notes record communications between the client and lawyer for the dominant purpose of legal advice or preparing for anticipated litigation, then privilege may be arguable.• Notes made for the social worker's own purposes will not be privileged (e.g. a summary of the client's mental health situation to be used to make a mental health service referral).
<p>A client attends an appointment with a lawyer seeking advice on family violence. During the meeting, the lawyer recognises the client is distressed and invites the social worker into the appointment to assist with the assessment of non-legal support needs.</p>	<ul style="list-style-type: none">• Depends on the individual circumstances.• The dominant purpose of the meeting will need to be for providing legal advice or in relation to anticipated litigation. If the meeting is predominantly for providing legal advice or preparing for anticipated litigation, then notes and other documents arising from the meeting will be privileged.• If, however, the meeting predominantly becomes an assessment for non-legal support, there is a risk that any notes or other documents created during this meeting will not be privileged.• Consider separating the meetings and making the client aware of the difference between the two meetings, particularly if the client is going to disclose something the social worker may be obliged to report if not protected by privilege.

Practical Tips

- While joint meetings between lawyers, clients and social workers are often a key aspect of integration – to avoid a ‘mixed purpose’ it is useful to structure these meetings so that the legal matters are the focus, with non-legal needs being addressed in a separate part of the meeting, e.g. call a coffee break before a detailed discussion of non-legal matters.
- At the beginning of the meeting (or part of) clarify that the primary purpose of the meeting is to provide legal assistance to the client, and ensure that the flow of information and nature of the meeting reflect this.
- All notes, by lawyers or non-lawyers, should be marked as “Legally Privileged and Confidential”.
- If a meeting covers both legal and non-legal matters, ensure any notes clearly distinguish between the legal and non-legal parts of the meeting (e.g. by taking notes relating to social assistance on a fresh page).
- Where a lawyer and social worker are both interviewing a client in the same room as part of an integrated model, and the lawyer suspects the client is going to begin discussing matters that a social worker might be legally or ethically bound to report (see Part 2 of this Toolkit), the social worker should leave the room temporarily. If there is nothing reportable, the social worker can be invited to return, and the matters discussed can be summarised for the benefit of the social worker. If there is something reportable, the lawyer should explain to the client the consequences of mentioning that matter to the social worker (i.e. reporting) and ask the client whether they want it reported. The lawyer should explain that the lawyer will not report it (or disclose it to anyone else, without permission) but the social worker would be obliged to report it if he or she knows of it.
- Be aware of situations where the dominant purpose of a meeting shifts from providing legal advice to other purposes, such as providing social support. Once the meeting moves into assessment of non-legal needs, the communications are not privileged even if they involve some elements which remain legal in character. What this means in practice is that, if subpoenaed, the notes of these conversations would become known to the other party in legal proceedings (e.g. family law or child protection).

Communications with third parties (including team social workers)

EXAMPLE

IS PRIVILEGE LIKELY TO BE ARGUABLE?

<p>A lawyer, in preparation for an upcoming hearing writes an email to a support worker, the purpose of which is requesting a letter of support. In that letter, the lawyer also organises transport to court.</p>	<ul style="list-style-type: none">• Yes.• The 'litigation privilege' limb of legal professional privilege extends to confidential communications between a lawyer and a third party, such as a social worker, so long as the communications are for the dominant purpose of preparing for actual or anticipated litigation.
<p>Re-communications of legal advice to a third party e.g. a lawyer who advised their client that a possession order will likely be granted at a VCAT hearing recommunicates this advice (with consent) to a social worker to allow them to assist the client to find new housing.</p>	<ul style="list-style-type: none">• Possibly.• Special care must be taken when re-communicating privileged information to ensure privilege is not waived. If the recommunication is made in a confidential manner, for the specific and limited purpose of supporting the client to find new housing, it is unlikely that privilege will be waived.
<p>A social worker is helping a client with emotional support in connection with a Court process. That social worker then also assists the client with other services, for example, connects the client with housing and financial counselling. The social worker re-communicates advice given by the client's lawyer to other workers to give them an indication of the merit of the client's case and likelihood of success with the aim of facilitating a coordinated response.</p>	<ul style="list-style-type: none">• Possibly, but special care is required.• If the re-communication is made in a limited way which maintains confidentiality in the re-communication of the lawyer's advice, and the purpose is to facilitate a coordinated response, privilege may be maintained. It will need to be made clear that each of these workers has an obligation of confidentiality and that the information has been communicated or re-communicated for the specific and limited purpose of supporting the client to access to appropriate services.• However, <u>any</u> deviation from these processes may lead to a waiver of privilege.

Practical Tips

- Be cautious about disclosing privileged information to third parties, particularly where no litigation is on foot or reasonably anticipated. Consider whether it is necessary to disclose the privileged information, and only proceed if you consider it reasonably necessary in order to advance the client's interests in some definable way.
- Where disclosure is required, explain to the third party that you are going to disclose privileged information and request the third party to keep the advice confidential, and only to use the advice for the limited and specific purpose that you have identified for disclosing the advice.
- Request that all participants, including lawyers, non-lawyers or third parties mark any notes or emails "Legally Privileged and Confidential" and explain that this will make it easier for the notes to be identified as privileged in the event that the third party's files are ever subpoenaed. Mark your own notes accordingly.
- Consider including the following disclaimer (or similar) in privileged email communications:

"The content of this email is privileged and confidential and should not be disclosed to the court. It is only to be used for the limited and specific purposes set out in this email. In the event that your files are subpoenaed please contact [insert CLC] immediately. The content of this email should not be disclosed to the court as it is subject to a claim for legal professional privilege".

Open File: Ongoing Legal Support

EXAMPLE

IS PRIVILEGE LIKELY TO BE ARGUABLE?

<p>A lawyer and social worker discuss a client's general mental health.</p>	<ul style="list-style-type: none">• Possibly.• It all depends on the purpose of the communication. If the lawyer needs to know, or wants to know, the client's mental health status in connection with providing legal services, and that is the dominant purpose of that communication, privilege may attach. However, communications that are unrelated to a legal matter or only indirectly related to a legal matter will not be for the dominant purpose of providing legal advice or preparing for actual or anticipated litigation, and are therefore not privileged.
<p>A lawyer cannot reach their client and a social worker suggests that they could pass on legal advice to the client on the lawyer's behalf.</p>	<ul style="list-style-type: none">• Usually not.• It will usually be necessary for a lawyer to give advice directly to their client in order to maintain privilege. There may be special circumstances where an agent could be used, but it is strongly recommended not to consider this approach unless there is some real emergency. In that situation, the lawyer may authorise the social worker to re-communicate the advice verbatim (word for word), on condition of strict confidentiality.• Slightly different considerations may apply in relation to litigation privilege, but it is recommended that specific advice be sought in those situations.

Practical Tips

- If you cannot reach your client by phone and they cannot receive mail, and a social worker suggests dropping a document to them in person, write the legal advice and place it in a sealed envelope marked "Legally Privileged and Confidential" with a direction that the letter is only to be opened by the client.

Written Documents

EXAMPLE

IS PRIVILEGE LIKELY TO BE ARGUABLE?

<p>Documents marked "Legally Privileged and Confidential"</p>	<ul style="list-style-type: none">• Depends on what the document contains.• Privilege does not automatically attach to a document marked "Legally Privileged and Confidential". The document will only be privileged if the legal professional privilege criteria are met, including the dominant purpose test.
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Practical Tips

While it is not definitive evidence that a document is privileged, it is good practice to mark privileged documents as "Legally Privileged and Confidential". This puts the recipient on notice that the document is intended to attract privilege and should be treated in a manner that does not waive privilege.

4. Privilege and responding to a subpoena

In the event that a social worker's or lawyer's file is subpoenaed, the CLC lawyer will need to thoroughly vet the file in order to determine whether a claim of legal professional privilege might be made in relation to any of the contents. The documents should be carefully reviewed to make sure no privileged documents are disclosed (which may waive privilege).

If only part of a document is privileged, it may be possible to redact the privileged sections of the document prior to production.

It is permissible to waive privilege and elect to produce privileged documents when responding to a subpoena. However it is the client's exclusive right (and not the lawyer's) to decide whether privilege is to be waived. Unless the client has clearly and unequivocally consented to the waiver of privilege, documents over which the client claims privilege should be placed in a separate, sealed envelope clearly marked "**Subject to Legal Professional Privilege**" and provided to the Court, to allow the Court to determine the privilege claim (if and when required).

STEP BY STEP GUIDE ON RESPONDING TO SUBPOENA REQUESTS

Access the client file.

The principal lawyer should review the file to identify (1) whether there are any grounds for objecting to the subpoena; and, if not, (2) any documents which fall within the scope of the subpoena to produce documents; and (3) of those responsive documents, any privileged documents.

Contact the client by phone regarding the subpoena.

If any of the responsive documents are subject to a claim for legal professional privilege, discuss with the client whether privilege is to be maintained or waived (keeping an accurate file note of this). If there is uncertainty about whether a claim of privilege can be made, consider seeking pro bono assistance from a barrister.

If the client does not waive privilege in relation to the responsive documents subject to legal professional privilege, they should be placed in a separate sealed envelope clearly marked "Subject to Legal Professional Privilege" and provided to the Court. Schedules of documents will need to be produced identifying any documents over which privilege is claimed with sufficient particularity to enable the Court to discern each document from the others (but not so as to waive legal professional privilege).

Make a copy of all the responsive documents provided to the Court (including privileged and non-privileged documents) and add the copies to the client's file so there is a record of what documents have been provided.

Send a follow up letter to the client confirming your instructions and the responsive documents provided to the Court (including those over which privilege was maintained).

5. Case studies – identifying and protecting privilege

The column 'is privilege likely to be arguable?' is a guide only. In practice, the Court will ultimately make the decision as to whether a communication is privileged.

EXAMPLE 1	IS PRIVILEGE LIKELY TO BE ARGUABLE?
<p>Jane's landlord has obtained a possession order against her. Jane has come to Sarah, a social worker, for assistance. Sarah helps Jane file her application to have the order set aside and Jane tells her a little bit about what is going on.</p>	<p>NO</p> <p>There is no lawyer-client relationship.</p>
<p>The next day Jane meets with her lawyers, Emily and John, to give them instructions about the re-hearing of the possession order.</p> <p>Sarah the social worker comes to the meeting to give Jane support. Sarah confirms to Emily and John that she will keep the matters discussed confidential.</p> <p>At that meeting, Emily and John tell Jane that they are worried about her prospects of success at VCAT and that they think there is a chance she might be evicted.</p>	<p>YES</p> <p>Jane's instructions, and Emily and John's advice about the prospects of success at VCAT, are privileged.</p> <p>They are confidential communications between a client and their lawyers for the 'dominant purpose' of the client obtaining legal advice in relation to an upcoming hearing.</p> <p>As Sarah has agreed to keep the meeting confidential, the fact that Sarah is present at the meeting is unlikely to waive privilege in the advice.</p>
<p>With Jane's consent, Sarah contacts Robert, who works for a housing provider. She tells him Jane has been advised by her lawyers that she will likely be evicted next week. Sarah asks Robert to provide Jane with emergency accommodation. Sarah makes it clear that this information is privileged and confidential and that Robert should only use the information to help Jane find emergency accommodation.</p>	<p>LIKELY YES</p> <p>Sarah is re-communicating privileged information.</p> <p>Sarah has been careful not to waive the privilege by:</p> <ul style="list-style-type: none"> • requiring Robert to only use the information for a specific purpose (to help find Jane housing); and • noting the confidential nature of the information. <p>Where possible, Sarah should communicate more generally with Robert, for example, "Jane is likely to need emergency accommodation", which would not waive privilege in earlier lawyer-client based communications.</p>
<p>The matter escalates. At a hearing, Sarah, the social worker, is questioned about the discussion between Jane, Emily and John.</p>	<p>LIKELY YES</p> <p>Sarah should claim privilege from answering the question on behalf of the privilege holder, Jane.</p> <p>She should state that she was party to the conversation as a third party in the context of litigation privilege, and that the discussion was between the client and her lawyers for the dominant purpose of facilitating legal advice.⁴</p>

⁴ There is unlikely to be any risk of a contempt of Court, unless the Court orders that the question be answered despite the objection. In that circumstance, the representative for Jane should request an adjournment and request a separate ruling on the privilege claim. Sarah should then comply with that ruling. If she complies with that ruling, she does not risk any contempt of Court.

EXAMPLE 2

Sam is receiving support from a social worker, Jo, while recovering from a workplace injury.

During some of these appointments, Jo observes that some of Sam's injuries indicate the existence of physical family violence.

Jo asks Sam if a lawyer can attend their next appointment.

During that appointment, Sam discloses to Jo and the lawyer that some of the injuries were received in circumstances of family violence. The lawyer advises that Sam should take out a Family Violence Intervention Order (**FVIO**).

Some months later, Jo's notes that were taken during the meeting between the lawyer and Sam are subpoenaed for the purposes of the workplace injury claim.

IS PRIVILEGE LIKELY TO BE ARGUABLE?

LIKELY YES

The notes taken during the consultation between the social worker, lawyer and client will be covered by legal professional privilege provided that the dominant purpose of the meeting was for the provision of legal advice.

Any other notes where Jo has made a record of Sam's family violence that are not connected to the provision of legal advice are unlikely to be privileged (for example, if Jo took notes at another appointment regarding the family violence where a lawyer did not attend). If Jo's role is funded to deliver specialist family violence services under a State contract (e.g. by DHHS and in some cases DOJR), then she may be required to share information that is not subject to a claim of privilege for family violence risk assessment and risk management in accordance with Part 5A of the *Family Violence Protection Act 2008* (Vic).⁵

In brief

- 1 During a client meeting where both a lawyer and social worker are present, remain mindful of the dominant purpose requirement and clearly separate the time dedicated to legal advice from the time dedicated to social worker advice. Keep all notes separate and clearly identified.**
- 2 Keep the legal files separate from the social worker files.**
- 3 Be cautious when re-communicating client related information to third parties.**
- 4 The following documents should be marked as "Legally Privileged and Confidential":**
 - File notes taken by a social worker during a legal meeting.
 - Documents sent between a lawyer and a client or a lawyer and a social worker relating to legal issues.
 - Documents or communications between a lawyer and third parties relating to legal advice or legal proceedings.

⁵ Detailed information about the family violence information sharing scheme under Part 5A of the *Family Violence Protection Act 2008* (Vic) is available at: State Government of Victoria, *Information Sharing and Risk Management* (<https://www.vic.gov.au/familyviolence/family-safety-victoria/information-sharing-and-risk-management.html>).

PART 2: MANDATORY REPORTING, VOLUNTARY REPORTING AND FAILURE TO REPORT

In brief

1 Legal requirement to report concerns of abuse and neglect?

- **Lawyers – No.** There are no general obligations on lawyers to report, however lawyers in the Family Court system may be captured by reporting obligations (e.g. where independently representing children's interests).
- **Social workers – No.** However, any person may report concerns that a child is in need of protection (as defined under the *Children, Youth and Families Act 2005* (Vic)) to the Department of Health and Human Services Child Protection (**DHHS**) and the ethical and professional obligations of lawyers and social workers may differ in this area.

2 Legal requirement to report suspected child sexual offences?

- **Lawyers – No, unless the information is not privileged.** In general, information communicated to lawyers for the purpose of receiving legal advice or in respect of pending litigation is subject to a claim of privilege, which is a reasonable excuse for not reporting suspected child abuse. Refer to Part 1 of this Toolkit for further information.
- **Social workers – Yes, unless the information is privileged.** All adults who hold a reasonable belief that a sexual offence has been committed by an adult against a child in Victoria must report that belief to police, unless they have a reasonable excuse for not reporting or are otherwise exempt (e.g. privileged information). In most cases information communicated to social workers may attract obligations of confidence, but not privilege, and therefore must be reported.

1. Overview of legislation in Victoria

Mandatory reporting obligations require selected classes of persons, in all states and territories of Australia, to report suspected cases of **child abuse** and **neglect** to government authorities. The obligations vary across the states and territories. The table below provides a summary of the mandatory reporting obligations applicable in Victoria:

TYPE OF HARM, TREATMENT OR ABUSE	LAW	WHO	TO WHOM	WHEN IS NOTIFICATION REQUIRED?	STATE OF MIND
Physical injury or sexual abuse.	VIC <i>Children, Youth and Families Act 2005</i> (Vic) (the CYF Act) ss 162, 182, 184.	<ul style="list-style-type: none"> Registered medical practitioners, nurses and midwives; Teachers; Principals; and Police officers. 	DHHS.	<p>As soon as practicable after forming a belief (and after each occasion on becoming aware of any further grounds for the belief) that a child is in need of protection on the grounds that the child has suffered, or is likely to suffer significant harm as a result of:</p> <ul style="list-style-type: none"> physical injury; or sexual abuse, <p>and the child's parents have not protected, or are unlikely to protect, the child from that type of harm.</p>	Belief on reasonable grounds, formed in the course of practising his or her office or position.
Sexual offences	VIC <i>Crimes Act 1958</i> (Vic) (the Crimes Act) s 327.	<p>Any adult who does not have reasonable excuse or an exemption, for example:</p> <ul style="list-style-type: none"> privileged information; confidential communications between victim and a medical practitioner or counsellor; victim is 16+ and requests confidentiality. 	Police Officer. Failure to disclose is a criminal offence.	<p>As soon as practicable after forming a reasonable belief that a sexual offence has been committed in Victoria against a child under the age of 16 by another person of or over the age of 18 (unless the reporter has a reasonable excuse for not doing so).</p>	Belief on reasonable grounds.
Ill treatment	CTH <i>Family Law Act 1975</i> (Cth) ss 4, 67ZA.	<ul style="list-style-type: none"> Registrars, family consultants and counsellors employed in the Family Court system; Family dispute resolution practitioners or arbitrators; and Lawyers independently representing children's interests. 	Child welfare authority.	<p>As soon as practicable after forming a suspicion that a child has been ill-treated, or is at risk of being ill-treated or has been exposed or subjected, or is at risk of being exposed or subjected, to behaviour which psychologically harms the child.</p>	Suspects on reasonable grounds, in the course of performing duties or functions, or exercising powers.

2. Summary of obligations to report physical injury, sexual abuse or sexual offences against a child

This table summarises the different mandatory and voluntary reporting obligations and considerations for lawyers and social workers.⁶

	MANDATORY REPORTING (SPECIFIC PROFESSIONS) (PHYSICAL INJURY OR SEXUAL ABUSE)	MANDATORY REPORTING (ANY ADULT) (SEXUAL OFFENCES)	VOLUNTARY REPORTING
LAWYERS	<p>No, unless you are in the Family Court System.</p> <p>There are no obligations that apply specifically to legal practitioners in Victoria to report instances of actual or suspected abuse or neglect of a child, outside the reporting duties imposed on lawyers independently representing a child's interests or otherwise acting in the Family Court of Australia, the Federal Magistrates' Court or the Family Court of Western Australia.⁷</p>	<p>No, unless the information is not privileged.</p> <p>It is an offence for any adult to fail to disclose a reasonable belief that a sexual offence against a child under 16 years of age has been committed unless a reasonable excuse applies (e.g. the information is privileged).⁸ For further information see Section 3 below.</p>	<p>Any person, who believes on reasonable grounds that a child is in need of protection (as defined in the CYF Act and summarised in the table in Section 1 above), may report their concerns to DHHS. However, lawyers are bound by a professional duty of confidentiality⁹ unless an exception applies. Examples include:</p> <ul style="list-style-type: none"> information disclosed for the sole purpose of avoiding the probable commission of a serious criminal offence; or information disclosed for the purpose of preventing imminent serious physical harm to the client or to another person.¹⁰

⁶ As noted above, in response to the findings of Victoria's Royal Commission into Family Violence, a family violence information sharing scheme has been created by Part 5A of the *Family Violence Protection Act 2008 (Vic)*. The scheme began on 26 February 2018, and it authorises a select group of prescribed information sharing entities (**ISEs**) to share information between themselves for family violence risk assessment and risk management. Community Legal Centres are not ISEs and are not covered by the scheme (Centres that are auspiced by an ISE should seek separate advice). Social workers who are funded to deliver specialist family violence services under a State contract (e.g. by DHHS and in some DOJR) are subject to the information sharing scheme. This does not affect legal professional privilege or the mandatory reporting obligations discussed in this guide, but it does create an additional regime for information sharing that CLCs need to be aware of. Detailed information about this regime is available at: State Government of Victoria, Information Sharing and Risk Management (<https://www.vic.gov.au/familyviolence/family-safety-victoria/information-sharing-and-risk-management.html>).

⁷ Pursuant to s67ZA of the *Family Law Act 1975 (Cth)* registrars, family counsellors, family dispute resolution practitioners, arbitrators and lawyers independently representing children's interests in the Family Court of Australia, Federal Magistrates' Court and Family Court of Western Australia must report reasonable grounds for suspecting that a child has been abused or is at risk of being abused. The person must, as soon as practicable, notify a prescribed child welfare authority of his or her suspicion and the basis for the suspicion in the course of performing duties or functions, or exercising powers.

⁸ *Crimes Act 1958 (Vic)* s 327.

⁹ A lawyer's duty of confidentiality to the client is set out in rule 9 of the *Legal Profession Uniform Law Australian Solicitors Conduct Rules 2015 (Conduct Rules)*. These rules apply to lawyers in both Victoria and NSW, and were made pursuant to the *Legal Profession Uniform Law*.

¹⁰ Exceptions to a lawyer's duty of confidentiality to the client are set out in r 9.2 of the Conduct Rules.

	MANDATORY REPORTING (SPECIFIC PROFESSIONS) (PHYSICAL INJURY OR SEXUAL ABUSE)	MANDATORY REPORTING (ANY ADULT) (SEXUAL OFFENCES)	VOLUNTARY REPORTING
SOCIAL WORKERS	<p>No, not yet.</p> <p>In Victoria, social workers are <i>not</i> presently mandated to report to DHHS under the CYF Act.¹¹</p> <p>However, persons:</p> <ul style="list-style-type: none"> with a post-secondary qualification in youth, social or welfare work who work in the health, education or community or welfare services field; and who [are] not a person employed under Part 3 of the <i>Public Administration Act 2004</i> (Vic) to perform the duties of a youth and child welfare worker (CYF Social Workers), <p>are identified under section 182(g) of the CYF Act as persons who <i>may</i>, in the future, be determined by the Government (by publication in the Government Gazette) to be mandatory reporters.¹²</p> <p>At the date of this Toolkit, CYF Social Workers have not been gazetted as mandatory reporters. However various commentary including the State of Victoria Department of Premier and Cabinet's Report "<i>Report of the Protecting Victoria's Vulnerable Children Inquiry</i>" (2012) recommends that the Victorian Government should progressively gazette the relevant professions set out in section 182 of the CYF Act. If this occurs in the future, the mandatory reporting obligations as they apply to all social workers and to CLCs will need to be reviewed.</p> <p>Note also the obligations of social workers employed in the Family Court system summarised in the table in Section 1 above.</p>	<p>Yes, unless the information is privileged.</p> <p>It is an offence for any adult to fail to disclose a reasonable belief that a sexual offence against a child under 16 years of age has been committed unless a reasonable excuse applies or they are exempt from reporting. For further information see Section 3 below.¹³</p>	<p>Any person, who believes on reasonable grounds that a child is in need of protection (as defined in the CYF Act and summarised in the table in Section 1 above), may report their concerns to DHHS.</p> <p>However, social workers may be bound by obligations of client confidentiality. Social workers may be guided by the Australian Association of Social Workers' Code of Ethics (the AASW Code of Ethics).¹⁴</p>

3. Reporting sexual offences against a child – Crimes Act

All adults must report a reasonable belief that a sexual offence against a child has been committed

The *Crimes Act 1958* (Vic) was amended by the *Crimes Amendment (Protection of Children) Act 2014* (Vic), to establish a new offence for failing to disclose sexual offences committed against children under 16 years of age.¹⁵

Any adult (not just professionals who work with children) who:

- holds a **reasonable belief** that a sexual offence has been committed by an adult (aged 18 or over) against a child (under 16 years of age) in Victoria;
- must report that belief to Victoria Police;
- unless they have a **reasonable excuse** for not reporting or are **exempt** from reporting.

¹¹ As identified in the table in Section 1 above, for professions who are mandated, the CYF Act requires reporting to DHHS, as soon as practicable after forming a belief (and after each occasion on becoming aware of any further grounds for the belief) that a child is in need of protection on the grounds that the child has suffered, or is likely to suffer significant harm as a result of physical injury or sexual abuse, and the child's parents have not protected, or are unlikely to protect, the child from that type of harm. The belief needs to be formed on reasonable grounds, in the course of practising his or her office or position (ss 162, 182 and 183).

¹² Note that it is unclear whether or not a person that has, for example, a Cert IV qualification, would be included in the mandatory reporting rules, if CYF Social Workers (as defined) were to be gazetted to be mandatory reporters in the future. This will turn on the construction of 'post-secondary qualification'.

¹³ *Crimes Act 1958* (Vic) s 327.

¹⁴ See also s 5.2.4(f) of the AASW Code of Ethics, which provides guidance to social workers in circumstances where they are considering disclosing information obtained in confidence from a client.

¹⁵ *Crimes Act 1958* (Vic) s 327.

Unlike other mandatory reporting obligations, this offence applies to all adults: all persons are required to report a suspected child sexual offence to police. The maximum penalty for failing to report such an offence is **3 years imprisonment**.

An important exemption for lawyers, however, is that the obligation to report is not contravened if the information on which the report would be based is privileged (refer to Part 1 of this Toolkit).

The below chart provides further information on this obligation to report.

CHILD SEXUAL ABUSE	A sexual offence committed by an adult against a child under the age of 16.
REASONABLE BELIEF	<p>A reasonable person in the same position would have formed the belief on the same grounds. A reasonable belief is more than a suspicion and requires tangible support to take the existence of an alleged fact beyond a mere belief or assertion.</p> <p>Examples of what may constitute a 'reasonable belief' are set out in the Department of Human Services 'Failure to disclose offence' factsheet¹⁶ and include where:</p> <ul style="list-style-type: none"> • a child states that they (or someone they know) has been sexually assaulted; • someone who knows a child states that the child has been sexually abused; • physical signs of sexual abuse; • professional observations of the child's behaviour or development; and • other signs e.g. risk taking behaviour, genital mutilation, risk to an unborn child, indications that a child is being groomed. <p>Note: If any person working with a CLC client has unresolved suspicions that do not lead them to form a reasonable belief, they should consult with the appropriate supervisor within the CLC.</p>
REASONABLE EXCUSE	<p>Examples of a 'reasonable excuse' include:</p> <ul style="list-style-type: none"> • A reasonable belief that the information has already been reported to police or to DHHS (as a result of mandatory reporting obligations) by another person and the person deciding whether to report has no further information to add. • A reasonable fear (subjective) that the disclosure will place someone (other than the alleged perpetrator) at risk of harm, including the discloser.¹⁷ <p>A person does not have a reasonable excuse for failing to comply only because the person is concerned for the perceived interests of the person reasonably believed to have committed, or to have been involved in, the sexual offence or the perceived interests of any organisation.</p>
EXEMPTIONS	<ul style="list-style-type: none"> • The information is privileged – this includes legal professional privilege (refer to Part 1 of this Toolkit), journalist privilege and religious confessions. • The victim (aged 16 or over) requests confidentiality – the exemption does not apply if the person who receives the relevant information is aware or should reasonably be aware that the victim requesting confidentiality (a) has an intellectual disability or (b) does not have the capacity to make an informed decision about a disclosure. • The reporter was a child when they formed a reasonable belief – the potential reporter was under the age of 18 when they formed that belief. • The information is a confidential communication – certain professions (e.g. social workers) are not required to disclose information to police if the information is obtained from a child whilst providing treatment and assistance to that child in relation to sexual abuse. • The information is in the public domain – a person does not have to disclose if they get the information solely from information that is in the public domain (e.g. television or radio reports).

What happens if I report a belief of a child sexual offence?

1 Your identity is protected

Your identity will remain confidential unless:

- you disclose it yourself or you consent in writing to your identity being disclosed; or

¹⁶ 'Failure to disclose offence' factsheet (Department of Justice and Regulation, Victorian State Government). Available at <http://www.justice.vic.gov.au/home/safer+communities/protecting+children+and+families/failure+to+disclose+offence>.

¹⁷ Ibid.

- a Court or Tribunal decides that it is necessary in the interests of justice for your identity to be disclosed.

2 No breach of professional ethics

If a report is made in good faith, reporting actual or suspected child abuse does not constitute unprofessional conduct or a breach of professional ethics on the part of the reporter.

3 No legal liability for the report

The reporter cannot be held legally liable in respect of the report. This means that a person who makes a good faith report, in accordance with the legislation, will not be held liable for the eventual outcome of any investigation of the report.

4. Mechanisms for managing different legal obligations and ethical and professional responsibilities within integrated practices

As set out in Part 2, Sections 1 – 3 of this Toolkit, the legal obligations of lawyers and social workers are different. For example, under the Crimes Act, social workers, like all adults in Victoria, are required to report to Victoria Police a reasonable belief that a sexual offence against a child under 16 years of age has been committed unless a reasonable excuse applies or they are exempt from reporting (e.g. if the social worker obtains the relevant information from a child under the age of 16 whilst providing treatment and assistance to that child in relation to sexual abuse). For lawyers, an important exemption under the Crimes Act is that this requirement to report is not contravened if the information on which the report would be based is privileged (refer to Part 1 of this Toolkit).

Furthermore, although social workers are not (yet) listed as mandatory reporters under the CYF Act (and therefore are not legally required to report to DHHS a reasonable belief that a child is in need of protection because they have suffered or are likely to suffer significant harm as a result of physical injury or sexual abuse), any person who believes on reasonable grounds that a child is in need of protection, *may* report their concerns to DHHS. Notably the ethical and professional obligations of lawyers and social workers may differ in relation to these decisions.¹⁸

It is important that CLCs have frameworks for effectively managing these differences, including:

- communicating with clients about different roles and obligations within integrated practices;
- meetings and correspondence with clients;
- file management practices (e.g. information barriers and separate files);
- sharing information between lawyers and social workers, including what should be shared and for what purpose;
- making decisions about when a non-legal expert within an integrated practice (e.g. a social worker) might report child abuse or neglect; and
- responding to requests for information or subpoenas, including in relation to family law, family violence, child protection or criminal proceedings.

Practical mechanisms for managing these differing obligations within a CLC can include:

- training for lawyers and social workers about the scope of each profession's obligations;
- external supervision for social workers and other non-legal experts within legal teams, so they have professional support outside the legal practice;
- a script or information sheet that explains the difference between social workers and lawyers for the client (a sample script is included in Practical Tip 2 below);
- clear policies and guidelines to minimise the chance of these challenges arising (see Practical Tip 1 below); and
- clear policies and processes for escalation of these decisions within an organisation (e.g. to the principal lawyer of a CLC).

¹⁸ See, e.g., section 5.2.4(f) of the AASW Code of Ethics, which provides guidance to social workers in circumstances where they are considering disclosing information obtained in confidence from a client; and Rule 9 of the Conduct Rules regarding a lawyer's duty of confidentiality to the client.

Practical Tip 1 – Managing meetings where both the lawyer and social worker are present

If a lawyer thinks the client is about to refer to a matter which would be reportable, consider requesting that the social worker leave the room while the lawyer explores the issues.

- If there is nothing reportable, the social worker can return.
- If there is something reportable, the lawyer should explain to the client the consequences of mentioning the matter to the social worker (i.e. reporting) and ask the client whether they would want the matter reported. The lawyer should explain that the lawyer will not report it (or disclose it to anyone else, without permission) but that the social worker would be obliged to report it if he or she knows of it. If, after receiving that advice, the client instructs that they want to proceed, knowing that the matter may be reported, the social worker can re-enter the room to explore the matter in detail.

Practical Tip 2 – Sample explanation of the difference between the roles and obligations of lawyers and social workers

- We have both a lawyer and a social worker working with you.
- These two professionals have different roles and obligations.
- The lawyer will help you with [insert] and the social worker will help you with [insert].
- Legal privilege means that communications about your legal matter are confidential and legally protected, which means they cannot be disclosed to anyone else without your consent. For example, if your file is subpoenaed in a legal proceeding, communications that are privileged will not need to be disclosed to other parties.
- For a social worker, although my/his/her work with you is confidential, there will be situations where what you discuss is not covered by legal privilege. In practice, this means, if the social work file is subpoenaed in legal proceedings, I/she/he may have to provide it to the Court. There could also be situations where I/she/he may have to break confidentiality. An example is where a social worker forms a belief that a child has suffered or is likely to suffer harm. I/she/he would always attempt to discuss these situations with you first, and would also need to consult with our principal lawyer before disclosing information to others without your consent.
- If you have any questions or concerns about the roles of the lawyer and the social worker working with you, please let us know.



Specialist social security lawyers and financial counsellors working together to improve client outcomes

A report on the implementation and evaluation of the Integrated Services Project (Year 1)

Acknowledgements

The Social Security Rights Victoria (SSRV) and Financial and Consumer Rights Council (FCRC) Integrated Services Project (Year 1) was funded through the Victorian Department of Justice and Community Safety Integrated Services Fund 2018-2019. The Fund was administered by the Federation of Community Legal Centres. This funding and support is gratefully acknowledged.

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This report has been written by Bryn Overend, Leanne Khan and Gillian Wilks (SSRV) and Taimur Siddiqi (The Incus Group), in consultation with Dr Sandy Ross (FCVic).

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FCRC changed its name to Financial Counselling Victoria (FCVic) in January 2020. As FCRC was the organisation's name during the period covered by the report, this name is used in the report.

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List of Acronyms

AAT	Administrative Appeals Tribunal
ARO	Authorised Review Officer
CLC	Community Legal Centre
CLE	Community Legal Education
CPD	Continuing Professional Development
DSP	Disability Support Pension
EQ	Evaluation Question
FCA	Financial Counselling Australia
FCLC	Federation of Community Legal Centres
FCRC	Financial and Consumer Rights Council
FCVic	Financial Counselling Victoria
FTB	Family Tax Benefit
HJP	Health Justice Partnership
ISP	Integrated Services Project
M&E	Monitoring and Evaluation
MOU	Memorandum of Understanding
NSSRN	National Social Security Rights Network
SSRV	Social Security Rights Victoria



Cover photograph: Bryn Overend (ISP Community Lawyer) and staff from EACH, Ringwood, February 2019

Project Partners

Social Security Rights Victoria (SSRV) is an independent, state-wide community legal centre that specialises in social security and related law, policy and procedure.

SSRV's vision is for a fair and just society in which all people are able to receive a guaranteed adequate income in order to enjoy a decent standard of living. SSRV's contribution to this vision is the provision of legal services to vulnerable and disadvantaged Victorians and those who support them, which assist them to secure and protect their right to equitable social security entitlements.

SSRV is governed by a skills-based Board drawn from and elected by its membership. A small team of staff and volunteers are responsible for organisational management, advocacy and service delivery. Partnerships and pro bono support assist SSRV to extend its reach and strengthen its foundations.

SSRV's core values include respect, empowerment, quality, integrity and courage. The organisation's strategic priorities for 2018-2021 are:

- We continue to strengthen our expertise in social security law, and we use our knowledge and experience to provide high quality community legal services.
- We target our services at vulnerable and disadvantaged Victorians and to where they are most needed.
- We build the capacity and capability of other professionals, enabling them to better identify and assist people experiencing, or who may encounter, social security problems.
- We highlight and address injustice, enhance service outcomes and build knowledge by engaging and collaborating with others.
- Evidence informs our decisions, practice and advocacy.
- We are a high performing, sustainable organisation.

Financial Counselling Victoria (FCVic), previously Financial and Consumer Rights Council (FCRC), "is the peak body and professional association for financial counsellors in Victoria.

FCVic provides resources and support to financial counsellors and their agencies who assist vulnerable Victorians experiencing financial difficulty. FcVic works with government, banks, utilities, debt collection and other stakeholders to improve approaches to financial difficulty for vulnerable consumers.

FCVic is the peak body representing financial counsellors, it advocates for continued funding and expansion of the sector to meet community need. FcVic is also the primary support and development body focused on professionalising and resourcing the sector. These functions are approached in a number of ways including:

- Co-ordinating access to professional development through an ongoing training calendar;
- Developing and supporting working groups and regional networks;
- Presenting an annual state-wide conference focused on issues relevant to financial counsellors and their clients;
- Representing the sector to industry and government; and
- Assisting financial counsellors to meet the ongoing requirements which allow agencies who employ them to hold an ASIC exemption" (FCVic, 2020).

FCRC changed its name to FcVic in January 2020. As FCRC was the organisation's name during the period covered by this report, that title is used in this report.



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1. Executive Summary

“Integrated services involve Community Legal Centres and Aboriginal Legal Services working with other services to support people in the community experiencing overlapping challenges in their life”

- Federation of Community Legal Centres, 2019

FCRC Southern Region Network workshop, Cranbourne, February 2019.

In October 2018, Social Security Rights Victoria (SSRV) and the Financial and Consumer Rights Council (FCRC) formed a partnership to design, implement and evaluate of an Integrated Services Project (ISP). The ISP was premised on the understandings that vulnerable and disadvantaged people often rely on social security payments as their sole or primary source of income, that the social security system is complex and difficult to navigate, that this can lead to errors by applicants/recipients or by Centrelink decision-makers, that Centrelink problems are often one of a range of matters raised by individuals with legal and non-legal advisors, and that threats to income security can have significant impacts on the lives of those who are affected. The proposed project offered the opportunity to focus on the points at which integrated legal/financial counselling service provision would benefit vulnerable Victorians in their engagement with the social security system.

The overarching aim of the ISP was, in a more formal and intentional way than had been done previously, to bring together social security law experts and financial counsellors to work together more effectively and improve client outcomes.

The ISP was funded for one year by the Victorian Government Department of Justice and Regulation’s CLC Integrated Services Fund. The funding was administered by the Victorian Federation of Community Legal Centres (FCLC). A Reference Group of stakeholders and ‘critical friends’ provided oversight and guidance to the project. A community lawyer and a financial counsellor were employed, and an evaluation consultant was engaged, with project funds. The project leveraged the experience, expertise and core functions of the partner organisations. It was also cognizant of models and learnings from other community legal centre (CLC) sector and health justice partnership (HJP) integrated (‘joined-up’, ‘holistic’, ‘wrap around’) services and projects.

Recognising that there is a continuum of possible integrated service activity and that relationships, services and approaches develop over time, in year one the ISP had two broad objectives:

- to strengthen the capability of financial counsellors in providing appropriate responses to social security issues, identifying when a client matter becomes a legal issue and in acting as a 'gateway' to legal assistance; and
- to strengthen the capability of SSRV staff to identify and respond to associated non-legal issues and to facilitate integrated service provision for clients.

A range of strategies and activities were implemented, these are described in more detail throughout this Report, but can be broadly summarised as including:

- establishing and building a partnership between SSRV and FCRC;
- engagement and promotion work with financial counsellors and with SSRV staff;
- design and delivery of professional development and resources to financial counsellors and SSRV staff;
- exploration and delivery of a range of integrated service approaches between social security law experts and financial counsellors;
- joint work to identify and respond to systemic issues; and
- development of understanding around integrated service delivery and contributing to sector learning and research.

There are a number of learnings and recommendations arising from year one of the ISP. Most importantly, through year one of the ISP it was demonstrated that integrated practice by financial counsellors and social security law experts can both directly and indirectly lead to improved client outcomes. Significantly, the need for shared objectives and commitment to working in an integrated way, the importance of relationships at management and service provision levels, and the need to commit resources and time to the endeavor, were highlighted in project implementation and evaluation.

The project has operated at a number of levels – within an organisation (SSRV), between organisations (SSRV and FCRC), and across a sector (Victorian financial counselling sector). In doing so, it has demonstrated that a range of approaches and activities (a spectrum of integrated service provision) are required in order to enable a range of stakeholders to engage and derive benefit in a manner that suits their context and circumstances. In effect, the ISP has worked with different organisations and workers across a “continuum of joined-up services” (Pleasance, et al, 2014, p.71).

The ISP project partners, staff and Reference Group welcome the opportunity provided by this report to document the project and share our learnings. The project partners appreciate and are greatly encouraged by a further grant from the Victorian Government Department of Justice and Community Safety to continue the ISP into a second year.

2. Background



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2.1 Project partners and funding

In June 2018 the FCLC announced that it had taken on the administrative support role to disseminate funds to the community legal centre (CLC) sector on behalf of the Victorian Department of Justice and Regulation (now the Department of Justice and Community Safety). The funding was in the form of twelve month grants directed at supporting the extension or enhancement of existing integrated services and building capacity to establish and deliver integrated services. Victorian CLCs were invited to make formal applications for funding. Applications were considered by an independent assessment panel which used clear criteria and evidence of need to determine the successful projects.

With over 30 years' experience in providing legal services to Victorians in receipt of, or seeking to be assessed as eligible for, government funded social

security payments, SSRV was well aware of the related non-legal issues that can arise for vulnerable and disadvantaged people who are living on no or low incomes, including those related to financial difficulties and debt. Given the intersection between social security and financial problems, there has been engagement between SSRV staff and financial counsellors over a number of years. However, the relationships had been primarily informal and on a worker-to-worker level.

The concept and approach of integrated service delivery aligned very closely with SSRV's strategic priorities and its understanding of the benefits that could be achieved for individual clients and communities through more holistic needs assessment and service provision. The Integrated Services Fund provided an opportunity to apply for funds with which to formalise and explore both the relationship between SSRV and the financial counselling sector and the commitment to integrated service provision.

As the peak and regulatory body for financial counsellors in Victoria, FCRC has sector recognition and knowledge. FCRC also has established networks, communications, formal professional development programs and policy making mechanisms. It was logical for SSRV to seek to engage with the Victorian financial counselling sector through FCRC rather than via individual workers and agencies. A key strength of the proposed collaboration being that it could leverage shared concerns, existing organisational bases, relationships, specific areas of expertise and service provision. Potential challenges to the collaboration were identified as managing expectations and demand, and developing shared understanding of respective roles and professional parameters in the delivery of legal and related services.

FCRC responded very positively when approached by SSRV to partner in an application to the Integrated Services Fund. The organisations proposed that they would establish a partnership to oversee the design, implementation and evaluation of an integrated service bringing together social security law specialists and financial counsellors to work more effectively and improve client outcomes. The application was successful and in September 2018 a grant of \$200,000 was received for the 12 month project.

2.2 Legal need addressed by the project

The project intended to focus on the legal and associated needs arising for people from their engagement with social security and family assistance law and its administration. Hundreds of thousands of Victorians are, or are seeking to be, recipients of social security payments. For many, this financial support is required because they are experiencing, or caring for someone who is experiencing, forms of financial and other disadvantage such as unemployment, old age, disability, illness, family breakdown and family violence. These people are among the most disadvantaged in our society.

Research shows clear links between economic disadvantage and issues (with associated potential for legal and non-legal needs) relating to government payments, debt, credit, consumer, health, family breakdown, housing and rights. The Law and Justice Foundation of New South Wales has found that “[T]hose on government payments tended to experience legal problems that reflected their socioeconomic disadvantage ... had significantly increased likelihood of experiencing family, government and health problems. The high level of government problems were largely due to problems related to government payments” (Coumarelos, et al, 2015, p. 71). Research conducted by the National Social Security Rights Network (2018, p. 6) also shows that “family violence intersected with social security entitlements across a range of payments and issues”.

Disadvantaged people often rely on social security payments. The social security system is complex and dynamic, and can be difficult to understand and to navigate. People experience issues arising from eligibility and compliance requirements and the imposition of penalties for non-compliance. Within the system, errors by applicants/ recipients or by Centrelink decision-makers are common. Many people raise their problems with Centrelink as part of a range of matters that they discuss with a legal or non-legal advisor. For others, the social security law issue only becomes apparent because the advisor has acted as a “problem noticer” (Coumarelos, et al, 2015, p.4).

At the time when the funding application was written, there was clear evidence of the interaction between SSRV staff and financial counsellors and a cross-over of clients and issues. An estimated 15% of callers to SSRV’s telephone advice service had been referred by a financial counsellor. In 2017-2018 more than 25 financial counsellors sought secondary consultation support regarding client matters from SSRV. FCRC advised that 60% of Victorian financial counsellor clients were in receipt of social security payments. The proposed project offered the opportunity to focus on the points at which integrated legal/financial counselling service provision would benefit vulnerable Victorians in their engagement with the social security system.

2.3 Project management and oversight

SSRV and FCRC signed a Memorandum of Understanding (MOU) which outlined how the organisations would work in partnership to oversee the development, implementation and evaluation of the Integrated Services Project (ISP). The MOU also stated the commitment of the organisations to establishing collaborative relationships which would continue to be productive beyond the life of the project.

The MOU addressed a range of matters, including:

- the principles underpinning the partnership
- nominated persons
- roles and responsibilities
- communications
- reference group
- intellectual property and
- dispute resolution.

The SSRV Director and FCRC Executive Officer agreed to meet/communicate regularly to progress the project and address any issues arising. It was also agreed that specific duties or responsibilities could be delegated to other staff within the organisations as appropriate.

The partner organisations agreed to establish a Reference Group which it was envisaged would have an oversight and advisory function, and would play an important role in informing the development, implementation, refinement and evaluation of the Integrated Service. Membership was to include nominees of each organisation and other agreed stakeholders and 'critical friends'. The final membership of the Reference Group included:

- Dr Sandy Ross, Executive Officer, FCRC (Chairperson)
- Gillian Wilks, Director, SSRV
- Elizabeth Stary, Financial Counsellor, Vincent Care
- Kelly Bowey, Senior Research and Policy Officer, Centre for Excellence in Child and Family Welfare
- Catherine Miller, Advice Services Manager, Consumer Action Law Centre.

It was also envisaged that a financial counsellor who was based in a rural or regional area would join the Reference Group, however, recruitment to that role was not completed during the year. Project staff, the FCRC Advocacy and Campaigns Manager and the Monitoring and Evaluation (M&E) Consultant also attended all or some of the meetings.

The Reference Group met three times during 2019. FCRC convened and chaired the meetings. Project staff provided administrative support and reported to the meetings.

Both SSRV and FCRC were involved in recruitment of Integrated Services Project staff. Bryn Overend commenced in the Community Lawyer (30.4 hpw) role in late November 2018. Leanne Khan commenced in the Financial Counsellor (15.2 hpw) role in mid-January 2019. The SSRV Director was responsible for project and staff management and the SSRV Principal Lawyer supervised legal service delivery. Taimur Siddiqi, The Incus Group, was contracted to guide project monitoring and evaluation.

Year 1 of the Integrated Services Project (ISP) commenced in October 2018 and ran through until 31 December 2019.

3. Purpose and objectives

3.1 Purpose and objectives

The stated purpose of the ISP was to bring together social security law specialists and financial counsellors to work more effectively and improve client outcomes (SSRV, 2018, p. 4). Recognising that there is a continuum of possible integrated service activity and that relationships, services and approaches develop over time, there were two broad project objectives and anticipated strategies:

1. The capability of financial counsellors in providing appropriate responses to social security issues, identifying when a client matter becomes a legal issue and in acting as a 'gateway' to legal assistance will be strengthened and supported by SSRV:
 - a. offering timely and tailored telephone information and advice/secondary consultation services to financial counsellors in relation to social security matters;
 - b. establishing pathways for further assistance such as document review.
 - c. provision of resources to support service delivery, client referrals for legal assistance and joint service delivery arrangements;
 - d. contributing to the knowledge and skills development of financial counsellors primarily through participation in the formal professional development program co-ordinated by the FCRC;
 - e. working with financial counsellors and the FCRC to identify and address relevant systemic issues arising through their work and joint activity, primarily through the FCRC Centrelink Working Group.
2. The capability of SSRV staff to identify and respond to associated non-legal issues and to facilitate integrated service provision for clients will be strengthened and supported through:
 - f. the employment of a financial counsellor who may provide information and secondary consultation, accept in-house client referrals, conduct joint interviews and co-ordinated service delivery, refine pathways for referrals to external financial counsellors, act as a resource for SSRV staff and other financial counsellors;
 - g. accessing training and resources through FCRC.

The project partners agreed that in its development the project should draw on relevant existing service models. It was also agreed that engagement with financial counsellors based in regional and rural areas should be a priority.

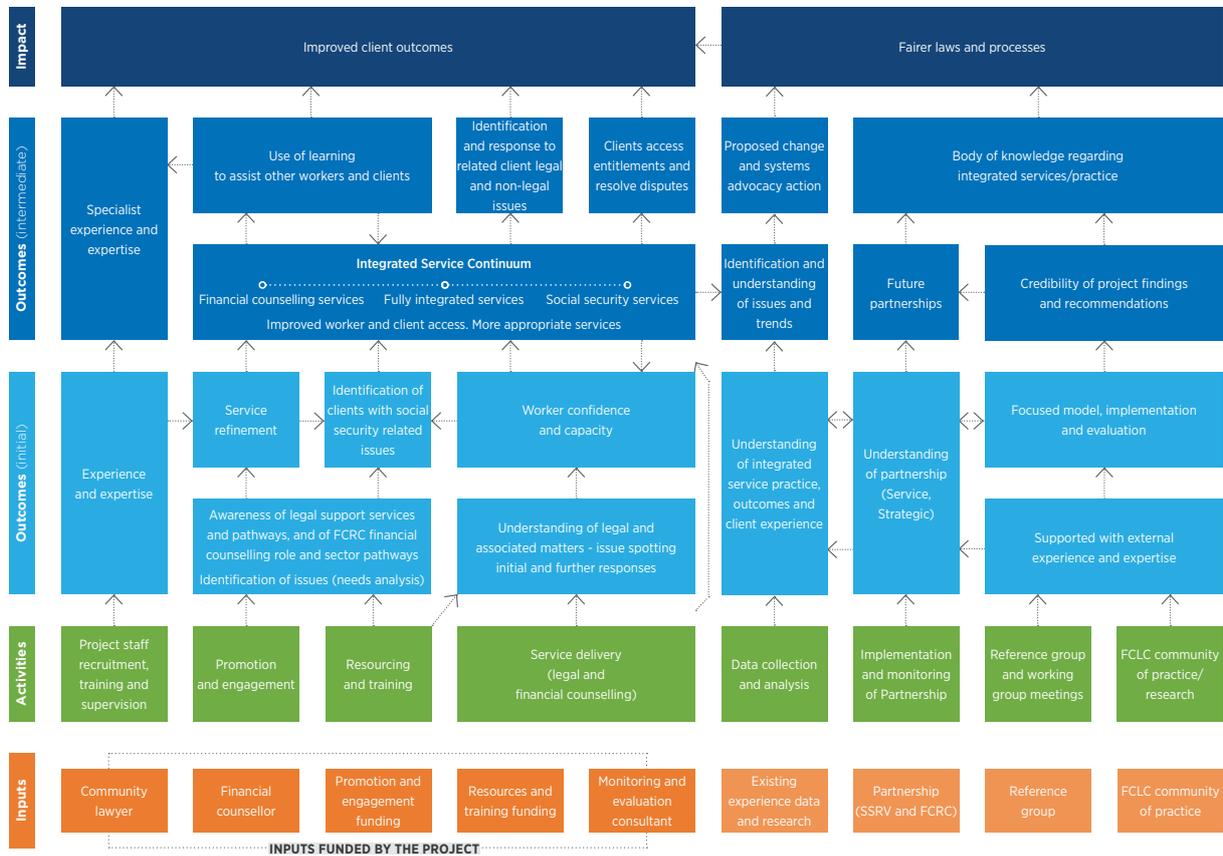
The expected outcomes that the project would achieve and approaches to measuring progress in these outcomes were outlined in the project proposal. It was anticipated that these would be refined by project staff and the Reference Group once the project got underway.

3.2 Theory of Change

Figure 1: Theory of Change

Integrated Services Project (ISP) Theory of Change Version 5 (3 May 2019)

Founded by Social Security Rights and Victoria Financial and Consumer Rights Council, this partnership aims to promote continuous learning and development across a continuum of integrated services and practice. The ISP supports the vision of a **fair and just society**.



SSRV staff worked with the Evaluation Consultant to develop a Theory of Change (see Figure 1) for the ISP. The document and the associated assumptions (consolidated in Table 1 below, see Attachment A for full list) which underpin it were finalised in consultation with the Reference Group. The Theory of Change describes in the form of a diagram how the project partners understand that the activities undertaken through the project will lead to a series of changes or results which contribute to the project making a difference and achieving its intended outcomes and impact.

“A ‘theory of change’ explains how activities are understood to produce a series of results that contribute to achieving the final intended impacts.”
(Rogers, 2014)

“A theory of change depicts how a program is intended to achieve meaningful, positive changes for stakeholders.”
(Siddiqi, 2018, p. 4)

Table 1: Integrated Services Project - Consolidated Theory of Change Assumptions

Theory of Change Assumptions

Social Security matters are complex and overlap with financial counselling and clients experiencing social security issues often have multiple legal and non-legal problems.

SSRV staff see benefits to learning from financial counsellors and in formally engaging in integrated practice with financial counsellors.

In the course of integrated practice, financial counsellors and social security law experts will identify systemic trends and issues.

It was understood by all stakeholders that achieving the desired impacts takes time and that in one year it was reasonable to expect progress towards, rather than completion of, the stages outlined in the Theory of Change.

The Theory of Change document subsequently informed the development of the project Work Plan and Monitoring and Evaluation Plan. It was agreed that the Theory of Change would be reviewed towards the end of Year 1 with a view to assessing progress and also whether the underpinning assumptions and linkages were substantiated and remained relevant.

3.4 Work Plan

The ISP Work Plan was designed by ISP staff in consultation with FCRC following the development of the Theory of Change. Founded on the measures and outcomes established through the Theory of Change, the Work Plan was designed as a comprehensive platform and guide for the implementation of the Project.

In the drafting of the Work Plan, eleven key activity areas were identified to group together activities to be undertaken within project implementation. These key activity areas provided a focused framework around which project implementation could take place.

These areas were:

1. Recruitment, training and supervision of Project staff.
2. Engagement and promotion of the Project work with financial counsellors.
3. Engagement and promotion of the Project work with SSRV staff;
4. Design and delivery of professional development and resources to financial counsellors;
5. Exploration and delivery of integrated services (specifically legal and financial counselling services);
6. Identification and response to systemic issues facing financial counsellors and social security experts;
7. Design and undertaking of Project monitoring and evaluation;
8. Establishment and building of a partnership between SSRV and FCRC;
9. Establishment and resourcing of a Project Reference Group;
10. Development of understanding around integrated service delivery and the contribution to sector learning and research;
11. Contribution to Project reporting and accountability.

A list of strategies was developed within each of these key activity areas, with corresponding actions and performance measures attached to those strategies. The strategies were designed and developed to achieve the outcomes identified within the Theory of Change. Actions were developed alongside the strategies, with any given action enabling execution of the whole or part of a corresponding strategy. Performance measures were then developed alongside the actions to enable Project staff to measure the efficacy of the actions in achieving a particular strategy that corresponded to the Project Theory of Change.

4. Evaluation approach (How will we know how well we did?)



The monitoring and evaluation of the project was guided by a detailed Monitoring and Evaluation (M&E) framework developed by SSRV at the outset of the project. A mixed methods approach was employed by The Incus Group to execute the M&E framework and conduct an independent evaluation.

This involved the collection and analysis of quantitative and qualitative data through direct stakeholder consultations and a review of data and documentation. A summary of the approach to evaluating the ISP is provided below.

4.1 Evaluation questions

The scope of the evaluation was to understand whether the ISP met its broad objectives. In order to determine this, a series of evaluation questions were formulated under four themes by SSRV, in concert with the evaluation consultant. These are listed in Table 2.

Table 2: Evaluation Questions (EQ's)

Theme	Guiding Questions
<p>Appropriateness</p> <p>To what extent was the design of the project suitable for achieving project objectives?</p>	<p>1. To what extent were the underlying program theory and assumptions substantiated or challenged?</p>
<p>Process</p> <p>To what extent were the concept and application of integrated practice developed through project implementation?</p>	<p>2. In what ways was integrated practice between social security law specialists and financial counsellors implemented/demonstrated through the project?</p> <p>3. In what ways and to what extent did these approaches replicate, build on to or differ from how SSRV staff and financial counsellors had worked together prior to the project?</p> <p>4. What were the strengths and weaknesses of the approaches to integrated practice as implemented in the project?</p> <p>5. Are there any suggestions for improvement to project design and implementation?</p>
<p>Effectiveness</p> <p>To what extent can the project be assessed as having been effective?</p>	<p>6. To what extent has financial counsellor awareness and understanding of SSRV's services and pathways to services changed? What factors contributed to this change?</p> <p>7. To what extent has financial counsellor's confidence and capability in detecting and/or assisting clients with social security issues changed? What factors contributed to this change? How was this change reflected in practice?</p> <p>8. To what extent has SSRV staff awareness and understanding of financial counsellor/sector role and pathways to services changed? What factors contributed to this change?</p> <p>9. To what extent has SSRV staff confidence and capability in detecting clients who may benefit from financial counsellor assistance and/or in linking the client to this assistance changed? What factors contributed to this change? How was this change reflected in practice?</p> <p>10. In what ways did the project engage with financial counsellors and organisations in rural and regional Victoria? What changes have resulted from this engagement?</p> <p>11. To what extent has the project provided evidence that integrated practice between social security law experts and financial counsellors contributed to improved client outcomes? Which approaches were most effective in improving client outcomes?</p> <p>12. In what ways did the ISP contribute to the identification of systemic issues and to proposed action? To what extent has action impacted upon laws and procedures?</p> <p>13. To what extent and in what ways did the relationship between SSRV and FCRC change as a result of partnering to implement the ISP? What were the outcomes of this change?</p>
<p>Sustainability</p>	<p>14. What evidence is there to suggest that the capacity that the project has developed in participating financial counsellors/organisations and SSRV staff / organisation will be sustained beyond the life of the project?</p>

Table 3: Data and documentation reviewed for monitoring and evaluation purposes

Item	Description
1. Activity summaries	Summaries of activity performed by ISP staff in 3 categories: <ul style="list-style-type: none"> • Community Legal Education sessions delivered • Systemic Issues and Policy related activity • Service engagement and promotion activity
2. Community Legal Education (CLE) feedback	Feedback forms completed by participants following attendance at a CLE session delivered by ISP staff
3. SSRV Worker Help Line statistics	Data collected through the Worker Help Line database filtered for Financial Counsellors: <ul style="list-style-type: none"> • Number of calls • Type of matter • Source of enquiry • Location of caller <p>The data for January – December 2018 (n=50 calls) and January – November 2019 (n=114 calls) was reviewed</p>
4. Worker Help Line feedback	Feedback was collected from financial counsellors in two forms: <ul style="list-style-type: none"> • Immediate feedback obtained at the end of the call on how ‘timely, accessible and useful’ the caller found the assistance provided by SSRV worker • Follow-up surveys administered by SSRV staff to callers who consented to be followed-up on their experience and matter (n=20)
5. Integrated Practice case summaries	8 x structured case summaries prepared by ISP lawyer outlining the matter, assistance provided by SSRV staff, assistance provided by financial counsellor, results achieved, learnings relating to integrated practice and any client feedback
6. FCRC conference surveys	Paper-based surveys were administered by SSRV staff to financial counsellors who attended the annual FCRC conference: <ul style="list-style-type: none"> • 2018 conference (n=29): a detailed survey to establish a ‘baseline’ on financial counsellors’ experiences with social security matters, preferences for legal assistance and their understanding of SSRV’s services • 2019 conference (n=25): a tailored survey to ascertain any change from the 2018 baseline
7. SSRV staff surveys	Online surveys were administered to SSRV staff: <ul style="list-style-type: none"> • November 2018 (n=6): a baseline survey administered to 6 staff to establish a baseline of their interaction with clients requiring financial counselling and understanding of financial counselling • October 2019 (n=6): a follow up survey administered to 6 staff to ascertain any change from the baseline
8. CLASS service data	<ul style="list-style-type: none"> • Client matters referred to SSRV from financial counselling organisations or other CLCs • Client matters referred from SSRV to financial counselling organisations or other CLCs <p>The data for January – December 2018 and January – November 2019 was reviewed</p>
9. Consultations with SSRV, FCRC and Reference Group	Semi-structured interviews were conducted by The Incus Group in October and November: <ul style="list-style-type: none"> • 5 SSRV staff (Director, ISP lawyer, ISP financial counsellor, lawyer, paralegal) • 2 FCRC staff (Executive Officer, Advocacy & Campaigns Manager) • 3 Reference Group members

4.2 Data collection and analysis

The M&E framework identified a series of indicators and information sources to assist in answering the above listed evaluation questions. The various data and documentation reviewed for the evaluation are set out in Table 3.

The various data and documentation listed were provided and analysed at various points between November 2018 and November 2019, and further explored and corroborated through the stakeholder consultations. This enabled a body of evidence to be progressively built from the multiple sources and the mixed methods approach employed. Emerging findings were revisited as further evidence was gathered and incorporated into the analysis. In July 2019 and again for this evaluation report, the findings were used to assess the ISP against a set of predefined 'success' measures, in the form of evaluation rubrics.

4.3 Evaluation rubrics

Rubrics are a matrix or guide that outline standards and criteria for judging levels of performance. Evaluation rubrics allow for judgement calls to be made about the success of a program across multiple evaluation questions which may not lend themselves to binary or precise measures of success. Applying rubrics helps to "make transparent the process of synthesizing evidence into an overall judgement" (Better Evaluation).

The evaluation rubrics were devised by The Incus Group and reviewed/approved by the Reference Group in April 2019. The rubrics included predefined indicators to determine the degree to which performance in an area could be judged as 'poor', 'adequate', 'good' or 'excellent'.

An example of the rubrics is presented below and the full set as Attachment B.

Rubrics were developed for ten of the evaluation questions. These questions were most conducive to establishing clear success criteria at the outset of the project. For the remaining questions, a rubric was not appropriate, e.g. Q 4 - "What were the strengths and weaknesses of the approaches to integrated practice as implemented in the project?". These questions were answered by the evaluation consultant weighing up the information reviewed and consultations undertaken.

Figure 2: Example rubric for evaluation question 2

Evaluation questions	Poor	Adequate	Good	Excellent
<p>Process</p> <p><i>In what ways was integrated practice between social security law specialists and financial counsellors implemented/demonstrated through the project?</i></p>	<ul style="list-style-type: none"> • No examples of integrated activities occurring with financial counsellors/ organisations • No CLE or joint advocacy activities delivered 	<ul style="list-style-type: none"> • Some examples of integrated activities occurring with financial counsellors/ organisations • At least 3 CLE and/or 1 joint advocacy activity delivered 	<ul style="list-style-type: none"> • A number of examples of integrated activities occurring with financial counsellors/ organisations • 6 CLE and at least 1 joint advocacy activity delivered 	<ul style="list-style-type: none"> • A number of examples of integrated activities occurring with financial counsellors/ organisations • More than 6 CLE and more than 2 advocacy activities delivered, including requests from organisations with whom SSRV did not previously have relationships • Sector stakeholders and decision makers (e.g. targets of advocacy and policy work) respond favourably to work

5. Project Delivery



Leanne Khan (ISP Financial Counsellor) and Bryn Overend (ISP Community Lawyer)

5.1 Induction and training of project staff

Initial stages of the ISP saw the ISP Community Lawyer and Financial Counsellor receive a comprehensive induction to SSRV operations and core practices. Both staff were new to the area of social security and therefore required foundational training and upskilling in this area of law. This included, for example, the Community Lawyer undertaking a range of social security law matters with clients drawn from across the SSRV legal practice, to develop competence as a specialist social security law practitioner. Casework was undertaken on matters relating to the Disability Support Pension, Newstart Allowance suspension and cancellation, debts, Carer Payment eligibility, and compensation preclusion periods.

The induction and foundational training allowed the Community Lawyer and Financial Counsellor to commence integrated service provision shortly after commencing in their roles, including providing ongoing legal representation to clients and secondary consultations with financial counsellors. It also helped to establish the knowledge and experience for all subsequent ISP work, specifically including integrated casework delivery and professional development training with financial counsellors. During this period ISP staff also established supervision practices and routines, including external supervision for the Financial Counsellor, to maintain professional standards and knowledge.

5.2 Engagement and promotion within the financial counselling sector

The initial stages of the ISP saw ISP staff working closely with FCRC staff to reach out and engage with individual financial counsellors, financial counselling organisations and groups throughout Victoria. This included discussing opportunities to engage with financial counsellors through working group meetings, professional development activities, network meetings, the state conference, the FCRC newsletter (The Devil's Advocate – FCRC's monthly flagship publication, focusing on consumer issues, the financial counselling sector, and the broader community legal and community sectors), and social media and web platforms.

ISP staff worked specifically with the FCRC Training and Professional Development Co-ordinator to identify initial engagement opportunities with financial counsellors across the state. The ISP Financial Counsellor also utilised existing networks within the sector to liaise directly with individual financial counsellors and financial counselling organisations to identify opportunities for engagement and professional development activities.

In total, eleven engagement activities were undertaken with financial counselling organisations and groups across Victoria during the initial stage of the ISP. These engagements enabled Project staff to speak directly with over 100 financial counsellors, and to measure existing levels of knowledge and understanding of social security law, SSRV and its services. It also enabled ISP staff to promote the work of the ISP, of SSRV and its services, and to establish networks and connections to facilitate further engagement, information sharing, and professional development. In addition, on several occasions SSRV published information about the ISP in the Devil's Advocate. This included information promoting the work of the ISP, inviting further engagement with SSRV's services, and profiling the ISP Financial Counsellor as a financial counsellor working within a social security law practice.

FCRC State Conferences

The promotion calendar also included attendance and involvement in the 2018 and 2019 FCRC annual conferences. The FCRC conference provides an opportunity for financial counsellors to network with each other and undertake professional development. It includes discussion panels and stakeholder updates regarding services and programs. SSRV staff attended to exhibit, engage with attendees, and disseminate surveys as part of the monitoring and evaluation process. The ISP was launched at the 2018 conference. In 2019, the ISP Financial Counsellor and SSRV Director provided a project update to conference participants. SSRV staff also attended 'speed dating' sessions where, along with other service providers and financial services, they moved from table to table providing information and updates to financial counsellors on SSRV's services and answering questions relating to social security.



Gillian Wilks, SSRV Director, speaking at FCRC State Conference, October 2019



Peter Horbury, SSRV Manager – Information & Operations, information stand FRC State Conference, October 2019



Leanne Khan, ISP Financial Counsellor, speaking at FCRC State Conference, October 2019

A proportion of attendees at both the 2018 and 2019 conferences were surveyed by SSRV staff to ascertain the experiences of financial counsellors with social security issues and their knowledge of SSRV’s services. The results of the 2019 conference were used to assess if there had been any changes against the ‘baseline’ results of the 2018 conference surveys in:

- their knowledge of laws, policy and processes related to social security entitlements
- their knowledge of SSRV’s services and referral pathways
- whether they had sought assistance from SSRV
- whether the assistance (if received) made a positive difference
- how capable and confident financial counsellors felt in identifying if a client had a social security issue
- how capable and confident financial counsellors felt assisting a client with a social security issue.

The breakdown of responses and results are below.

Table 4: FCRC Conference Survey Response Demographics

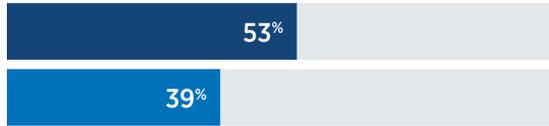
	2018	2019
Number of responses	29	25
Respondent’s role		
Financial Counsellor	86%	80%
Manager	10%	8%
Administrator	0%	4%
Other	4%	8%
Location of services		
Inner Metro	31%	28%
Outer Metro	22%	38%
Regional Victoria	25%	21%
Rural Victoria	13%	3%
State-wide	6%	3%
National	3%	7%

From the responses it was clear that there had been significant increases in attendees’ level of awareness of, and contact with, SSRV in 2019. Only 13% had not had any contact compared to 29% in 2018 and nearly 50% had engaged with SSRV for both client matters and other purposes, most likely reflecting the high level of engagement around professional development.

Figure 3: FCRC Conference Survey Responses – Assistance Sought from SSRV (% of survey respondents)

Have you ever sought assistance from Social Security Rights Victoria in relation to a client matter or for another purpose?

Yes, for a specific client matter



Yes, for another purpose



Yes, for both client matters and other purposes



No, I haven't contacted or recall asking anyone else to contact



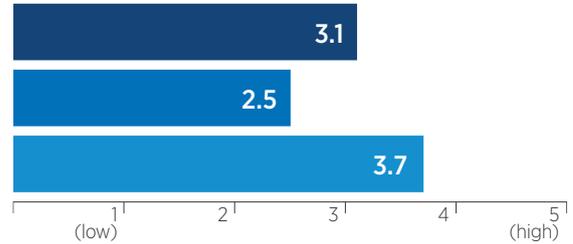
2018 2019

The survey responses also indicated that the level of knowledge of SSRV's services, referrals pathways/ what SSRV can and cannot help with had increased. Respondents were asked to rate their level of knowledge in both these areas in 2018 and in 2019, to again rate their knowledge but also to retrospectively rate what they thought their knowledge was a year ago. The results (see Figure 4) show a clear increase of between 0.6 – 1.2 points and 0.6 – 1.3 points for knowledge of SSRV's services and referral pathways/ what they can help with, respectively.

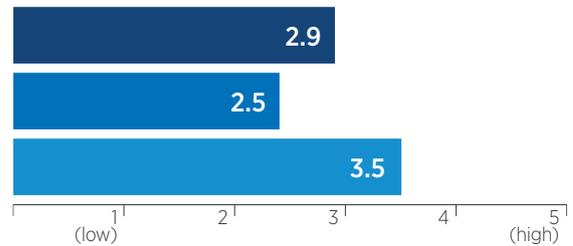
Twelve of the survey respondents at the 2019 FCRC Conference recalled using the SSRV Worker Help Line during the year. 67% of them rated the service provided to them by SSRV as 4 or 5 (out of 5) with a mean score of 3.8. These twelve respondents were also asked if the service made any positive

Figure 4: FCRC Conference Survey Responses – Respondent's rating of their level of knowledge of SSRV's services and referral pathways on a scale of 1 (low) to 5 (high) as reported in 2019 vs what they would have said a year ago vs what they did report in 2018.

How would you rate your level of knowledge of SSRV's services?



How would you rate your level of knowledge of referral pathways and what SSRV can/cannot help with?



2018 2019 - 1 year ago 2019 - Now

difference to their understanding, their client's understanding and the outcome of the matter (see Figure 5). The vast majority (83 – 92%) felt that the Worker Help Line support had made a difference to their understanding and service and their client's understanding, while half felt it had affected the outcome of the matter for which they had called. A quarter of respondents responded it was 'too early to tell' on the outcome of the matter and a further 25% also felt there had been no difference. This is not surprising, given the Worker Help Line Advice can often clarify that an issue is not a legal matter or has no merit to be pursued further, and so there is no impact on the outcome, even if clarity has been provided.

Figure 5: FCRC Conference Survey Responses – Respondent’s assessment of whether the assistance provided by SSRV made a positive difference (% of respondents)

Did the service make any positive difference to the following?

Your understanding of a Centrelink matter



The service you were able to give your client



Your client’s understanding of their Centrelink issue and options for action



The outcome for your client in relation to their Centrelink matter



Too early to tell No difference
 Some difference Substantial difference

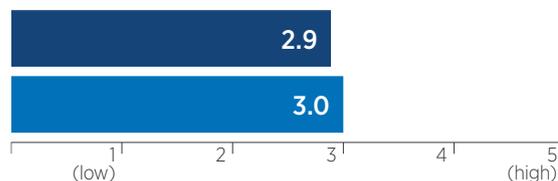
The survey did indicate, however, that there has not yet been any significant change in knowledge of social security law or capability/confidence to assist clients.

This contrasts with the immediate change and feedback evidenced in the professional development sessions run by SSRV, suggesting that those attendees surveyed in both 2019 and 2018 may have already had professional development or contact with SSRV and so there was less potential for improvement and/or that there is a ‘ceiling’ in self-reported knowledge and capability among financial counsellors for social security issues, beyond which they would refer to or involve a specialist like SSRV. Open-ended responses in the 2019 survey seemed to support these two explanations:

- “Am only confident because I know who to go to”
- “The skills and confidence I have in SS issues are because of the secondary consults and PD training I have had from SSRV”.

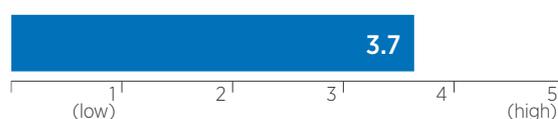
Figure 6: FCRC Conference Survey Responses – Respondent’s rating on a scale of 1 (low) to 5 (high) of knowledge, capability and confidence

QA. Your knowledge of laws, policy and processes related to social security entitlements and obligations?



QB. How capable and confident you feel identifying if a client has a social security issue?

Note: Statement B was not asked in the 2018 survey



QC. How capable and confident you feel assisting clients with social security matters



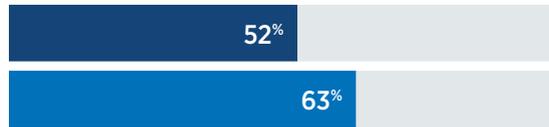
2018 2019

Respondents also indicated that resources/training/advice from SSRV were a bigger contributor to their current level of knowledge and capability around social security matters in 2019 compared to 2018 (see Figure 7). This was a much larger increase than any other source, although SSRV’s work through the ISP may have also contributed to the responses under ‘Continuing professional development’ and ‘On the job’.

Figure 7: FCRC Conference Survey Responses – Respondent’s source of knowledge and capability in social security matters (% of respondents)

How have you developed your current level of knowledge and capability in relation to social security matters?

Formal financial counselling diploma



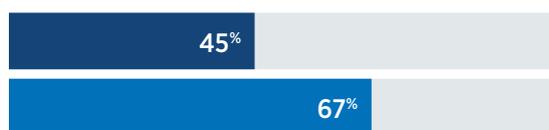
Continuing professional development (e.g. via FCRC)



On the job



Resources/training/advice from SSRV



Resources/training/advice from another legal centre



Resources/training/advice from a government agency



■ 2018 ■ 2019

5.3 Engagement and professional development of social security experts

Another key activity of the ISP was the engagement and professional development of the SSRV staff and volunteers about financial counselling, integrated practice theory and implementation. This began through the engagement with FCRC and their staff, with ISP staff able to gain a greater overview of the financial counselling sector and the interaction of the peak body with the sector and individual financial counsellors.

The ISP Financial Counsellor worked closely with other SSRV staff to develop their understanding of financial counselling both as a practice and as a sector. This included the dissemination of general information to SSRV staff and the provision of professional development around the role of financial counsellors, FCRC, and financial counselling services more generally to SSRV staff and volunteers. The professional development was designed to assist in improving the ability of SSRV staff to identify clients who might benefit from financial counselling service, and to be able to provide better linkage to financial counselling services through referrals or direct service provision with SSRV’s in-house ISP Financial Counsellor.

The training also covered a number of topics relating to financial counselling practice, including:

- debts - secured and unsecured;
- every day accounts to ensure services remain connected;
- bankruptcy;
- sequestration orders and taxation debts;
- the negotiation of full and final offers and then there some of the more obscure debts that we deal with like equable sales;
- mortgage foreclosure; and
- advocating for and assisting clients in court who may have a special circumstance defence for fines.

Surveys were completed by six SSRV staff in November 2018, prior to the ISP Financial Counsellor commencing in her role, and again in October 2019. In 2018 respondents were asked to rate their level of understanding and knowledge of services provided by a financial counsellor. In 2019, respondents were again asked to rate their knowledge but also to retrospectively rate what they thought their knowledge was a year ago – to control for the ‘Dunning-Kruger’ effect. Simply put, the Dunning-Kruger effect is a cognitive bias where people overestimate their ability in an area in which they are not familiar and do not realise what they do not know (The Decision Lab).

The results of these surveys indicate that the ISP financial counsellor’s professional development efforts and the increased interaction between SSRV staff and financial counsellors had led to a marked increase in the understanding of financial counsellors at SSRV.

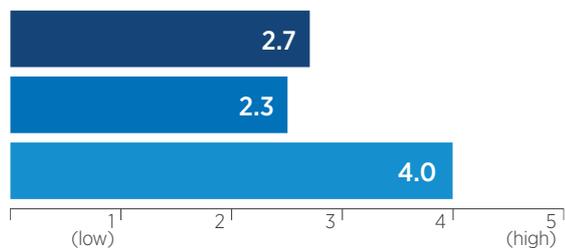
Five of the six staff (83%) had worked with the ISP financial counsellor directly in 2019, whereas only 50% of the staff had worked with any financial counsellor before.

Client needs, triage and appropriate referrals were areas in SSRV’s practice identified as potential areas for improvement by the ISP Financial Counsellor. The Financial Counsellor undertook training with staff (both formal and informal) focused on strengthening the identification of client needs (outside of social security law) and the making of appropriate referrals to a range of workers and organisations, such as mental health, alcohol and other drugs, family violence services, social workers and community health centres, and counselling services.

The ISP Financial Counsellor also participated in weekly casework meetings to update SSRV staff on any relevant opportunities, developments, changes or information that could be useful in regard to financial counselling or other integrated service provision for SSRV clients. This also provided an opportunity for the Financial Counsellor to continue to reinforce and remind the team of the versatility of financial counselling and the benefits to clients. As discussed further below, the Financial Counsellor also assisted in the casework triage process to ensure that all clients being considered for ongoing representation who might require financial counselling would be identified. This would then lead to ongoing integrated service provision between an SSRV lawyer and the in-house financial counsellor or an external financial counsellor.

Figure 8: SSRV staff rating of understanding of services provided by financial counsellor – Respondent’s rating on a scale of 1 (low) to 5 (high)

How would you rate your understanding/knowledge of the services provided by a financial counsellor?



2018 2019 - 1 year ago 2019 - Now

How has your understanding of financial counsellors changed?

“Greater awareness of the ongoing work they undertake for clients and how they triage clients.”

All SSRV staff reported that they were now **more inclined** to refer clients to a financial counsellor and all felt having a financial counsellor working at SSRV was valuable for the organisation, clients and their role.

Figure 9: SSRV staff 2019 survey responses to value of having a financial counsellor at SSRV (% of respondents)

How valuable do you think it has been to have an FC working at SSRV for...?

SSRV overall



Your clients



Your role



- Not at all valuable ■ Not so valuable
- Somewhat valuable ■ Very valuable
- Extremely valuable

How has it been beneficial having a financial counsellor working at SSRV?

“All kinds of ways, particularly in negotiating with the Centrelink debt line, negotiating with utility creditors, obtaining financial circumstances statements, obtaining advice regarding potential financial options and concessions available.”

5.4 Professional development of financial counsellors

Working closely with the FCRC Training and Professional Development Co-ordinator, the ISP staff established initial priorities for professional development need relevant to social security law and practice within the financial counselling sector. ISP staff also reflected on the learnings from the initial engagement with financial counsellors, learnings from FCRC, and the monitoring and evaluation data from previous secondary consultations with financial counsellors through the SSRV Worker Help Line, to help establish priorities for professional development delivery and resources.

ISP and FCRC staff again worked closely together to identify opportunities to design and deliver the professional development. This included being clear about the purpose of the training and resources, dates, preferred methods, and specific standards or requirements that must be met (including for the purposes of meeting requirements of financial counselling continuing professional development points). This also included liaising directly with financial counselling organisations and FCRC working group convenors to determine when and how professional development could be delivered in the most appropriate manner. This resulted in a number of professional development sessions being scheduled throughout the year, including three x three-hour professional development sessions accredited as part of the official FCRC Continuing Professional Development (‘CPD’) calendar.



FCRC Northern Region Network workshop, Epping, May 2019

The ISP Community Lawyer took primary responsibility for the development and delivery of professional development sessions for financial counsellors. Other SSRV staff contributed to the delivery of sessions where their expertise was relevant. This included, for example, in relation to the intersection between family violence and social security or specific resources such as the SSRV *Disability Support Pension Toolkit*. Although the professional development sessions were primarily targeted at financial counsellors, some of the sessions were also opened up to other staff from the specific agencies or from the local area. This was particularly the case in rural and regional areas.

Both the involvement of other SSRV staff with specific expertise and the opening up of sessions were examples of effectively using whole of organisation resources to meet need and extend reach.

In total, twelve professional development/training sessions with financial counsellors were conducted across Victoria during 2019. Workshops were held in Melbourne, Epping, Ballarat, Heidelberg, Deer Park, Benalla, Bendigo, Springvale, Geelong and Sale. These sessions reached approximately 200 individuals. This included 120 financial counsellors and a range of other professional including health workers, lawyers and managers. (Two further sessions were delivered in late November/early December 2019, in Mildura and Melbourne. However, these have not been considered in this report and will be reported on in year 2).

Feedback from participants was collected and analysed. This informed improvements to the resources and delivery of future sessions. The feedback was also used for monitoring and evaluation purposes.

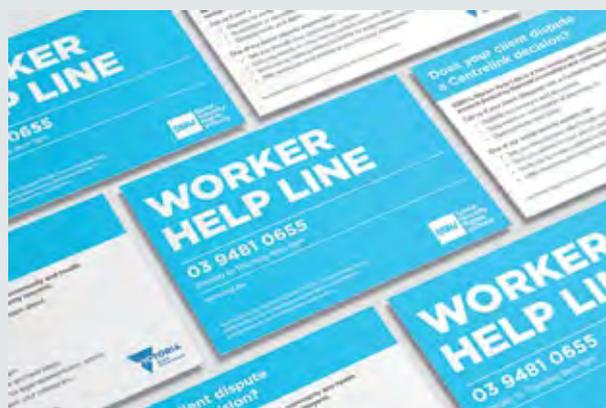
The feedback made clear that the sessions were very well received. Aggregate feedback from eight sessions (representing around 110, or 55%, of participants) are reported below. Feedback from the remaining sessions was not received in time to be included in this report. It will be included in the year 2 report.

Positive results were uniform across all the sessions, with very little variance in the feedback from individual sessions.

Table 5: Professional development post-session feedback on level of agreement (% of respondents, n=110)

	Agree	Not sure	Disagree
Purpose of workshop was clear	98%	2%	0%
Content was relevant	99%	1%	0%
Resource materials are useful	95%	5%	0%
Presenter was knowledgeable	100%	0%	0%
Presentation was engaging	100%	0%	0%

96% of participants also reported that the sessions increased their knowledge of SSRV. All participants reported that the sessions improved their confidence to identify and respond to individuals with social security matters and help them provide better assistance to clients.



IFCRC Western Region Network workshop, Geelong, February 2019

Figure 10: Professional development post-session feedback (% of respondents, n=110)

Extent to which you feel more confident in identifying and responding to client social security matters? N/A 3%



Extent to which what you learned in today's session will help you better assist clients? N/A 1%



■ To a large extent ■ To some extent
■ Not at all ■ Not sure
■ N/A

Again, there was very little variance in the responses across the sessions, though the proportion of respondents indicating ‘to a large extent’ for both questions was slightly lower at the two sessions hosted by or delivered in conjunction with other community legal centres (CLCs), Barwon Community Legal Service and Ballarat and Grampians Community Legal Centre. This would make sense if participants already had some experience with legal assistance provision around social security.



Workshop held in conjunction with Ballarat and Grampians Community Legal Centre, June 2019

For a number of the professional development sessions, ISP staff were invited to present based on previous engagements. These included being invited to discuss SSRV’s services at social service organisations or discuss specific topics, such as ‘debts and hardship’ as part of Seniors Week at Council on the Ageing Victoria.

Resources were also developed and disseminated in support of each professional development session to support financial counsellors to identify and respond to social security issues.

5.5 Resource development and dissemination

A key ISP activity involved the development and dissemination of resources specifically designed for supporting the work of financial counsellors and social security lawyers assisting clients with social security issues. This included the design and development of interactive presentations and corresponding hard copy handouts covering topics including - SSRV purpose and services, social security as a human right, Centrelink decisions and how to appeal them, overpayments and debts, the Disability Support Pension, Centrelink complaints, the Commonwealth Ombudsman, compensation income maintenance periods and superannuation. Presentations were refined and developed over time in accordance with feedback and data obtained from sources including financial counselling sector engagement, professional development sessions, the SSRV Worker Help Line and the ISP Reference Group.

The ISP Community Lawyer worked closely with the national peak body for financial counsellors, Financial Counselling Australia (FCA), and the peak national community organisation in the area of social security and family assistance law, National Social Security Rights Network (NSSRN), in the development of fact sheets specifically designed for financial counsellors. At the time that this report is being written, the fact sheets are being finalised for publication. They include fact sheets covering Centrelink debts, Centrelink penalties, compensation payments, income protection payments, income maintenance

periods, and Centrelink payments and family violence. These fact sheets will be disseminated to financial counsellors across Australia and may be used as a resource and training tool for future professional development sessions.

ISP staff also developed Worker Help Line postcards. These were designed for dissemination amongst financial counsellors in particular and other community workers. The postcards are designed as an easy reference tool for workers covering SSRV's Worker Help Line, when it is available, and what type of matters that SSRV can help with. Once developed, these postcards were disseminated at all financial counsellor engagements and professional development sessions. Following very positive feedback regarding the usefulness of the postcards, ISP staff developed the General Advice Line postcards. These were developed for dissemination to community workers, including financial counsellors in particular, so that they can provide these to their clients. The postcards were designed as an easy reference tool for community members. They provide information about SSRV's General Advice Line, when it is available, and what type of matters that SSRV can help with. Other existing resources such as the SSRV *Disability Support Pension Toolkit* and SSRV and NSSRN developed fact sheets were also distributed as part of professional development and support activities.

As noted in Table 5. above, 95% of participants in the professional development felt the resources provided were useful and the presentations overall were engaging. This underscores the value of the investment in developing these resources, as they add value to engagement, professional development and service delivery and they can be used on an ongoing basis.

5.6 Exploration and delivery of integrated service

During the conceptualisation of the ISP, it was identified that integrated service delivery potentially included a range of services/activities on a continuum of integration or "joined-up service" (Pleasance, et al, 2014, p. 71). The joined-up activities identified along

the continuum by Pleasance include recognising, networking, co-ordinating, co-operating, collaborating and integrating (Pleasance, et al, 2014, p. 71, as quoted in Health Justice Australia, 2018, p. 16).

In the context of the ISP, it was envisaged that at one end of the continuum of integrated service activity could include referrals made between financial counsellors and social security lawyers. At the other end it was thought that integrated service could include integrated casework and ongoing representation where the financial counsellor and lawyer work closely together throughout the entirety of a case, and also joint work on policy issues.

The main areas where integrated approaches to service delivery were demonstrated in year one of the ISP included referrals, secondary consultation and joint casework. Integrated practice was also demonstrated and promoted through professional development, resource development and policy activities.

5.7 Integrated client services

Referrals and Secondary Consultations

Referral information and pathways, going both ways, between financial counsellors and SSRV were promoted by ISP staff.

A key component of delivering integrated service was the undertaking of **secondary consultations** with financial counsellors. This was facilitated through the SSRV Worker Help Line, which enabled financial counsellors to call SSRV to receive a secondary consultation with a social security law expert around social security issues including matters specifically related to a client of the financial counsellor. This service is open to all community workers from Monday to Thursday 9am to 5pm. As part of the ISP, the Community Lawyer staffed the Worker Help Line one day per week. In year one, financial counsellors were a significant cohort of the professionals who accessed services through the Worker Help Line.

There was a 128% increase in the number of calls from financial counsellors in calendar year 2019 compared to 2018 prior to the ISP. The number of unique organisations represented has nearly doubled and there has been a proportionally greater increase (171%) in calls from rural/regional financial counsellors, albeit off a lower base.

Figure 11: Total calls to the SSRV Worker Help Line from financial counsellors, unique organisations and calls from rural or regional financial counsellors (note: there are unique calls made and include repeat callers)

SSRV Workers Help Line

Total calls



Unique organisation calls



Rural/regional calls



Jan - Dec 2018 Jan - 14th Nov 2019

The chart below confirms that there has been a steady increase in the number of calls from financial counsellors since the ISP commenced, many of whom note that it was through engagement with ISP staff that they have heard about the service. This confirms the service promotion work has filtered through and suggests momentum has developed around the ISP.

Figure 12: Average number of calls per month to SSRV Worker Help Line by financial counsellors

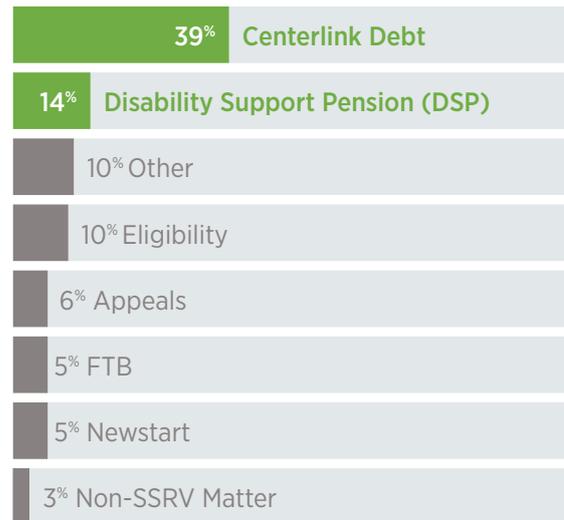
Average calls per month



The Worker Help Line data also shows that financial counsellors were mainly calling for matters related to Centrelink debt and the Disability Support Pension, and that the vast majority of matters were at the Authorised Review Offices (ARO) or pre-appeal stage.

Figure 13: Percentage of calls by matter type between January and November 2019 (n=114)

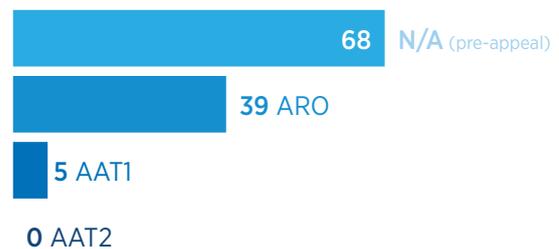
% of calls by primary and secondary matter (Jan - Nov 2019)



Carer Payment (2%), Crisis Payment (1%), Special Benefit (1%), Age Pension (1%), Assets (1%), Rent assistance (1%), Residency (1%)

Figure 14: Appeal stage for financial counsellor matters through the Worker Help Line in 2019 (n=114)

Appeal stage



Financial counsellors made use of the Worker Help Line in various ways. Some used the service only once, while others called on multiple occasions for different clients, others called multiple times seeking staged assistance in relation to a particular client.

The feedback from the Worker Help Line service was overwhelmingly positive. Feedback was collected by SSRV staff at both the end of the consultation and then through a follow-up survey with a sample of financial counsellors who had agreed to be contacted.

Table 6: SSRV Worker Help Line financial counsellor feedback 2019

	Immediate feedback	Follow up survey
Number of responses	83	20
Location of services		
Metro - overall	82%	80%
Inner Metro		40%
Middle Metro		20%
Outer Metro		20%
Rural or Regional	18%	20%

Figure 15: Worker Help Line immediate feedback (n=83)

Immediate feedback on whether help line advice was...

Accessible



Timely



Useful



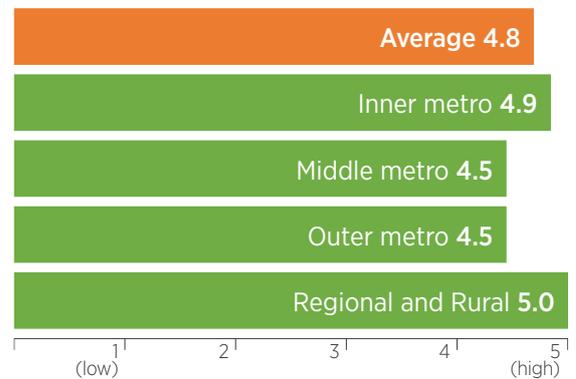
■ Yes ■ No

The immediate feedback made it clear that the consultations were accessible, timely and useful for the majority of financial counsellors.

20 financial counsellors completed the follow up survey and were also very positive about the service provided, rating it as 4.8 on average on a scale of 1 (poor) to 5 (excellent).

Figure 16: Worker Help Line follow up survey respondent rating of service provided by SSRV, broken down by location of financial counselling service (n=20) – Respondent's rating on a scale of 1 (low) to 5 (high)

Services provided by SSRV



The rating was particularly high for both inner metropolitan and regional/rural financial counsellors. Nearly all the respondents also indicated that the service made a positive difference to their own confidence and capability around social security matters, while a majority felt the service made a difference to their client's understanding of their options and outcomes.

Figure 17: Percentage of follow up survey participants who felt SSRV's assistance made a difference for them (n=20)

% of respondents who felt SSRV help, made a difference in these areas for them

SSRV help to feel confident and capable to identify client that has social security issue



SSRV help to feel confident and capable to assist client that has social security issue



■ No difference ■ Some difference
■ Substantial difference

Figure 18: Percentage of follow up survey respondents who felt SSRV's assistance made a difference for their clients (n=20)

Extent of SSRV help for difference to client service



Extent of SSRV help to client understanding of their issue and options



Extent of SSRV help to client outcomes in their matter



- N/A
- Not yet known
- No difference
- Some difference
- Substantial difference

How did SSRV's assistance make a difference for you?

"I was able to get an action plan straight away and reassure clients and I now know options available for contesting decisions"

"I received a considered brief about my client's options not just generic information"

All respondents indicated that they would use SSRV's Worker Help Line in future and would recommend it to other financial counsellors and clients. Crucially, 84% of the financial counsellors who also indicated that they had used information or resources provided by SSRV for other purposes beyond the presenting matter

5.7 Integrated client services

Another key component of integrated service delivery has been the undertaking of **legal tasks** on behalf of and in consultation with financial counsellors. Legal tasks are one-off, discrete forms of legal assistance. These typically involved a financial counsellor calling through to the Worker Help Line and discussing a particular client matter with a social security law expert. These matters usually required extended analysis of certain materials or documents. The social security lawyer would then review and analyse those materials in order to provide more extensive advice and information to the financial counsellor and/or their client.

A significant example of integrated service provision explored through the ISP has been the undertaking of **ongoing integrated casework** by financial counsellors and SSRV lawyers working collaboratively. This has involved referrals by financial counsellors of a client appealing a Centrelink decision where the financial counsellor is invited or otherwise already wishes to remain involved and provide an integrated service. Integrated casework has also involved cases where a client's appeal of a Centrelink decision was identified as being appropriate for integrated service provision during the SSRV triage and intake processes. In these latter types of matters, either the ISP Financial Counsellor or an external financial counsellor has taken the case on for integrated service provision with an SSRV lawyer.

As there was no established financial counselling service within SSRV prior to the ISP, the development of integrated service protocols and resources was required. This was for the purposes of SSRV staff and internal and external financial counsellors who were providing integrated services. The ISP Financial

Counsellor developed a Financial Counselling Service Manual. The manual is designed to be viewed in the context of SSRV's organisational policy, procedures and practice framework. Content includes legal requirements, supervision, national standards requirements for services with financial counselling practices and other resources. The Manual also includes an outline of what an integrated service model is, case management principles, file management, case notes, policy and media policy and service processes, out of office operation principles, management of client matters, and the opening and closing of financial counselling files. Templates on intake, referral and assessment, assessment of risk, debt summary and money plans, case notes, authority to act and integrated service plans, file document check lists, file open and closure check lists, and a financial counselling feedback form are also included.

Exploration of integrated casework between financial counsellors and SSRV lawyers also included the development of separate and integrated assessment and triage practices. Consideration of whether the client would benefit from financial counselling services has been incorporated into SSRV's intake matrix and procedures. The ISP Financial Counsellor attended SSRV intake and casework meetings, playing an active role in encouraging exploration of points in practice where financial counsellor involvement may benefit clients in the resolution of social security and related matters, and ensuring that matters appropriate for integrated service delivery were identified.

During the year it was agreed that all clients who were accepted for ongoing legal assistance would be offered a financial health check by the ISP Financial Counsellor. This involves a thorough financial assessment and exploration of any related or other financial issues that may be relevant and require attention. The financial health check also created an opportunity for the ISP Financial Counsellor to confirm all eligible concessions (usually relating to utilities), discuss hardship provisions and services to which the person may be entitled.

The most common type of matter that has been identified as being appropriate for integrated service is where the client is appealing a Centrelink debt arising from overpayments. This has also been the most common matter type for which financial counsellors have sought secondary consultation assistance through the SSRV Worker Help Line. The amenability of this type of matter for integrated service provision is, at least in part, because of the unique position of financial counsellors to undertake assessment of and reporting of clients' financial circumstances. Such reports can strongly support legal submissions made on behalf of the client. This can be important to success in an application to have a client's debt waived, specifically on the grounds of special circumstances. Every debt matter that is taken on by an SSRV lawyer is now referred to the in-house financial counsellor. She assists the client to complete a statement of financial circumstances and advises of eligibility for hardship provisions/programs and of concessions and services.

ISP staff have played an important role in championing, leading and modelling this approach to legal and related service provision. Throughout the year integrated practice developed across the organisation. All SSRV lawyers were involved in integrated service provision in collaboration with the in-house ISP Financial Counsellor and/or with financial counsellors from external agencies.

5.8 Integrated practice case studies

The following case studies are examples of where an SSRV lawyer and a financial counsellor have worked together to provide integrated services to clients. These and other cases provided learnings which formed a basis for reflection and service improvement. Names and some other details have been changed in the case studies so as not to identify individuals.

Carmen

Carmen and her family fled Iraq as asylum seekers. They arrived in Australia by boat with nothing to their name. Initially, Carmen was granted a Status Resolution and Support Services payment while her status was resolved. However this ended when she was found to be a refugee, was granted a visa, and was no longer eligible. Still unable to work, Carmen applied for Special Benefit. This was granted, but the payment was then cancelled due to the property Carmen's partner owned in Iraq.

There were two main problems with this. Firstly, the property was incorrectly valued at \$80,000, when in fact it was closer to \$8,000 (a mistake had been made on the form). Secondly, Carmen and her family could not sell or deal with the property, and were deriving no income from it.

An SSRV lawyer provided Carmen with representation at the Administrative Appeals Tribunal's (AAT) first tier. SSRV argued that not only should the mistaken value be corrected, but the house in question should not be considered as an asset for the purposes of Special Benefit eligibility. Ultimately this argument was convincing, with the AAT finding in Carmen's favour.

AAT appeals take time. There was almost three months between the Centrelink Authorised Review Officer's (ARO) decision and that of the AAT. In that time Carmen had no income and her bills and expenses were mounting. Carmen faced eviction from her rental property. SSRV's in-house financial counsellor contacted external services and advocated on Carmen's behalf in order to obtain an emergency rental payment. With this payment secured, Carmen's housing was secured (at least temporarily). This allowed Carmen and her family to have the fundamental stability and security of having a roof over their heads.

Carmen told us – *“It was very, very hard for me without Special Benefit. I am very thankful for everything you've done. My situation would not have gotten better without you.”*

Sam

In 2009 Sam was injured in an accident at home, resulting in a broken neck and permanent paralysis from the shoulders down. Sam spent 6 months in hospital receiving treatment, and a further more than 15 months in rehabilitation before returning home. Sam was granted a Disability Support Pension (DSP). He was also receiving income protection payments and has continued to receive these.

As Sam was incapable of applying for the DSP himself at the time due to the treatment he was receiving, his then wife applied on his behalf. In 2018 Centrelink became aware that Sam was receiving income protection payments, these payments had not previously been reported. Sam was not aware that these had not been reported. He believed that everything was in order. Centrelink raised an overpayment of around \$23,000.

Since 2009, Sam's marriage had broken down and he and his wife had separated. This made trying to obtain information about the original DSP and income protection applications difficult to impossible. Sam's matter was referred to SSRV by his financial counsellor.

An SSRV lawyer took Sam's case on and assisted with the appeal to the AAT. The lawyer prepared written submissions focusing on the special circumstances waiver. Unfortunately, this appeal was unsuccessful. The matter was then appealed to the second tier of the AAT.

At the negotiation stage, the financial counsellor provided a statement of financial circumstances for Sam. This document assisted in showing Sam's lack of capacity to ever pay the debt back. The matter was ultimately resolved by agreement, with Centrelink agreeing to waive the debt in full.

Sam provided the following feedback –

How did you feel when the debt was raised against you?

Not very good at all. I didn't understand why they had been raised, and I felt very judged.

What challenges did you face when addressing the debt? What challenges did the debt itself cause?

The debt caused a lot of added pressure, both financially and in terms of stress. I had questions about how and why the debt was allowed to grow so large and why Centrelink didn't notice earlier. My access to the whole world is minimised. I can only access my phone via Bluetooth, and rely on my carers for basically everything.

How did it feel having SSRV work with a financial counsellor to appeal this debt?

It felt very good. I got support where I needed it, and the support was very understanding. Someone was willing to believe in what I believed in, and follow through with it.

How would your life be different now if you hadn't been referred to SSRV?

Financial pressure would have been a big issue. There would be lots of stress. I was in no position to be able to pay the debt back.

Do you have any other feedback or thoughts?

I'm very grateful and appreciative of the support I got, from the financial counsellor and from the SSRV lawyer. I only have good things to say about the support I received. I said at the start that I was in the right, and I could always sleep with a clear conscience. It felt good to have that acknowledged.

Helena

Helena is a survivor of cancer. She has arthritis, severe depression, anxiety and several other serious health conditions. She cannot work due to poor health. She lives week to week, has no savings and survives on a minimal income insurance payment.

Several years ago Helena applied to Centrelink for support. Centrelink rejected her application. However, on appeal the AAT found her eligible for the DSP. Helena commenced receiving payments. The Secretary of the Department of Human Services then appealed the AAT decision and won. Helena's benefit was cancelled and she was left with no ability to work, no social security and a Centrelink debt of greater than \$10,000 to pay back.

The existence of the debt caused Helena severe financial hardship and drastically affected her mental health. Helena asked SSRV for help.

SSRV helped Helena appeal the debt at the AAT. In preparation for the AAT hearing, an SSRV lawyer and the SSRV financial counsellor worked with Helena to put together arguments about her financial hardship and personal vulnerability.

During the hearing, the AAT Member heard arguments from Helena's SSRV lawyer about why it was appropriate to waive the debt. The AAT found there were special circumstances to warrant waiving the entire debt – noting Helena's significant financial hardship, the profound negative impact on her mental health and that even if the debt were reduced to a minimal repayment of \$15 a fortnight it would take many years to repay.

Helena told us -

"I was worried, stressed and confused about where I was going to find the money to pay back the Centrelink debt. It took an emotional toll on me and my family. The debt meant I struggled to pay my bills on a fortnightly basis. Sometimes I had the money but sometimes I didn't. I had to get help from my adult daughter the majority of the time. I had a very tight budget."

Not very good at all. I didn't understand why they had been raised, and I felt very judged.

Without help from the SSRV lawyer and financial counsellor I would still be stuck in a position where I'd have to pay off the debt. My lawyer stood by me 101%. He fought for me and did not give up until he achieved the right outcome. Without SSRV's help, my life would be so different right now.

Now that the debt has been waived I don't have to worry about how I was ever going to pay it off. I don't have to worry about how to find the money each fortnight to keep up the payments.

Knowing that I am debt free has lifted a burden off my shoulders. I can finally breathe again. I am able to go to bed at night and wake up the next morning knowing that the debt is not there. I feel happy and relieved, walking around with the biggest smile on my face thanks to SSRV.

Jane

Jane was overpaid more than \$5,000 of Parenting Payment. Jane sought assistance with appealing this debt. The reason for the overpayment was a failure by Centrelink to take into account Jane's partner's income when calculating her fortnightly payments.

Centrelink's position was that Jane had to report her partner's income each fortnight, and that the reporting, usually done on a yearly basis as an estimate, was not sufficient. Jane maintained that she had done everything Centrelink required of her, and had complied with the instructions they had sent her.

Jane was referred to SSRV by her financial counsellor. The SSRV lawyer worked closely with Jane and her financial counsellor and represented Jane at the AAT Social Services and Child Support Division (Tier 1). Unfortunately the outcome was unfavourable for Jane.

SSRV assisted with lodging an appeal to the AAT's General Division (Tier 2). However, the appeal did not proceed to hearing as a Centrelink legal representative contacted SSRV with an offer to settle.

Jane provided the following feedback –

How did you feel when the debt was raised against you?

Horrible. It's a huge thing that looms over you. I've never had a credit card or anything like that because I don't want to be in debt. Centrelink are supposed to be there to help you, not hinder. They make a lot of mistakes and blame you.

What challenges did you face addressing the debt? What challenges did the debt itself cause?

I wasn't getting very much from Centrelink at the time anyway. Only about \$100 a fortnight. The debt was so huge that I put everything I was getting from Centrelink back into it. It was difficult without that extra support.

I've had to deal with family lawyers before. I couldn't afford to seek a private lawyer for this knowing how expensive they can be. Accessing assistance was difficult for me.

How did it feel having the financial counsellor and SSRV working together to take your case on and assist you at the AAT?

Really good. Having the support of both was helpful and stopped me making mistakes. It was good to have the financial counsellor specifically, as I could sit down with someone face to face, ask questions, and go through the paperwork together.

How would your life be different now without the financial counsellor having referred to SSRV to assist?

I wouldn't have bothered to take the matter further by myself. There's not really a way to get justice when you have to pay for it.

What difference did it make to you having your matter settled with a refund to be given to you?

It will be really, really helpful. I just had a new baby so it's good timing.

Any other feedback or thoughts?

Just compliments to the SSRV lawyer. He's a lovely man, and did a really good job. He helped me as much as he could.

The offer involved reducing the debt significantly, and meant Jane would be entitled to a refund of some of the recovered money. Jane instructed SSRV to accept this offer.

The connection with the financial counsellor helped to enhance SSRV's interactions with Jane who lived in a regional area. The financial counsellor was able to provide the hands on support. The financial counsellor prepared a statement of financial circumstances which was crucial in showing Jane had financial hardship for the purposes of a special circumstances waiver.

Shelley

Shelley is a 50 year old woman. Centrelink raised Family Tax Benefit ('FTB') non-lodger debts against Shelley for two financial years. These debts were raised as a result of Shelley's then, now former, husband failing to lodge income tax returns for the relevant financial years. The debts constituted the entire FTB amounts paid to Shelley during those financial years.

In August 2013, Centrelink decided that Shelley was entitled to the following amounts of FTB:

- Approximately \$11,000 for the 2006/2007 financial year; and
- Approximately \$12,000 for the 2007/2008 financial year.

Centrelink accordingly paid Shelley the difference between the original debt amounts and the reconciled entitlement amounts. This resulted in the following net payments being processed in August 2013:

- Approximately \$2,000 for the 2006/2007 financial year; and
- Approximately \$2,500 for the 2007/2008 financial year.

In February 2018, Centrelink then decided to raise new debts against Shelley for the same periods they had already reconciled. Centrelink said that Shelley owed the following for FBT overpayments:

- Approximately \$11,000 for the 2006/2007 financial year; and
- Approximately \$12,000 for the 2007/2008 financial year.

In 2019, Centrelink decided to re-reconcile the 2006/2007 debt. As a result, Shelley was left with a debt of approximately \$2,500 for the 2006/2007 period and an approximately \$12,000 debt for the 2007/2008 period.

Shelley has a long-time financial counsellor with whom she has a strong relationship. The financial counsellor initially referred the matter to SSRV. After SSRV undertook the initial assessment and analysis of the relevant freedom of information and tribunal documents, SSRV and the financial counsellor began to work more closely in the appeal.

The financial counsellor assisted in the drafting of the submissions by also drafting a statement of financial circumstances for Shelley. This was central to the argument of special circumstances waiver. At the AAT1 Shelley was supported by the financial counsellor who attended. The presiding member was inclined to waive at least some of the debts on the basis of special circumstances, however requested further information, including documentation regarding Shelley's admission to mental health institutions. A week was provided to obtain these documents. The financial counsellor worked extremely hard with Shelley in order to obtain a number of documents within only a few days following the AAT hearing. These were then submitted to the AAT by SSRV.

Ultimately, the member found special circumstances existed and that the 2006/7 debt should be waived. The member said that the 2007/8 debt could not be waived until it had been reconciled, but that it should be noted that once the reconciliation was completed by Centrelink, the written decision should be considered in relation to a potential waiver of this debt also.

5.9 Identification and response to systemic issues

A core objective of the ISP was the identification of and development of responses to systemic issues in the social security system affecting clients of both financial counsellors and social security lawyers. A range of activities were undertaken by ISP staff to identify systemic issues. This included regularly reviewing and reflecting on SSRV advice, casework and Worker Help Line data specifically relating to financial counsellors, and regularly monitoring social security related law and news, including reviewing information provided by professional networks, such as the National Social Security Rights Network. SSRV ISP staff also regularly attended the FCRC Centrelink Working Group. The Working Group is a group of financial counsellors and other related stakeholders that meet each two months to share information and resources, discuss Centrelink related systemic issues affecting clients, and work on strategies to address these issues. A range of systemic issues were identified and discussed at the Centrelink Working Group throughout the year, including:

- the low rate of Newstart Allowance;
- compliance difficulties with the ParentsNext scheme;
- debts to Centrelink, and particularly the intersection of family violence and debts, as well as bankruptcy and debts;
- difficulties understanding the DSP application process;
- difficulties obtaining appropriate medical evidence in the DSP application and appeal process;
- access to clinical psychologists for the purpose of DSP applications;
- prevalence and issue of child care benefit debts within particular communities;
- the differing services able to be provided by financial counselling services in relation to clients with Centrelink matters; and
- the difficulty in getting access to Centrelink documents and information in order to assist clients.



Bryn Overend (ISP Community Lawyer) and Leanne Khan (ISP Financial Counsellor), August 2019

The ability to undertake substantive responses to systemic issues was limited during the first year of the ISP. The FCRC Centrelink Working Group's main systemic advocacy activity for 2019 focused on advocating for a raise to the rate of Newstart Allowance. While the ISP supported these efforts, the activity did not specifically align with the advice and casework matters for which Project staff had been providing assistance. Importantly, in year 1 the ISP was being established and was focused more on building relationships, approaches and a body of integrated client service work. It is expected that the work undertaken in 2019 will provide a solid basis upon which to identify areas for and build systemic advocacy in year 2.

5.10 Building of partnership between SSRV and FCRC

FCRC and SSRV have a longstanding relationship, however, the ISP provided an opportunity to formalise and deepen that relationship. This was an explicit aim of the ISP, with the theory being that it would facilitate the effectiveness of the project and the sustainability of integrated practice between the sectors into the future beyond the life of the ISP.

A key part of developing and deepening the relationship has been the ongoing and regular dialogue and consultation between FCRC's Executive Officer and SSRV's Director, consistent with the MOU signed between the project partners. This has included consultation in relation to all major decisions relating to the ISP and its direction. The FCRC Executive Officer was involved in ISP staff selection and chaired Reference Group meetings.

The initial stages of the ISP also involved the ISP staff meeting with and liaising extensively with FCRC staff to learn about FCRC operations and to share knowledge and information around the Project. SSRV staff were able to develop a deeper familiarity with FCRC scope of work, operations and the staff members themselves, identify relevant opportunities through FCRC operations and activities to engage with financial counsellors and financial counselling organisations.

Throughout the year ISP staff were in regular contact with FCRC staff to organise training, to have information published in the Devil's Advocate, and to share resources and knowledge. There has been exceptional commitment and dedication from all of the FCRC team in supporting the ISP staff and the ISP in general. This has led to the planning of further collaboration and professional development sessions being scheduled into 2020. This planning was underway even before confirmation of a second year of ISP funding.

5.11 Development of understanding and practice in relation to integrated service delivery and contribution to sector learnings and research

Beyond the steps discussed above to further understanding of integrated practice and integrated service delivery, ISP staff participated in the FCLC Community of Practice. Through this forum, CLCs involved in undertaking integrated services projects and their project partners met with others to share information and learnings about their activities.

The SSRV ISP Community Lawyer co-presented with West Justice representatives about their projects generally and they lead a discussion around secondary consultation, specifically drawing on SSRV's experience working with financial counsellors. SSRV staff also participated in an interview for Federation research undertaken for the purpose of showcasing and advocating for integrated service.

6. Integrated Services Project Observations and Learnings



More specific and targeted service promotion may be helpful

Through formal feedback provided by financial counsellors and informal feedback and ISP staff observations, it was noted that many of financial counsellors who ISP staff engaged with, or ran professional development training with, had heard of SSRV. Many had also contacted the service and/or used resources on the SSRV website. However, many were not aware of the Worker Help Line as being a distinct service from the General Advice Line. Many were also unaware of when exactly the General Advice Line operated.

Issues associated with family violence are a shared concern

Family violence was a significant topic of interest within the sector, with many financial counsellors enquiring about or sharing concerns about family violence impacting their clients' Centrelink payments or causing Centrelink debts, specifically in regard to Family Tax Benefit payments and Parenting Payments.

Centrelink debts are a significant issue

Debts raised by Centrelink were far and away the most significant social security issue that clients presented to financial counsellors with. In turn, financial counsellors were most interested in receiving professional development, obtaining resources and further information regarding how to assist clients with Centrelink debts. Financial counsellors working in certain socioeconomic areas, particularly those with higher concentration of migrant families, noted in particular the debts arising from overpayment of Child Care Benefit payments (often referred to as 'family day care' debts). Many lamented the large quantum of the debts involved in such cases.

Significance of relationships between professionals

It was observed that numerous financial counsellors contacted the ISP Financial Counsellor directly after learning of her employment at SSRV. In addition, once financial counsellors had face to face interactions with ISP staff during outreach or professional development sessions, there appeared to be a greater likelihood of contact from those financial counsellors through the Worker Help Line. This seemed to indicate the significance and importance of interpersonal networks and relationships within the sector, and also emphasised the importance of having a financial counsellor embedded within SSRV.

Caseloads, time, complexity and organisational guidelines impact on extent of service provision

Many financial counsellors lamented their high caseloads. This related to the occasional inquiry about the capacity of SSRV to take Centrelink related matters on so that the financial counsellor would not be required to undertake this type of work. A number of financial counsellors noted the time consuming and onerous nature of having to deal with Centrelink in attempting to resolve a client's issue. The complexity of Centrelink matters was also cited on occasion as a hurdle in being able to take on such cases at times.

Engagement with financial counsellors also revealed an apparent variation of practices among financial counselling organisations as to the level of service they are able to provide to clients faced with a Centrelink problem. Some services, for example, were able to assist clients to get an Authorised Review Officer ('ARO') review decision, whilst others were not. Similarly, some financial counselling services were willing and able to provide assistance to a client applying for the DSP or appealing a DSP rejection decision, but others deemed that this was outside of their capacity. There were a range of factors that appeared to influence this differentiation, including:

- the different funding guidelines and or other limitations relating to the scope of work that the financial counselling organisations were able to take on (noting in particular that many have long waiting lists); and
- the experience/capability and capacity of the individual financial counsellor to assist in relation to Centrelink matters.

Building capability and confidence is important

The ISP specifically sought to address the second factor raised above through the professional development and engagement activities conducted by SSRV and FCRC. Being able to increase the capacity and confidence of the financial counsellors with clients who have Centrelink issues will theoretically increase the likelihood of those financial counsellors being able to better identify social security issues and respond effectively within the scope of their role. Specifically, the ISP engagement and professional development activities aimed to increase financial counsellor confidence to first identify that an issue exists and undertake some assessment, and then contact SSRV for further assistance, or to understand what steps need to be taken to address the issue. For example, it may increase the likelihood that a financial counsellor will assist a client in lodging a request for an ARO review.

Building pathways from non-legal to legal assistance

While there was significant uptake of secondary consultation services by financial counsellors, in year one there were fewer client referrals from financial counsellors into SSRV for further casework assistance and representation services than was anticipated. This is an area that will be further explored in year two.

SSRV typically accepts referrals only when the case has been through the ARO review. Ensuring that financial counsellors have the information and resources to assist clients with ARO requests was identified as important during year one, and will continue to be a priority into 2020. In year one, adjustments to the professional development resources were made to ensure a greater focus on the procedure for requesting an ARO. It was also identified that a 'Challenging a Centrelink Decision' fact sheet will be a worthwhile resource to develop and disseminate amongst financial counsellors to assist in addressing this issue. It is hoped that through engagement and professional development financial counsellors may provide further pre-ARO assistance to clients and that there will then be a subsequent increase in the number of matters that are ready for referral to SSRV for legal assistance.

Flexibility is required to meet stakeholder needs

It was noted that some financial counselling organisations are not funded or it is not within the scope of their role to assist clients with DSP applications. This led to a slightly decreased emphasis on DSP in the professional development sessions for financial counsellors throughout the year, at least in comparison to the emphasis placed on debt.

However, DSP training was still very relevant to the work of many financial counsellors. It was also noted that for many the process of assisting a client with the DSP application can be exhausting and extremely frustrating. Often it was discussed how applications are rejected at the first stage because they do not get the right advice by Centrelink workers about how to apply for DSP and doctors get fatigued at having to do everything twice. It was identified that those assisting applicants need be able to provide assistance at an early stage to ensure appropriate applications are being submitted. There was further support for the dissemination and training in the use of the SSRV DSP Toolkit.

Relationships are integral to success, but require commitment and resources

The partnership with FCRC has clearly been extremely useful for ensuring maximum attendance, engagement, and efficiency of financial counsellors with engagement and professional development activities, but also ensuring engagement with the ISP more generally. Development of relationships with FCRC, and also individual financial counselling networks and organisations has either facilitated, or at least significantly streamlined, the ISP process, including ongoing integration between organisations with planning for 2020.

The SSRV and FCRC partnership demonstrated that the development and maintenance of organisational and cross sector relationships requires shared purpose along with conceptual and practical commitment, respect and openness. In the ISP's experience, whole of organisation understanding and commitment supports successful outcomes. The Project has also confirmed that resources must be allocated to building and maintaining relationships and undertaking joint activity.

Importance of active presence and engagement in rural and regional areas

FCRC and the Project Reference Group were very clear from the outset that the ISP should give priority to visiting, engagement and providing professional development to financial counsellors and their agencies in rural and regional areas of Victoria. This guidance was taken seriously, with ISP and other SSRV staff attending network meetings and other forums across all regions of the state in 2019. Very positive feedback was received from professional development session participants and there was a subsequent increase in utilisation of Worker Help Line by financial counsellors from outside of the Melbourne metropolitan area.

Clients benefit from integrated service delivery

Integrating a financial counsellor directly in the SSRV legal practice opened up an entirely new set of skills and service capacity for SSRV clients. Understanding that each time clients retell their story, which is often traumatic, there is a risk of re-traumatisation, the efficiency and streamlining of an integrated service cannot be underestimated. For vulnerable clients, an integrated service increases the client's capacity to feel supported, and have greater stability and security.

Having a financial counsellor directly embedded within SSRV also allowed direct access to a crucial complementary service, specifically in regard to appeals of debts and the application for waiver on grounds of special circumstances. Similarly, having closer relationships with other financial counsellors also served a similar purpose. In particular, the capacity of a financial counsellor to provide a statement of financial circumstances can have a significant impact on whether or not a person in financial hardship will be left with tens of thousands of dollars of debt to Centrelink. It may be possible for a legal practitioner to obtain and use this kind of information elsewhere, but it is far more efficient to have a financial counsellor provide this, given their knowledge, expertise and experience.

Relationships provide the foundation for effective collaboration and service delivery

The integrated casework also demonstrated the significant value in lawyers working closely with a financial counselling service which has a pre-established working relationship based on trust and ongoing interaction with client. Having the financial counsellor link in directly with the SSRV lawyer and having that existing relationship between the client and the financial counsellor helps to facilitate the building of trust of and confidence in the social security lawyer.

As seen in the case study of Shelley outlined earlier in this report, the nature of the relationship between Shelley and her financial counsellor meant that the financial counsellor was able to work closely with Shelley to obtain all relevant documents for the AAT to support her appeal in circumstances where time was of the essence. It is questionable whether the SSRV lawyer would have been able to obtain sufficient material to argue the case of special circumstances were it not for the financial counsellor having such a close relationship with Shelley to assist and support her to obtain the important documents. The financial counsellor was also a strong supporter and advocate for Shelley throughout the process, including at the AAT. The financial counsellor was able to provide SSRV with important information and pointers to ensure that the appropriate instructions were obtained from Shelley in relation to her appeal.

The geographical proximity of the financial counsellor to the client and their existing ongoing relationship can increase the capacity for the obtaining of very important and relevant information and documentation, resulting in more effective representation during the social security appeal process. This was especially important in the case of Sam (see case study above), where Sam was a quadriplegic living in a remote area and had limited capacity to obtain and send documents or other important material through to SSRV as required during the undertaking of his legal matter.

Professionals learning from and with each other

The undertaking of integrated practice by SSRV lawyers and financial counsellors also facilitated the ongoing learning and development of both parties. In the case of Shelley, the financial counsellor directly requested to be involved in the AAT hearing as she wanted to upskill in that area and had not previously been involved in such a hearing. The financial counsellor was able to attend an AAT hearing for the first time and gained a greater understanding of the Centrelink appeals process and procedure first hand.

Having a financial counsellor in SSRV's practice has also been integral in identifying a number of practices or gaps which may need to be addressed to accommodate financial counsellor professional practice requirements and integrated service provision. The attendance of the ISP Financial Counsellor at intake and allocation meeting enabled the team to view cases with a financial counselling lens. The financial counsellor provided input into cases that may be appropriate for integrated service provision and/or referral to financial counselling or other services. This input has helped build awareness of and commitment by SSRV staff to issue identification and more holistic practice, both as relevant to financial counselling services and more broadly.

Building integrated practice it complex and takes time

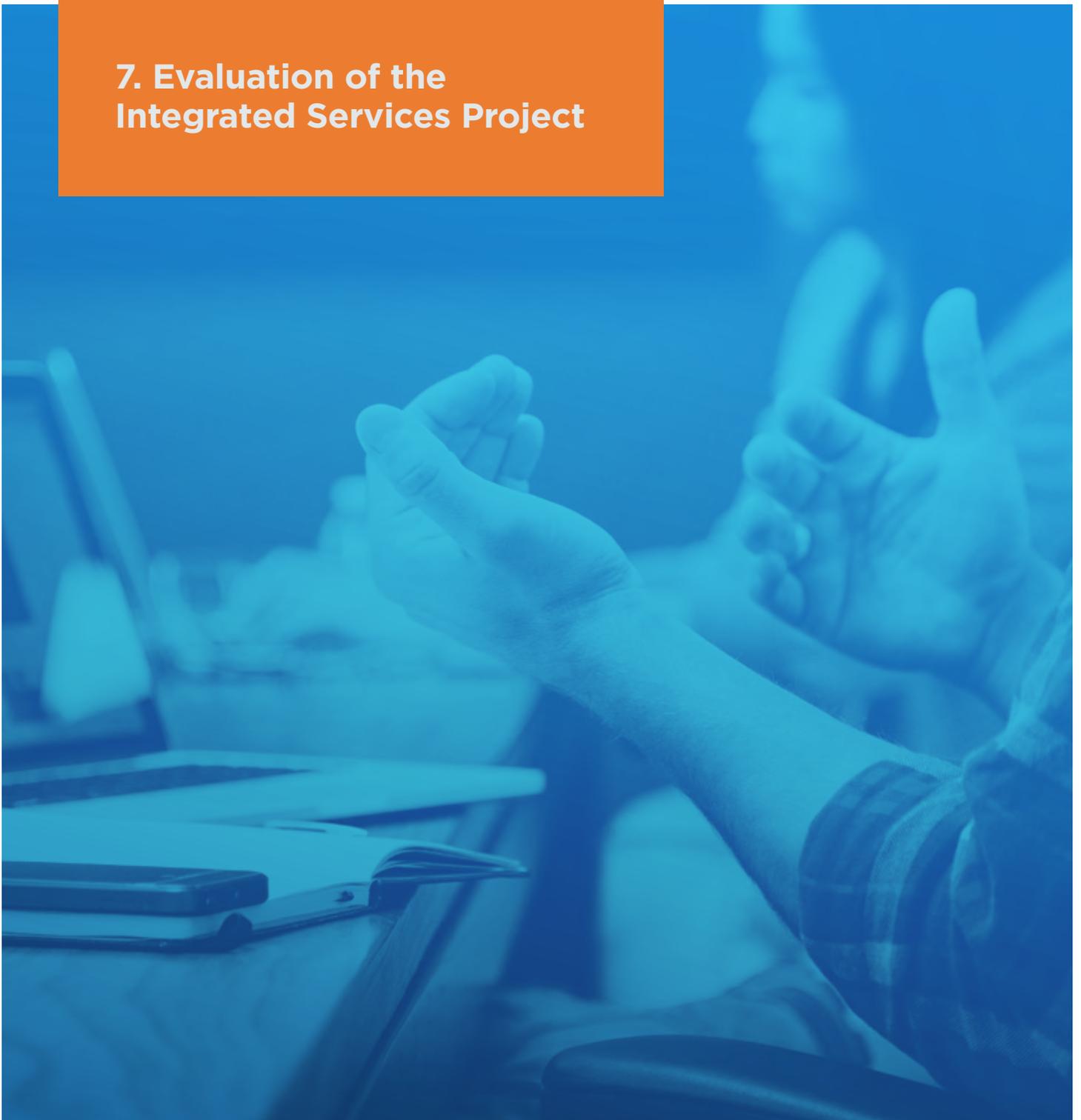
The first year of the ISP has also demonstrated how complex it is to build integrated practice, and how it requires extended time for appropriate implementation. Simply learning and sharing information between the parties about the respective work of financial counsellors and social security lawyers takes time. Integration of services is also harder than it would first appear - it is not just a matter of individual programs sitting within an organisation. The ISP demonstrated the importance of designing and implementing integrated practice in a thoughtful, considered way, allowing for time and evolution of practice and procedures.

As discussed above, there was no established financial counselling service within SSRV prior to the ISP. The development of policy procedures and processes was required alongside the development of the integrated service. It was identified in consultation with the Reference Group that this process will continue to be evolutionary and needs continual attention. Indeed, this process will need to continue into the second year of the ISP, with significant time and effort being placed on improving policies and procedures for integrated services, including the integration of the financial counselling practice into the SSRV legal practice. This includes ensuring best practice around information sharing and joint interviews, particularly considering legal client privilege, confidentiality and mandatory reporting obligations.

Importance of establishing monitoring and evaluation framework at the outset

Fortunately, project funding enabled the engagement of a consultant who specialised in monitoring and evaluation and who had experience in working with the legal assistance sector. Working closely with SSRV staff and in consultation with the Project Reference Group, the consultant assisted ISP staff to construct a theory of change, a monitoring evaluation plan and data collection tools. Having these in place from early in the life of the project provided added rigour, built understanding of the processes and their value, and ensured that data was collected consistently throughout the project. It also enabled mid-term review and adjustment, and the making of judgements about project outcomes at the end of year 1 and recommendations for the future.

7. Evaluation of the Integrated Services Project



The evaluation of the ISP was led by the evaluation consultant and framed around a series of guiding questions under four themes: Appropriateness, Process, Effectiveness and Sustainability of the Project.

As noted, these questions have been answered through an analysis of multiple information sources and informed by an assessment against criteria established in evaluation rubrics for some of these questions. A snapshot of the performance against evaluation rubrics is presented in the Figure 19 –

Figure 19: Snapshot of performance against evaluation rubrics

Evaluation questions	Poor	Adequate	Good	Excellent
7.1 Appropriateness				
Q1. To what extent were the underlying program theory and assumptions substantiated or challenged?	N/A			
7.2 Process				
Q2. In what ways was integrated practice between social security law specialists and financial counsellors implemented/demonstrated through the project?				
Q3. In what ways and to what extent did these approaches replicate, build on to or differ from how SSRV staff and financial counsellors had worked together prior to the project?				
Q4. What were the strengths and weaknesses of the approaches to integrated practice as implemented in the project?	N/A			
Q5. Are there any suggestions for improvement to project design and implementation?	N/A			
7.3 Effectiveness				
Q6. To what extent has financial counsellor awareness and understanding of SSRV's services and pathways to services changed? What factors contributed to this change?				
Q7. To what extent has financial counsellor's confidence and capability in detecting and/or assisting clients with social security issues changed?				
Q8. To what extent has SSRV staff awareness and understanding of financial counsellor/sector role and pathways to services changed?				
Q9. To what extent has SSRV staff confidence and capability in detecting clients who may benefit from financial counsellor assistance and/or in linking the client to this assistance changed?				
Q10. In what ways did the project engage with financial counsellors and organisations in rural and regional Victoria? What changes have resulted from this engagement?				
Q11. To what extent has the project provided evidence that integrated practice between social security law experts and financial counsellors contributed to improved client outcomes?				
Q12. In what ways did the ISP contribute to the identification of systemic issues and to proposed action? To what extent has action impacted upon laws and procedures?				
Q13. To what extent and in what ways did the relationship between SSRV and FCRC change as a result of partnering to implement the ISP?	N/A			
7.4 Sustainability				
Q14. What evidence is there to suggest that the capacity that the project has developed in participating financial counsellors/organisations and SSRV staff / organisation will be sustained beyond the life of the project?				

The remainder of this section discusses the evaluation findings for each question, with the accompanying evaluation rubric assessment where applicable.

7.1 Appropriateness

Q1. To what extent were the underlying program theory and assumptions substantiated or challenged?

Prior to the substantive work of the ISP commencing, a detailed theory of change and list of assumptions was developed. In reflecting upon the project 12 months on, it is clear that many of the underlying assumptions and program theory have been corroborated while a few were not substantiated. These are explored below.

Social security matters are complex and overlap with financial counselling and clients experiencing social security issues often have multiple legal and non-legal problems.

- Financial counsellors regularly come across related social security issues in their work – over 80% of financial counsellors surveyed at the FCRC conferences estimated that at least half of their clients received or were seeking to receive social security payments and that common issues were Centrelink Debt and DSP eligibility.
- Financial counsellors believe their role encompasses assisting people with social security matters – over 90% agreed with this in the FCRC conference surveys.

There is a spectrum of awareness, skill, confidence and capacity amongst financial counsellors to undertake social security related work and it takes time to create change in practices.

Financial counsellors have some knowledge of the laws, policies and processes related to social security but want to learn more from specialists such as SSRV and want to better support their clients through secondary consultations and referrals. This was reported in the surveys with financial counsellors, although in practice SSRV received

fewer client referrals and undertook less integrated casework than expected and many more secondary consultations, which can be interpreted in multiple ways:

- a. The point at which a social security problem becomes a legal matter is not always clear to all parties (one of the underlying assumptions behind the ISP);
 - b. Financial counsellors are reluctant to refer their clients to SSRV as a professional preference to not refer clients or because of a perceived lack of capacity at SSRV;
 - c. Financial counsellors are reluctant to refer/engage in ongoing work as a personal preference or because of perceived impact on their workload or because they simply want periodic advice on legal matters.
- The multi-pronged approach of this project (delivering community legal education, having an in-house financial counsellor, providing secondary consultations through a Worker Help Line, delivering collaborative casework, participating in the Centrelink Working Group) has been successful at contributing to, and responding to, the spectrum of awareness, skill, confidence and capacity in the financial counselling sector around social security related work.

SSRV staff see benefits to learning from financial counsellors and formally engaging in integrated practice with financial counsellors

- SSRV staff have been receptive to and engaged with the trial of integrated practice in this project and have seen it as beneficial to the organisation as well as to clients.
- The integrated practice between the ISP lawyer and external financial counsellors as well as with the ISP financial counsellor and SSRV lawyers has led to positive outcomes for clients.
- The process of undertaking, documenting and evaluating the ISP has generated learnings which can contribute to a body of knowledge on integrated services and practice that can be of benefit to the broader sector.

In the course of integrated practice, financial counsellors and social security law experts will identify systemic trends and issues.

In year one, the project identified systemic issues but was not able to progress actions to address them. While the project has identified systemic trends and issues, the project underestimated the extent to which it could formulate and execute actions that would contribute to 'fairer laws and process' (a goal in the ISP theory of change). This was constrained by external factors (e.g. existing sector priorities for change, prevailing political climate) and the extent of the other work being delivered by the project. But it also takes time to develop the foundations to formulate a response to systemic issues, for example, through SSRV developing its practice and knowledge, and cultivating relationships across the sector. As such, there was a temporal constraint which meant that executing actions to address systemic issues was unlikely in year one of operations.

7.2 Process

Q2. In what ways was integrated practice between social security law specialists and financial counsellors implemented/demonstrated through the project?

Good

- A number of examples of integrated activities occurring with financial counsellors / organisations.
- 12 CLE activities (exceeded target).
- Contributing to advocacy research with FCLC but no joint advocacy work.

The integrated work between SSRV and financial counsellors has been catalogued earlier in section 5. Project Delivery and highlighted through the case studies provided. Over the course of the project:

- ✓ the ISP lawyer participated in the FCRC Centrelink Working Group, and involved other SSRV staff
- ✓ 12 professional developments sessions delivered by the ISP Lawyer and SSRV staff (doubling the target of 6 that was set at the commencement of the ISP). These sessions were delivered to nearly 200 individuals (mostly financial counsellors but also other social sector workers) and covered topics such as on the DSP Toolkit, challenging Centrelink decisions, debts and overpayments
- ✓ training provided to SSRV staff by the ISP Financial Counsellor
- ✓ there were over 100 secondary consultations provided by the ISP lawyer
- ✓ 14 case files were opened by SSRV lawyers working with a financial counsellors
- ✓ there were multiple instances where matters were referred internally to the in-house financial counsellor who supported both the lawyer and external financial counsellor.

However, there were no joint advocacy activities delivered during the year which was an explicit target under this rubric and so overall the performance has been judged as 'Good' rather than 'Excellent'.

Q3. In what ways and to what extent did these approaches replicate, build on to or differ from how SSRV staff and financial counsellors had worked together prior to the project?

Excellent

- SSRV staff very positive about project and ways of working.
- A number of examples provided of integrated practice between SSRV staff and FC.
- A majority of financial counsellors expressed positive impacts of service, with some specific examples, and there has been both an increase in *volume* of matters and changes to the *nature* of working relationships and responses to matters.

As documented earlier, SSRV staff have interacted and worked with financial counsellors in the past, and had a presence at forums such as the Centrelink Working Group. The ISP has formalised and expanded these relationships and signalled to the financial counselling sector the focus on this integrated work, as well as creating an in-house financial counsellor role that has never previously existed.

At SSRV, it has resulted in the creation of new protocols and resources such as the Financial Counselling Service Manual developed by the ISP Financial Counsellor to align with SSRV's organisational policies and procedures. It has also provided the organisation with a first-hand view of how financial counsellors operate, the breadth of matters they address and the variety of constraints and preferences for supporting clients through a DSP review or AAT hearing. This has influenced SSRV's legal education work on this topic and how to make and accept referrals from financial counsellors.

More broadly, this has also led SSRV to rethink how it delivers its legal services from intake stage (i.e. by considering whether a financial counsellor involvement would be helpful for the matter) through to performing the service (i.e. by considering how best to involve the financial counsellor collaboratively). Feedback from SSRV staff made clear that the ISP had meant the organisation can deliver a more holistic service and affect better client outcomes.

“Having a financial counsellor on board from the start means that whenever we get a matter related to Centrelink Debt, we can prepare a Statement of Financial Circumstances and this is required for almost every case and so is invaluable for building the legal case” – *ISP lawyer*

This was reinforced by the ISP Financial Counsellor, noting that a level of trust has been established with numerous financial counsellors by SSRV staff being ‘on the ground’ and delivering targeted professional development and promoting the service. The relatively small number of financial counsellors in Victoria and the nature of their work means that establishing rapport and trust is critical, so having a financial counsellor working at SSRV has lent further credibility to the organisation. Feedback from the financial counsellors also suggested that while they have multiple avenues for legal assistance, there can be a reluctance to contact lawyers but the approach of the ISP lawyer was reassuring and made it more likely that they would contact SSRV in future.

“I would absolutely contact SSRV [for future social security issues]. It can be daunting speaking with lawyers but Bryn was open, non-judgemental, extremely helpful, and very generous with his time and spirit. I didn't feel like I was in a queue and being rushed. He made sure I understood on the call and followed up with written information.”

– *Metropolitan financial counsellor*

The increase in volume of work with external financial counsellors over the past year, including over 20 financial counsellors calling the Worker Help Line on multiple occasions, validates SSRV's promotion and relationship building efforts. It is clear that SSRV is working more with financial counsellors with increases in the volume of matters and professional development sessions. There have also been changes to the *nature* of the working relationships. Previously the SSRV Worker Help Line was the main source of interaction with financial counsellors and was supported by a mix of lawyers and paralegals at SSRV. With the ISP, the main interaction is through a lawyer, backed up by other SSRV resources to ensure collaborative casework occurs and the learnings translate into better outcomes for matters and more tailored legal education to financial counsellors.

Q4. What were the strengths and weaknesses of the approaches to integrated practice as implemented in the project?

The approaches to integrated practice implemented in the ISP and its progress towards its intended outcomes were enabled and inhibited by a range of factors. These were identified in consultation with stakeholders and are discussed below.

Strengths and enabling factors

✓ **The positive, productive collaboration between SSRV and FCRC** – It is clear that the project would not have succeeded to the extent that it has without the explicit and implicit support provided by FCRC. The two organisations have worked very well together and brought their strengths to bear in their respective roles. On the one hand, FCRC lent credibility to the endeavour and shared its networks and mechanisms for engagement, without which it would not have been possible for SSRV to undertake the volume of legal education and promotion activities it managed across the state. Similarly, FCRC have been impressed with the energy with which SSRV have executed the project, and how they have helped to demonstrate the nuance required to deliver integrated practice and the clear benefits of it.

“A lot of goodwill has been demonstrated by Sandy and all the staff at FCRC. They’ve really stepped up to the plate in enabling us to leverage their networks and communication channels for the project, notably by actively involving Leanne and Bryn in training opportunities” - *Director, SSRV*

“The project has been very successful and there have been a lot of learnings. Gillian has worked hard to link effectively with me and ensure a satisfactory governance for the project. Underlying all of it is a shared mission and alignment of interests– the relationship is deeper than this project and we’ve worked well together” - *Executive Officer, FCRC*

- ✓ **Face to face engagement with financial counsellors for professional development and service promotion activities** – the depth and breadth of the engagement work undertaken, particularly by the ISP lawyer, were critical factors in raising the profile of the project and SSRV and building strong connections across the financial counselling sector. The variety of engagement (professional education, attendance at network meetings, participation in working groups, etc.) meant that it was crucial to have the right staff in the team. The consistent feedback from stakeholders confirmed that the professional qualities of the ISP staff backed up by others at SSRV, ensured that not only was extensive engagement activity undertaken but that it was undertaken exceptionally well, and means the flow on benefits are more likely to be sustained.
- ✓ **Flexibility and responsiveness of the ISP staff** – the ISP staff conducted more professional development / legal education sessions than anticipated. This reflected a clear demand but also the flexibility and responsiveness of the team, who tailored the content to be relevant to both financial counsellors and other workers and also delivered sessions with other SSRV staff and pro bono partners (e.g. family violence lawyer), which meant that sessions provided value to entire organisations rather than just financial counsellors in a particular area. This also benefitted SSRV by further integrating legal education across multiple areas of law.
- ✓ **The experience and network of the in-house financial counsellor** – although the ISP financial counsellor is only in a part-time role and worked on limited matters, her involvement in the sector and relationships with other financial counsellors has lent credibility to the ISP and to SSRV and built up trust quicker than may have been the case otherwise. The financial counsellor’s experience working in community organisations in holistic ways also meant that she was able to set up processes and build collaborative practice across SSRV.

- ✓ **Multiple staff operating the Worker Help Line** - this is standard practice at SSRV but has meant that the direct engagement of the ISP lawyer has been consolidated at an organisational level. Financial counsellors have greater awareness of the Worker Help Line and by speaking with multiple staff, the relationship with them has not been restricted to one individual at SSRV.
- ✓ **A clear work plan, theory of change and monitoring & evaluation framework** – it was acknowledged by ISP staff that this required a lot of upfront time but both SSRV and FCRC stakeholders concurred that spending this upfront time meant that the fundamentals were in place to deliver the project well. The work plan provided a documented roadmap for the work to keep everyone on track, and minimised the potential disruption from staffing changes at SSRV during the course of the project. Similarly, the theory of change and monitoring & evaluation provided direction, and also maintained the focus on higher level outcomes and a means to assess performance. Preparing these documents does require expertise and resources to develop and having an independent expert provide input and oversight was beneficial.
- ✓ **Having a Reference Group in place** – the Reference Group played an important role throughout the project. In addition to providing a mechanism for accountability and transparency, the Group provided insight into project delivery and identified contacts and research for the team to consider. Having an active and engaged Reference Group was considered by the stakeholders to have strengthened the delivery and governance of the project.

Inhibiting factors

As with any service delivery project, there were factors which affected the ISP. None had a major adverse impact on the project itself, but two inhibiting factors have been identified here as opportunities for learning and improvement for year two of the project and for other integrated service projects:

- ✗ **Delay in recruiting the financial counsellor and their role** – there were challenges in recruiting a financial counsellor, due to a number of factors:
 - the 0.4 FTE nature of the role may have deterred potential applicants who were seeking a 0.6-1.0 FTE role
 - SSRV looking for a candidate who would best fit the project and within the organisation, given this was the first time SSRV was employing a financial counsellor
 - Funding uncertainty in the financial counselling sector in late 2018, when the role was advertised.

It meant the financial counsellor commenced two months after the ISP Community Lawyer so affected some of the early project momentum. Conversely, SSRV was fortunate to have a suitable lawyer apply for the ISP lawyer role at the right time, and had they not applied, that role too could have been delayed. The delay with the financial counsellor did not materially impact upon project delivery, although this was partly due to a lower than anticipated volume of casework through the project. This was due to both a natural 'lead-in' time for casework as the ISP was building and also capacity constraints with the financial counsellor on leave several times during the year and a vacancy in the Principal Lawyer role in the middle of 2019. Consequently, less work was required/completed by the financial counsellor in the first few months of the project.

- ✗ **Manual M&E processes and data collection** – while the M&E framework has been an overall enabler of the project's success, much of the data collection and analysis had to be conducted manually. There were also difficulties in collecting feedback from financial counsellors beyond immediate feedback from Worker Help Line calls or community legal education (CLE)/professional development sessions, which hinders the tracking of medium to long term benefits. None of this has had a significant impact on project delivery or created an undue administrative burden, but there is an opportunity to revisit and streamline M&E processes for this project to ensure that the requisite data is being captured in the most efficient manner.

Q5. Are there any suggestions for improvement to project design and implementation?

This question is addressed throughout the report and in the conclusion and recommendations section.

7.3 Effectiveness

Q6. To what extent has financial counsellor awareness and understanding of SSRV's services and pathways to services changed? What factors contributed to this change?

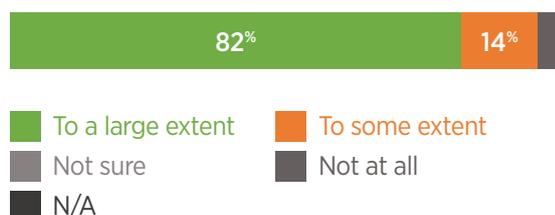
Excellent

- Over 90% of financial counsellors who attended CLE sessions reported an improved awareness of SSRV
- Over 1 point average improvement in 'knowledge of SSRV services and referral pathways' between FCRC conference attendees in 2018 vs 2019
- 40% increase in number of referrals into SSRV from financial counselling organisations between 2018 and 2019

Improving the awareness of SSRV's services and referral pathways was identified in the ISP theory of change as a critical intermediate step for financial counsellors to improving worker access to appropriate legal support and improved client outcomes. The feedback from the CLE sessions delivered by SSRV staff to workers (both financial counsellors and other workers) found, unsurprisingly, that there was an improved understanding of SSRV among the majority of attendees.

Figure 20: Aggregate feedback from five of the CLE sessions delivered by SSRV (n=78)

Extent to which you have improved understanding of SSRV? Not sure 0% Not at all 3% N/A 1%



As noted earlier, there was also increased knowledge of SSRV's services and referral pathways evident in the feedback from the FCRC conference surveys (see Figure 4).

Clearly the extensive CLE and service promotion activities, including ISP staff's attendance at regional/statewide financial counsellor network meetings and the 2018 and 2019 FCRC conferences have led to increased (and renewed) awareness of SSRV among financial counsellors.

This has manifested itself in increased calls to the Worker Help Line (see Figures 11 and 12) and also through a 40% increase in referrals to SSRV from financial counselling organisations in 2019 compared to 2018.

Figure 21: Total referrals into SSRV, broken down by source of referral

Jan - Dec 2018



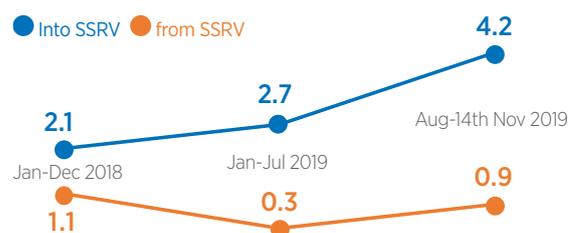
Jan - Nov 2019



Financial counselling service CALC

While the numbers are not large, it is clear that, as with many other aspects of this project, the benefits of the initial work in late 2018/early 2019 have emerged from the middle of 2019 onwards and suggests there is forward momentum for the project. The figure below illustrates the average relevant referrals into SSRV and made by SSRV in all of 2018, January - June 2019 and July - November 2019.

Figure 22: Average number of referrals per month in an out of SSRV, broken down by period



Concurrently, the number of referrals made from SSRV to financial counsellors appears to have dropped slightly from a total of thirteen in 2018 to six in 2019. This may reflect the capacity to take on clients at SSRV with the in-house financial counsellor and focus provided by this project.

Q7. To what extent has financial counsellor’s confidence and capability in detecting and/or assisting clients with social security issues changed? To what can this change be attributed? How was this change reflected in practice?

Excellent

- Nearly all financial counsellors who used the Worker Help Line indicated it was timely, relevant and useful
- Over 85-90% of financial counsellors who used Worker Help Line felt it helped increased their confidence and capability
- Most gave an example of how this was reflected in their work
- Over 90% of CLE attendees felt more “confident in identifying and responding to social security matters” AND “better able to assist clients”, including providing specific examples

Beyond increasing the awareness of, and access to SSRV’s services, the Project sought to improve the confidence and capability of financial counsellors to detect and assist clients with social security issues. As discussed previously, the positive responses from the CLE sessions, Worker Help Line feedback and follow up surveys with financial counsellors clearly demonstrate that financial counsellors felt their confidence and capability increased and attributed this to SSRV’s work:

- Around 85% agreed that the Worker Help Line service was accessible, timely and useful (see Figure 15: Worker Help Line immediate feedback).
- 95% of follow up survey respondents felt the WHL service helped them feel more confident and capable to identify clients with social security issues and 100% more confident to assist clients with social security issues

- Nearly 100% of CLE attendees felt the session made them more confident in identifying and responding to social security matters and better able to assist clients (see figure 23).

Figure 23: Aggregate feedback from eight CLE sessions on the extent to which attending the session helped (n=110)

Extent to which you feel more confident in identifying and responding to client social security matters? N/A 3%



Extent to which what you learned in today’s session will help you better assist clients? N/A 1%



■ To a large extent ■ To some extent
■ Not sure both 0% ■ Not at all both 0%
■ N/A

The one source of information which did not indicate an increase in financial counsellor confidence and capability was the FCRC conference attendee survey, where the 25 respondents in 2019 did not rate themselves any higher than the 2018 respondents.

It should be noted that the surveys in 2018 and 2019 were *not* completed by the same individuals at the conference. Given the responses to confidence and capability are contrary to the evidence from the Worker Help Line and CLE sessions, it is likely that this is due to significant differences in the 2018 and 2019 conference survey cohorts (i.e. those in 2019 happened to be more knowledgeable and confident than those who responded in 2018) and/or those who responded in 2019 had less direct contact with SSRV through the CLE or Worker Help Line during the year.

(Note: Half of the conference respondents in 2019 did not recall using the Worker Help Line during the year and they had slightly lower ratings for their capacity and confidence to identify and assist clients with social security matters, but these were not significant differences. The survey did not ask if they attended a CLE session with SSRV.)

Q8. To what extent has SSRV staff awareness and understanding of financial counsellor/sector role and pathways to services changed? What factors contributed to this change?

Excellent

- All SSRV staff reported an increase in their understanding of financial counsellors since the project commenced

The other aspect of the ISP was to build an understanding of financial counsellors and the sector within SSRV. This was pursued through having the in-house financial counsellor deliver training to SSRV staff and prepare a Service Manual, as well as through the direct engagement and integrated casework by the ISP lawyer and other SSRV lawyers.

The surveys of SSRV staff confirmed that the project had led to an increase in understanding of financial counsellors within the CLC. As shown earlier in report the average rating by SSRV staff of understanding of financial counsellor services was 4.0 (out of 5) in 2019 compared to 2.7 in 2018.

Q9. To what extent has SSRV staff confidence and capability in detecting clients who may benefit from financial counsellor assistance and/or in linking the client to this assistance changed? What factors contributed to this change? How was this change reflected in practice?

Good

- SSRV staff very positive about project and ways of working
- A number of examples provided of Integrated Practice between SSRV staff and financial counsellors
- A majority of financial counsellors expressed positive impacts of service, with some specific examples

The staff survey results indicated that the SSRV staff found it valuable for the organisation, their role and clients to have the financial counsellor based in SSRV through this project (see 9). Consultations with the ISP Lawyer and SSRV Director underscored the value of the project and impact it had on SSRV and ways of working with financial counsellors.

“I have seen first-hand bridge building through the engagement and CLE work we’ve done. This has translated into increased communication from financial counsellors for further information and advice regarding specific cases. There are instances where financial counsellors have called us to give us feedback on their experiences, e.g. what Centrelink said to them, what they are seeing on the ground. This gives us greater perspective on matters and is evidence of the trusted relationships we’ve built.”

– ISP lawyer

These are also reflected in the case studies exemplifying the integrated practice and benefits for clients. The most notable change in way of working brought about by the ISP is having an in-house financial counsellor at SSRV who worked with lawyers on a small number of matters and felt this had made a difference.

“[Having a financial counsellor is valuable because] it is a complimentary role, supports the resolution of social security and related issues, makes us more conscious of associated needs of clients and of the importance of collaborative/integrated professional relationships and practice.” – SSRV staff

In the majority of matters, it was the SSRV lawyers providing secondary consultations to external financial counsellors and these have clearly increased in quantity and possibly quality from having an in-house financial counsellor and a focus from the ISP. Across SSRV, and in particular from the ISP Lawyer, there is a stronger understanding and appreciation of the role of financial counsellors and how they can work together, as well as clear examples of integrated practice that have already occurred. This is likely to strengthen over time as more integrated casework is undertaken.

Q 10. In what ways did the project engage with financial counsellors and organisations in rural and regional Victoria? What changes have resulted from this engagement?

Excellent

- Multiple engagements with rural / regional areas, and new relationships established
- Over 90% of rural / regional financial counsellors report “improved awareness of SSRV” after CLE
- Over 1 point average Improvement in rating of ‘knowledge of SSRV services’ and “knowledge of referral pathways” in FCRC conference survey among rural/regional FCs
- Proportionally greater increase in Worker Help Line calls from rural/regional FCs, although referral numbers overall did not increase significantly

A standout feature of the ISP has been the breadth and depth of engagement with rural and regional financial counsellors and organisations. This was an explicit focus for FCRC and it was expected that the Reference Group would include a rural or regional financial counsellor. While this did not occur, it did not hinder the project with multiple face to face service promotion and CLE activities occurring at organisations in rural and regional Victoria. In one year, SSRV has been on the ground in virtually every region where financial counsellors operate. Much of this was facilitated by the FCRC leveraging their networks to effect introductions and incorporating SSRV into their existing training calendar.

“We’ve been able to travel out to a range of regional areas and that’s been assisted by us doing CPD engagements earlier where rural/regional financial counsellors came into the city and we met them so then followed up by visiting their locations and attending other network meetings. This meant most financial counsellors have seen our faces and spoken to us a number of times” – ISP lawyer

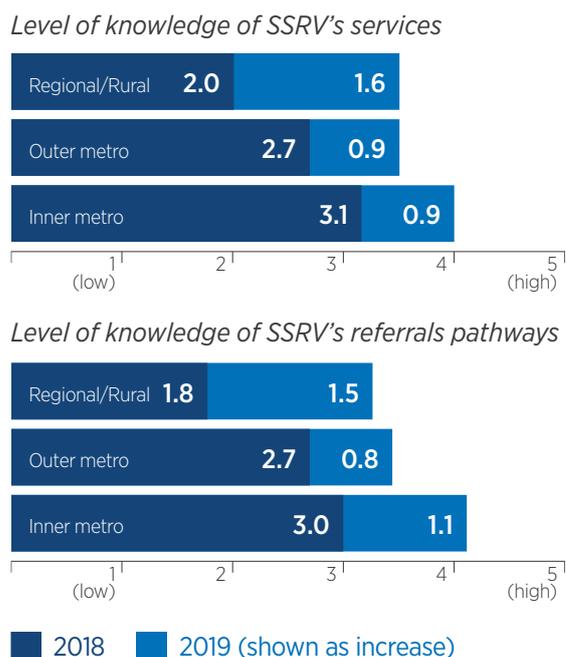
The engagements and professional development sessions were also not restricted to only financial counsellors, with many sessions delivered to entire community services organisations in rural and regional areas. This was not anticipated at the

start of the project and ended up being a valuable component to the work, with almost 40% of CLE attendees being in roles other than financial counsellors. In the majority of engagements, the ISP lawyer and financial counsellor were involved but on a number of occasions, other SSRV personnel (e.g. the family violence lawyer, pro bono partners) were also invited to present and thus adding extra value for the audience but also expanding SSRV’s integration across multiple areas of law.

The unanimous feedback from the CLE sessions was, as discussed, that the sessions improved attendee awareness of SSRV and would help them better assist clients (see Figures 20 and 22). This applied to both those undertaken in rural / regional areas as well as metro sessions which may also have been attended by rural / regional financial counsellors.

The increased awareness of SSRV’s services and referral pathways can also be evidenced in the FCRC conference surveys. As figure 24 demonstrates, the level of knowledge was lower for regional/rural financial counsellors in 2018 compared to those who are based in metro areas. This was still true in the 2019 survey, but the increase has been greater for those financial counsellors based in rural/regional areas.

Figure 24: FCRC conference survey responses to knowledge of SSRV service and referral pathways, broken down by location of financial counsellor.



This engagement translated into both a proportionally greater increase in calls to the Worker Help Line from rural / regional financial counsellors (as shown in Figure 26) and help for them to assist clients with social security matters. The sample size is small but the WHL follow up surveys suggest that the service made less of a difference to outcomes for rural / regional financial counsellors and that the benefit from them is more likely to be in the training/professional development and collaborative casework, as evidenced in the case study of ‘Jane’.

“I contacted the WHL for two matters and that hasn’t helped because there was not much that could be done, but the training really did help me. I have worked with CALC on an ongoing matter before and that worked well, so would be happy to have an ongoing case with SSRV and speaking with them, I can tell that they would be open to doing that with me.” – *Regional financial counsellor*

Q 11. To what extent has the project provided evidence that integrated practice between social security law experts and financial counsellors contributed to improved client outcomes? Which approaches were most effective in improving client outcomes?

Good

- Project team confident in improved client outcomes
- 50% of financial counsellors surveyed indicate that SSRV service improved client outcomes
- Majority of clients in case summaries express satisfaction with service and outcomes

The overarching objective of the ISP was to “improve client outcomes”. The twin mechanisms for this were to strengthen the capability of financial counsellors in providing appropriate responses to social security issues, and to improve the capability of SSRV staff to facilitate integrated service provision for clients with associated non-legal issues. Earlier sections of this report have confirmed the strengthening of the respective capacity and confidence among both financial counsellors and SSRV staff. The majority of this occurred through training and secondary

consultations provided by SSRV to financial counsellors. It is important to understand whether there has been, or expected to be, a *downstream* benefit to clients.

The most compelling data is from the 14 case files that were opened where the ISP staff directly worked on client matters with an external financial counsellor or other SSRV lawyer. These have been highlighted in the case summaries previously presented, and indicate that clients have received a quicker, more seamless service through the ISP than they might have otherwise and that they were satisfied with the service provided.

“[Having a financial counsellor and SSRV work together] felt really good. Having the support of both was helpful and stopped me making mistakes. I wouldn’t have bothered to take the matter further by myself. There’s not really a way to get justice when you have to pay for it.” – *Jane, client*

Beyond the direct casework support, it was clear that financial counsellors and SSRV staff felt that the ISP had already contributed, or was likely to contribute, to better service and outcomes for clients.

Q 12. In what ways did the ISP contribute to the identification of systemic issues and to proposed action? To what extent has action impacted upon laws and procedures?

Adequate

- No joint actions undertaken to date
- There was regular attendance by ISP staff at Centrelink Working Group and a positive response from sector stakeholders
- Project partners acknowledge lack of action but confident that foundation in place for further policy and system level work in 2020

Identifying and responding to systemic issues to contribute to ‘fairer laws and processes’ was a discrete outcome of the ISP Theory of Change, as well as an intermediate outcome towards ‘improved client outcomes’. The main mechanism envisaged to advance this was ISP staff participation in the FCRC Centrelink Working Group. During the course of the project:

- The SSRV Director launched the ISP at a Centrelink Working Group meeting
- ISP staff attended a further 4 Centrelink Working Group meetings, including one at which the SSRV family violence lawyer presented on the intersection of social security matters and family violence
- The ISP lawyer was invited to discuss bankruptcy and Centrelink debt at an FCRC Bankruptcy Working Group meeting

There was a positive reception to the ISP from the Working Group as confirmed in feedback provided directly to the ISP staff as well as from the Working Group member on the Project Reference Group. The ISP lawyer also felt that participation in the Working Group meetings was beneficial for increasing his understanding of financial counsellors' day to day work, the sector's strategic priorities and insights into the synergies between his legal work and financial counsellor's work.

Despite the goodwill generated and issues identified, there were no joint actions proposed or undertaken in 2019. The Working Group only meets every 2 months or so and had a strong focus on the 'Raise the Rate' campaign during the year. As noted earlier, formulating a systemic response requires time to build a deep understanding of the sector and SSRV was not in the best position to propose joint actions within the first 12 months of the project.

It was acknowledged by the project partners and Reference Group that undertaking joint advocacy work was aspirational for the first year of the project and even an explicit outcome of 'fairer laws and processes' was unrealistic for the timeframes and scope of the ISP. There was confidence, however, that issues had been uncovered and a foundation established for policy and system level work going forward so this should be a focus for 2020. It was suggested by FCRC and the Reference Group that the ISP Theory of Change and this evaluation rubric should be updated for next year to reflect a more realistic aim for this area of work. This would involve acknowledging systemic work will often be contingent on the political climate, sector

level preferences and other external constraints beyond the control of the ISP and that while the Working Group is a valuable forum for identifying and progressing this work, other options should be considered (e.g. directly through FCRC's policy team).

Q 13. To what extent and in what ways did the relationship between SSRV and FCRC change as a result of partnering to implement the ISP? What were the outcomes of this change?

The partnership between SSRV and FCRC is one of the unequivocal enabling factors for the success of the project. There was a pre-existing relationship between the organisations prior to the ISP but SSRV brought the opportunity to FCRC shortly after it appointed a new Executive Officer and it immediately reinforced the continued relevance of the relationship with SSRV and potential benefits of deepening it through the ISP. Consultations with SSRV and FCRC representatives confirmed that the institutional relationship now extends beyond this project and that partnering to implement the project has been of benefit to both organisations. FCRC's imprimatur on the project and support has helped expand SSRV's footprint and presence across the state among financial counsellors. The work undertaken has obviously been of benefit to FCRC's membership and supported the purpose of the organisation, but in addition the methodical approach taken by SSRV has aided in FCRC's thinking around how to structure, execute and evaluate projects. During the year, the learnings from implementing the ISP were used by FCRC to strengthen grant submissions for a similar project with another organisation, for which they were successful.

7.4 Sustainability

Q 14. What evidence is there to suggest that the capacity that the project has developed in participating financial counsellors/ organisations and SSRV staff/organisation will be sustained beyond the life of the project?

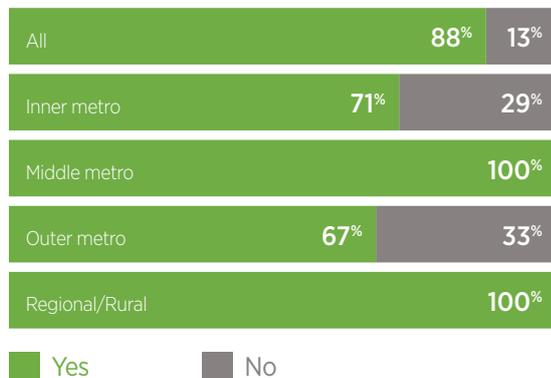
Excellent

- The majority of financial counsellors surveyed expressed interest in further professional development, as well as nominating SSRV as their preferred source for help with social security matters
- A number of CLE presentations and tangible resources have been developed which financial counsellors have used
- All SSRV staff believed that the project has been worthwhile and there is ongoing value in continuing
- Both SSRV and FCRC management are committed to continuing the work and believe capacity will be sustained
- A second year of funding has been secured

As discussed throughout this report, there was very positive feedback from the financial counsellors who received professional development or assistance from SSRV through the ISP. There were multiple requests for further professional development during the course of the year, and a majority of the 20 financial

Figure 25: Worker Help Line follow up responses to whether financial counsellor would be interested in further professional development from SSRV, broken down by location of financial counselling services (n=20)

Interested in further professional development



counsellors who were followed up for an in-depth survey after receiving assistance through the Worker Help Line indicated they would be interested in further professional development from SSRV.

Additionally, when presented with multiple options for what they would prefer to do if unsure how to assist a client with a social security matter, the majority of financial counsellors surveyed would prefer to contact SSRV or use resources on the SSRV website (see figure 26).

While this clearly demonstrates an appetite for continuing the work from financial counsellors, the feedback does also suggest that the capacity development work is not a one-off and will need to be ongoing for the benefits to be sustained. Financial counsellors noted that ‘refreshers’ of the training would be valuable, while both ISP staff and Reference Group made clear that there was a level of trust that has been established through personal relationships with financial counsellors and these would have to be maintained for referrals and joint casework to continue to occur.

“I am the only financial counsellor in my organisation, so there is no one I can talk to about my cases. It’d be great to hear more from SSRV about their cases so they should consider sending out little fact sheets and their case studies from time to time to refresh our memories and learning”

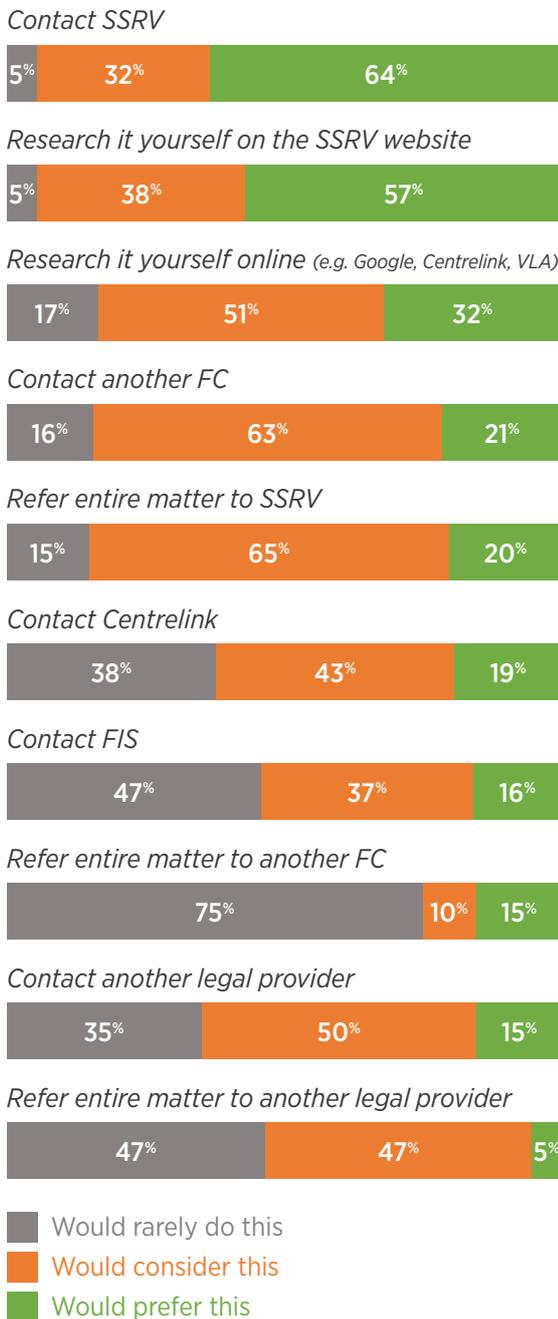
– Regional financial counsellor

However, both the ISP staff and FCRC management expected that the large increase in secondary consultations through the Worker Help Line would continue as they were prompted by the initial service promotion work and face to face interaction between ISP staff and financial counsellors but has been consolidated through Worker Help Line assistance from SSRV at an organisational level.

“I think the worker advice line will continue to be utilised and will just depend on SSRV maintaining their expertise and knowledge – by having multiple people staffing the worker help line, a relationship has been built between financial counsellors and SSRV overall rather than any particular SSRV personnel.” – FCRC Executive Officer

Figure 26: FCRC 2019 conference survey responses to “what action would you prefer to take if unsure how to assist client with social security matter?”

What action would you prefer to take if unsure how to assist client with social security matter?

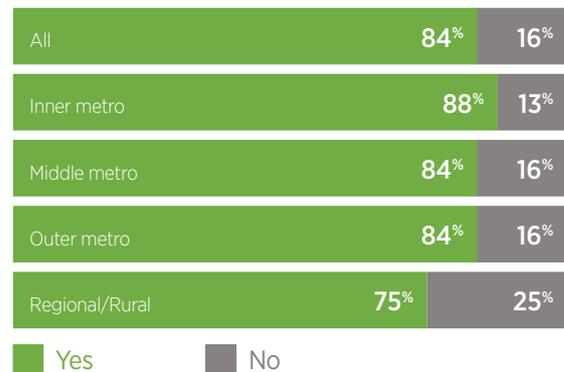


The development of tangible resources that can be provided at professional development sessions or accessed through the website is one way that the benefits of this project will be sustained with minimal additional or ongoing funding. The CLE presentations developed by ISP staff can continue to be used for professional development (with updates

as necessary). The feedback from these suggests that the handouts and factsheets that the ISP staff either developed or contributed to developing will be useful, while evidence from the Worker Help Line follow up surveys suggests some of these resources have already been used (see Figure 27).

Figure 27: Worker Help Line follow up survey responses to whether financial counsellors have used information/ advice/resources provided by SSRV beyond the initial matter, broken down by location of financial counsellor services (n=20)

Used info/ advice/ resources provided by SSRV to assist other clients or for other purposes



At the staff and management level at SSRV and management level at FCRC, there is a very strong commitment to continuing the project and consolidating the success of the past 12 months. Consultations with SSRV staff and FCRC management made clear that they felt the project was having an impact and there was a desire to continue both the project and the collaboration into 2020.

Finally, the project was successful in obtaining funding for a second year in September 2019, based on the demonstrated benefits of the project to date. This ensures the project can build on the work of the first year and recommendations have been provided in the next section to focus on further developing the capacity among both financial counsellors and at SSRV, as well as sustaining benefits beyond the end of the second year of the project.

8. Conclusions, recommendations and focus for year two arising from ISP year one evaluation



In one year of operation, the ISP has demonstrated a viable model for social security specialists and financial counsellors to work together to enhance the capability of both practitioners and deliver better outcomes for clients. Evidence gathered throughout the ISP and detailed in this report demonstrates the success of the approach undertaken, and yielded lessons for the organisations involved and for integrated practice more broadly.

The work undertaken has received strong support from the stakeholders involved, notably numerous financial counsellors, and there is both momentum and commitment from the two implementing partners to continue the program. The results from the first year have secured additional funding for the project to continue and identified areas for improvement and future action.

A set of recommendations to guide future project delivery and ongoing monitoring and evaluation are provided below.

Table 7: Project Delivery Recommendation

Aspect	Recommendation
Professional Development / Community Legal Education	1. Respond to the positive feedback from CLE sessions and high demand for further training by: <ol style="list-style-type: none"> a. scheduling in follow-up or refresher sessions with attendees from 2019 b. liaising with 2019 attendees to identify additional suitable organisations and audiences for CLE
	2. Respond to demand for further resources by developing fact sheets or templates for: <ol style="list-style-type: none"> a. A toolkit for Centrelink debts (akin to ‘DSP toolkit’) b. Centrelink decisions and how to challenge them when to make a complaint to the Commonwealth Ombudsman <p>To minimise the burden of producing these, the resources should leverage or direct people to publicly available information from other legal organisations or on the AAT/ Ombudsman websites as appropriate.</p>
	3. Incorporate the Integrated Practice case studies from year one of the project into future CLE sessions
	4. Share case studies through established FCRC communication channels and/or directly with Financial Counsellors
	5. Consider if the ISP legal education presentations can be included in Financial Counselling diploma / formal education
	6. Consider outreach client sessions where FCs can book clients for ‘one off’ direct advice sessions/collaborative casework with SSRV
Systemic issues	7. Consult with the FCRC Centrelink Working Group and identify strategies to build systemic issue engagement into community legal education sessions, e.g. by developing a simple tool for workers to use to identify and communicate existing or emerging system issues
	8. Meet every 6-8 weeks with FCRC policy team to discuss emerging issues and CLE sessions to plan potential advocacy or systemic work
	9. Meet with the Federation of Community Legal Centres and other relevant audiences (e.g. Department of Justice) to demonstrate outcomes and generate support
	10. Work with FCRC and/or Centrelink Working Group to have a ‘ready reference’ to relevant sections of the legislation
Developing and strengthening relationships with financial counsellors	11. Continue to focus on engagement with rural and regional financial counsellors, particularly where there are opportunities for face to face meetings or joint client meetings.
	12. Recognising the value of ‘closing the loop’ on matters, ISP staff should follow up with all financial counsellors (and potentially clients) after casework to close off the file and, for referred matters, to ensure they know what has happened.

Table 8: Monitoring and Evaluation Recommendations

Aspect	Recommendation
Enhancing data collection	<ol style="list-style-type: none">1. Schedule a review with project team in early 2020 to consolidate and streamline existing M&E tools, including:<ol style="list-style-type: none">a. an assessment of which data points are required again next year or need to be addedb. Identifying how data collection / analysis tools can be incorporated into existing processes at SSRV in terms of timing and systems2. Employ an interactive app during presentation at FCRC 2020 conference to ask survey questions of larger audience, e.g. Poll Everywhere, Mentimeter, Sli.Do
Expanding data collection	<ol style="list-style-type: none">3. To help substantiate or discard a possible driver of the low casework volume, delve into trends in DSP and Debt appeals data statewide and compare that to matters at SSRV to discern whether matters are growing and not coming to SSRV's attention or there are simply fewer matters4. Leverage the updates to the SSRV website to capture more data on website traffic5. If feasible, collect more granular data through the Worker Help Line (e.g. specific issue, client demographics) which can be used to identify systemic issues

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10. Attachments

Attachment A: Theory of Change Assumptions

- The complexity of the social security system means that errors by individuals or by Centrelink decision-makers are common.
- Disadvantaged people are particularly vulnerable to legal problems including multiple legal problems. Social security law problems feature amongst the multiple legal problems. (Law and Justice Foundation of NSW research).
- Disadvantaged people often rely on social security payments as their primary source of income. However, they often don't identify stresses and disputes with Centrelink as legal problems. (SSRV/Justice Connect Homeless Law survey of clients regarding Centrelink problems)
- In assisting their clients, financial counsellors often come across related social security issues.
- Most financial counsellors view assisting clients with social security matters, to the extent appropriate within their professional role, as part of their responsibility.
- Financial counsellors want to understand social security guidelines and procedures so they can undertake the related work that is within their scope of practice and work role/capacity.
- Financial counsellors want to make good (warm) client referrals to relevant agencies for appropriate assistance when a matter moves outside of their scope or capacity.
- There is a spectrum of awareness, skills, confidence and capacity amongst financial counsellors to undertake social security related work so the multi-pronged approach of this project should assist financial counsellors along that spectrum.
- The point at which a social security problem becomes a legal matter is not always clear to all parties.
- SSRV has a long history of working with financial counsellors. The ISP provides an opportunity to formalise and promote this relationship, providing the basis for greater collaboration aimed at improving client outcomes.
- Financial counsellors have experience in working with other specialist community legal centres (Consumer Action Law Centre and Women's Legal Service). This provides confidence in the potential process and models for service provision.
- SSR has a growing body of experience in formally engaging with and supporting other professionals to identify and respond (as appropriate within their work role) to social security issues (capability building).
- The range of issues experienced by many SSRV clients mean that they could benefit from assistance from a financial counsellor.
- SSRV staff are willing and have the capacity to trial and engage in integrated practice with financial counsellors.
- Clients want to receive and are willing to engage with holistic, integrated services.
- Integrated practice between financial counsellors and social security law experts will result in improved client outcomes.
- Increased awareness of and engagement with respective services, and positive experiences and successful outcomes, will build confidence and capability on worker, organisational and sector levels, and will cultivate integrated practice.
- In the course of integrated practice, financial counsellors and social security law experts will identify systemic trends and issues.

Attachment B: Evaluation Rubrics

Year 1

Evaluation rubrics are a way to set up criteria and standards for assessing different levels of performance. They help assess the achievement of more complex and subjective outcomes, which may not have clear targets or thresholds that we can formulate at an early stage, and aid the overall process of synthesising evidence into an overall evaluative judgement.

The following tables lists the evaluation questions for this project and rubrics, where applicable.

Evaluation questions	Poor	Adequate	Good	Excellent
Appropriateness				
<i>To what extent was the project implemented as intended?</i>	N/A			
<i>What, if any, changes were made and what were the reasons for these?</i>	N/A			
<i>To what extent were the underlying program theory and assumptions substantiated or challenged?</i>	N/A			
Process				
<i>In what ways was integrated practice between social security law specialists and financial counsellors implemented/ demonstrated through the project?</i>	<ul style="list-style-type: none"> No examples of integrated activities occurring with financial counsellors/ organisations No CLE or joint advocacy activities delivered 	<ul style="list-style-type: none"> Some examples of integrated activities occurring with financial counsellors/ organisations At least 3 CLE and/or 1 joint advocacy activity delivered 	<ul style="list-style-type: none"> A number of examples of integrated activities occurring with financial counsellors/ organisations 6 CLE and at least 1 joint advocacy activity delivered 	<ul style="list-style-type: none"> A number of examples of integrated activities occurring with financial counsellors/ organisations More than 6 CLE and more than 2 advocacy activities delivered, including requests from organisations with whom SSRV did not previously have relationships Sector stakeholders and decision makers (e.g. targets of advocacy and policy work) respond favourably to work
<i>In what ways and to what extent did these approaches replicate, build on to or differ from how SSRV staff and financial counsellors had worked together prior to the project?</i>	<ul style="list-style-type: none"> Majority of SSRV staff and financial counsellors consulted express no change in ways of working since the project or negative change 	<ul style="list-style-type: none"> At least half of SSRV staff and financial counsellors consulted express positive changes in ways of working 	<ul style="list-style-type: none"> Majority of SSRV staff and financial counsellors consulted express positive changes in ways of working, and can point to specific examples 	<ul style="list-style-type: none"> All SSRV staff and financial counsellors consulted express positive changes in ways of working, and can point to specific examples

Evaluation questions	Poor	Adequate	Good	Excellent
Process				
<i>What were the strengths and weaknesses of the approaches to integrated practice as implemented in the project?</i>	N/A			
<i>Are there any suggestions for improvement to project design and implementation?</i>	N/A			
Effectiveness				
<i>To what extent has financial counsellor awareness and understanding of SSRV's services and pathways to services changed? What factors contributed to this change?</i>	<ul style="list-style-type: none"> • Less than 50% of financial counsellors who attend CLE sessions and complete feedback sheets report "improved awareness of SSRV and its service" • No improvement in rating of financial counsellors at FCRC 2019 Conference (compared to 2018 baseline results) for knowledge of SSRV services and referral pathways • No change in number of referrals into SSRV from financial counsellors (compared to 2018) 	<ul style="list-style-type: none"> • 50-75% of financial counsellors who attend CLE sessions and complete feedback sheets report "improved awareness of SSRV and its service" • Up to 0.5 point average improvement in rating of financial counsellors at FCRC 2019 Conference (compared to 2018 baseline results) for knowledge of SSRV services and referral pathways • Slight increase (10-20%) in number of referrals into SSRV from financial counsellors (compared to 2018) 	<ul style="list-style-type: none"> • 75% of financial counsellors who attend CLE sessions and complete feedback sheets report "improved awareness of SSRV and its service" • Up to 1 point average improvement in rating of financial counsellors at FCRC 2019 Conference (compared to 2018 baseline results) for knowledge of SSRV services and referral pathways • Moderate increase (20-40%) in number of referrals into SSRV from financial counsellors (compared to 2018) 	<ul style="list-style-type: none"> • Over 75% of financial counsellors who attend CLE sessions and complete feedback sheets report "improved awareness of SSRV and its service" • Over 1 point average improvement in rating of financial counsellors at FCRC 2019 Conference (compared to 2018 baseline results) for knowledge of SSRV services and referral pathways • Large increase (over 40%) in number of referrals into SSRV from financial counsellors (compared to 2018)

Evaluation questions	Poor	Adequate	Good	Excellent
<p>Effectiveness</p> <p><i>To what extent has financial counsellor's confidence and capability in detecting and/or assisting clients with social security issues changed? To what can this change be attributed? How was this change reflected in practice?</i></p>	<ul style="list-style-type: none"> • Less than 50% of financial counsellors who attend CLE sessions and complete Feedback sheets report they “are more confident in identifying and responding to social security matters” or “anticipate they will use learnings to better assist people” • Less than 50% of financial counsellors who respond to follow up survey indicate that as a result of the assistance provided by SSRV they have increased confidence and/or capability in identifying and assisting people with social security issues • Less than 50% of financial counsellors assisted through the Worker Help Line, who provide feedback at the completion of the interaction, indicate that the assistance was timely, relevant and useful • None can give an example of how this has been reflected in their work 	<ul style="list-style-type: none"> • 50-75% of financial counsellors who attend CLE sessions and complete Feedback sheets report they “are more confident in identifying and responding to social security matters” or “anticipate they will use learnings to better assist people” • 50-75% of financial counsellors who respond to follow up survey indicate that as a result of the assistance provided by SSRV they have increased confidence and/or capability in identifying and assisting people with social security issues • 50-75% of financial counsellors assisted through the Worker Help Line, who provide feedback at the completion of the interaction, indicate that the assistance was timely, relevant and useful • Only a few can give an example of how this has been reflected in their work 	<ul style="list-style-type: none"> • 75% of financial counsellors who attend CLE sessions and complete Feedback sheets report they “are more confident in identifying and responding to social security matters” or “anticipate they will use learnings to better assist people” • 75% of financial counsellors who respond to follow up survey indicate that as a result of the assistance provided by SSRV they have increased confidence and/or capability in identifying and assisting people with social security issues • 75% of financial counsellors assisted through the Worker Help Line, who provide feedback at the completion of the interaction, indicate that the assistance was timely, relevant and useful • Some can give an example of how this has been reflected in their work 	<ul style="list-style-type: none"> • Over 75% of financial counsellors who attend CLE sessions and complete Feedback sheets report they “are more confident in identifying and responding to social security matters” or “anticipate they will use learnings to better assist people” • Over 75% of financial counsellors who respond to follow up survey indicate that as a result of the assistance provided by SSRV they have increased confidence and/or capability in identifying and assisting people with social security issues • Over 75% of financial counsellors assisted through the Worker Help Line, who provide feedback at the completion of the interaction, indicate that the assistance was timely, relevant and useful • All can give an example of how this has been reflected in their work
<p><i>To what extent has SSRV staff awareness and understanding of financial counsellor/sector role and pathways to services changed? What factors contributed to this change?</i></p>	<p>None of the SSRV staff (outside of project lead) express an increase in understanding of the financial counsellor/sector role or pathways to services</p>	<p>Half of the SSRV staff (outside of project lead) express at least a modest increase in understanding of the financial counsellor/sector role and pathways to services</p>	<p>Majority of the SSRV staff (outside of project lead) express at least a modest increase in understanding of the financial counsellor/sector role and pathways to services</p>	<p>Majority of the SSRV staff (outside of project lead) express a large increase in understanding of the financial counsellor/sector role and pathways to services</p>

Evaluation questions	Poor	Adequate	Good	Excellent
<p>Effectiveness</p> <p><i>To what extent has SSRV staff confidence and capability in detecting clients who may benefit from financial counsellor assistance and/or in linking the client to this assistance changed? What factors contributed to this change? How was this change reflected in practice? (Including change in the number of client referrals to financial counsellors or in the seeking of in-house financial counsellor support).</i></p>	<ul style="list-style-type: none"> • None of the SSRV staff (outside of project lead) express an increase in confidence and capability to detect clients • No increase in referrals received or made between SSRV and financial counsellors (compared to 2018) • No examples of more warm/facilitated referrals or impact in practice/on clients 	<ul style="list-style-type: none"> • Half of the SSRV staff (outside of project lead) express at least a modest increase in confidence and capability to detect clients • Slight increase (~10%) in referrals received or made between SSRV and financial counsellors (compared to 2018) • No examples of more warm/facilitated referrals or impact in practice/on clients 	<ul style="list-style-type: none"> • Majority of the SSRV staff (outside of project lead) express at least a modest increase in confidence and capability to detect clients • Moderate increase (~20%) in referrals received or made between SSRV and financial counsellors (compared to 2018) • Some examples of more warm/facilitated referrals or impact in practice/on clients 	<ul style="list-style-type: none"> • Majority of the SSRV staff (outside of project lead) express a large increase in confidence and capability to detect clients • Large increase (over 40%) in referrals received or made between SSRV and financial counsellors (compared to 2018) • Multiple examples of more warm/facilitated referrals and impact in practice/on clients

Evaluation questions	Poor	Adequate	Good	Excellent
<p>Effectiveness</p> <p><i>In what ways did the project engage with financial counsellors and organisations in rural and regional Victoria? What changes have resulted from this engagement?</i></p>	<ul style="list-style-type: none"> • No evidence of engagement with rural and regional financial counsellors • No change in referrals or calls to worker line from rural/regional financial counsellors • No requests from rural/regional financial counsellors for CLE • Less than 50% of rural/regional financial counsellors who attend CLE sessions and complete Feedback sheets report “improved awareness of SSRV and its service” • No improvement in rating of rural/regional financial counsellors at FCRC 2019 Conference (compared to 2018 baseline results) for knowledge of SSRV services and referral pathways • Project team cannot articulate specific changes 	<ul style="list-style-type: none"> • Engagement in at least 1 rural / regional area • Slight increase (10%) in referrals received or made between SSRV and rural / regional financial counsellors (compared to 2018) • Slight increase (10%) in requests or attendance of CLE activities from rural/regional financial counsellors • 50-75% of rural/regional financial counsellors who attend CLE sessions and complete Feedback sheets report “improved awareness of SSRV and its service” • Up to 0.5 point average improvement in rating of rural/regional financial counsellors at FCRC 2019 Conference (compared to 2018 baseline results) for knowledge of SSRV services and referral pathways • Project team can articulate specific changes 	<ul style="list-style-type: none"> • Engagement with multiple rural and regional financial counsellors and at least 2 rural/regional areas • Moderate increase (20-40%) in referrals received or made between SSRV and rural regional financial counsellors (compared to 2018) • Moderate increase (20-40%) in requests or attendance of CLE activities from rural/regional financial counsellors • 75% of rural/regional financial counsellors who attend CLE sessions and complete Feedback sheets report “improved awareness of SSRV and its service” • Up to 1 point average improvement in rating of rural/regional financial counsellors at FCRC 2019 Conference (compared to 2018 baseline results) for knowledge of SSRV services and referral pathways • Both project team and financial counsellors/ organisations can articulate specific changes 	<ul style="list-style-type: none"> • Engagement with multiple rural and regional A financial counsellors and at least 3 rural/regional areas • Large increase (over 40%) in referrals received or made between SSRV and rural/regional financial counsellors (compared to 2018) • Large increase (over 40%) in requests or attendance of CLE activities from rural/regional financial counsellors • Over 75% of rural/regional financial counsellors who attend CLE sessions and complete Feedback sheets report “improved awareness of SSRV and its service” • Over 1 point average improvement in rating of rural/regional financial counsellors at FCRC 2019 Conference (compared to 2018 baseline results) for knowledge of SSRV services and referral pathways • Both project team and financial counsellors/ organisations can articulate specific changes

Evaluation questions	Poor	Adequate	Good	Excellent
Effectiveness				
<i>To what extent has the project provided evidence that integrated practice between social security law experts and financial counsellors contributed to improved client outcomes? Which approaches were most effective in improving client outcomes?</i>	<ul style="list-style-type: none"> Neither project team or financial counsellors/ organisations consulted express any perceived improvement in client outcomes specifically from integrated practice Majority of clients consulted express dissatisfaction with service or outcomes achieved 	<ul style="list-style-type: none"> Project team and at least half of financial counsellors/ organisations consulted express perceived improvement in client outcomes specifically from integrated practice but cannot point to specific example At least half of clients consulted express satisfaction with service and outcomes achieved being better than expected 	<ul style="list-style-type: none"> Project team and at least half of financial counsellors/ organisations consulted express perceived improvement in client outcomes specifically from integrated practice and can point to specific examples Majority of clients consulted express satisfaction with service and outcomes achieved being better than expected 	<ul style="list-style-type: none"> Project team and majority of financial counsellors/ organisations consulted express perceived improvement in client outcomes specifically from integrated practice and can point to specific examples All clients consulted express satisfaction with service and outcomes achieved being better than expected
<i>In what ways did the ISP contribute to the identification of systemic issues and to proposed action? To what extent has action impacted upon laws and procedures?</i>	<ul style="list-style-type: none"> 1 joint action proposed or undertaken for systemic issues Sector stakeholders (e.g. Centrelink Working Group) express dissatisfaction with engagement and advocacy activity Project partners express dissatisfaction with engagement and advocacy activity 	<ul style="list-style-type: none"> 2-3 joint actions undertaken between ISP project team and financial counsellors Sector stakeholders (e.g. Centrelink Working Group) express moderate satisfaction with engagement and advocacy activity Project partners express moderate satisfaction with engagement and advocacy activity No evidence of impact upon any laws or procedures 	<ul style="list-style-type: none"> 4 joint actions undertaken between ISP project team and financial counsellors Sector stakeholders (e.g. Centrelink Working Group) express strong satisfaction with engagement and advocacy activity Project partners express strong satisfaction with engagement and advocacy activity No evidence of impact upon any laws or procedures 	<ul style="list-style-type: none"> 5 or more joint actions undertaken between ISP project team and financial counsellors Sector stakeholders (e.g. Centrelink Working Group) express strong satisfaction with engagement and advocacy activity Project partners express strong satisfaction with engagement and advocacy activity Examples of actual or likely impact upon laws or procedures
<i>To what extent and in what ways did the relationship between SSRV and FCRC change as a result of partnering to implement the ISP? What were the outcomes of this change?</i>	N/A			
<i>Were there any unexpected outcomes or learnings arising from the project?</i>	N/A			

Evaluation questions	Poor	Adequate	Good	Excellent
Sustainability				
<i>What evidence is there to suggest that the capacity that the project has developed in participating financial counsellors/ organisations and SSRV staff/organisation will be sustained beyond the life of the project?</i>	<ul style="list-style-type: none"> • The majority of financial counsellors and SSRV staff consulted do not believe that capacity development will be sustained or express interest in continuing the work. • Neither SSRV nor FCRC management believe the capacity will be sustained and there is minimal commitment to the work 	<ul style="list-style-type: none"> • At least half of financial counsellors and SSRV staff consulted believe that capacity development will be sustained or express interest in continuing the work • Both SSRV and FCRC management believe the capacity will be sustained and there is strong commitment to the work • No additional funding or resources identified 	<ul style="list-style-type: none"> • A majority of financial counsellors and SSRV staff consulted believe that capacity development will be sustained or express interest in continuing the work • Both SSRV and FCRC management believe the capacity will be sustained and there is strong commitment to the work. • Demonstrable resources developed through this Project which can be accessed beyond the project (e.g. templates, guides) • Further funding options and resources have been identified to continue or expand 	<ul style="list-style-type: none"> • A majority of financial counsellors and SSRV staff consulted believe that capacity development will be sustained or express interest in continuing the work • Both SSRV and FCRC management believe the capacity will be sustained and there is strong commitment to the work • Demonstrable resources developed through this Project and evidence that they have been used by individuals/ organisations outside of SSRV • Further funding options and resources have been secured



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Standards for agencies employing financial counsellors

Version 1: January 2015

financial
counselling
australia



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About Financial Counselling

Financial counsellors assist consumers in financial difficulty. They provide information, support and advocacy to help consumers deal with their immediate financial situation and minimise the risk of future financial problems. The majority of financial counsellors work in community organisations, although some are employed by government. Their services are free, confidential and impartial.

Financial counsellors have extensive knowledge in a range of areas including consumer credit law, debt enforcement practices, the bankruptcy regime, industry hardship policies and government concession frameworks. Financial counsellors also have training in counselling skills.

How Does a Financial Counsellor Assist a Client?

Financial counsellors assist their clients to get a clear picture of their overall financial situation. They will listen to their client's story, providing support as necessary and explain the various options open to the client. For example, this could include:

- assessing whether any debts are legally owed, if the amount said to be owing is correct or whether the contract was fair
- explaining what options clients may have in relation to their debts, weighing up the pros and cons of each option
- providing assistance in completing documentation, for example, in lodging a dispute with an external dispute resolution scheme
- empowering the client to negotiate or advocate with creditors and others on their own behalf, or negotiating and/or advocating on behalf of the client
- developing a budget
- providing ongoing support and referral to other services, for example legal services, No Interest Loan Scheme providers, health or housing services, that may also assist.

Financial counsellors aim to empower their clients so that they make their own informed choices. Their services are free, independent, confidential and non-judgmental.

Financial counsellors also work to prevent financial difficulty through community education and by providing input to government and industry policy development processes.

About State and Territory Financial Counselling Associations

There is a financial counselling association in each State and Territory in Australia. Amongst other things, a core role of these associations is to set standards for membership, including professional development and supervision requirements.

About Financial Counselling Agencies

Many different agencies employ financial counsellors, ranging from large charities, to community legal centres to neighbourhood centres. The work of financial counsellors sometimes involves providing financial advice and engaging in credit activities,¹ both of which would normally require specific licences. Agencies employing financial counsellors are exempt from requirements to hold an Australian Financial Services Licence and an Australian Credit Licence, as long as the agency meets certain conditions.

¹ See ASIC Regulatory Guide 203 'Do I need a credit licence' for examples of credit activities.

INTRODUCTION

Purpose

The purpose of these standards is to assist agencies offering financial counselling services to provide a high quality service.

The standards set out the essential requirements an agency should meet if it wishes to offer financial counselling services.

Application

In this document “financial counselling services” means counselling and advocacy services provided predominantly for the purpose of assisting individuals who are in financial difficulty to address their current situation.

These guidelines apply to all agencies that provide free financial counselling services. A “free” financial counselling service is one where the client is not charged a fee to use the service.

In particular, the standards apply:

- To agencies offering generalist or specialist financial counselling services, such as gambling financial counselling
- Whether financial counselling is the only service provided by that agency or as part of a broader suite of services
- Whether the agency provides financial counselling through the use of paid staff, contractors or volunteers
- Whether the agency is a community based or a government service
- Whether the service is provided face-to-face, by telephone, by email or other electronic means, or by any other means.

Why have these standards been developed?

The standards were produced based on feedback from the financial counselling sector about the need for workplace guidance to support financial counsellors in their roles.

Benefits for Agencies

By adopting the standards, agencies employing financial counsellors will be demonstrating a commitment to high quality and consistent service delivery. The standards will also assist agencies in managing risk.

Funding for financial counselling services is not always adequate and varies between funding bodies. Separately, it is important to continue discussions with funders about funding levels overall so that adequate resourcing is provided to enable agencies to meet these standards.

Status of the standards

Adoption of these standards by agencies is on a voluntary basis and we strongly encourage all agencies to adopt them as part of their normal quality frameworks.

The standards supplement any legal or regulatory obligations that an agency may have. However, we note that some funding bodies may require agencies to adopt these standards as a requirement in funding agreements.

Accompanying Checklist

The standards are accompanied by a separate checklist. This has been prepared to assist agencies in assessing their compliance with the Standards. This checklist should be used each year to check for compliance with the Standards.

Review Date

These standards will be reviewed three years after implementation. The review will be undertaken by FCA, in consultation with financial counsellors, financial counselling agencies, funders and regulators.

STANDARD 1 KEY SERVICE FEATURES

1.1. Service is free to clients

The agency does not impose any fees or charges upon clients in relation to any aspect of the financial counselling service.

This will be achieved by:

- 1.1.1. Ensuring that the agency, and each person acting on its behalf, does not request or accept payment of any fees or charges by clients.

1.2. Service is free of conflict of interest

The agency ensures that financial counselling services are provided free of any conflict of interest.

This will be achieved by ensuring that:

- 1.2.1. The agency does not place itself in a position where a relationship with a third party could be seen to conflict with its obligation to provide independent financial counselling services to its clients.
- 1.2.2. The agency does not accept a client where the relationship between an individual staff member and a third party could be seen to conflict with the agency's obligation to provide independent financial counselling services to that client. Staff in the agency have a duty to disclose such conflicts.
- 1.2.3. The agency does not accept a client where the interests of an individual staff member could be seen to conflict with the agency's obligation to provide independent financial counselling services to that client.
- 1.2.4. The agency does not accept a new client where providing services to that client could conflict with its obligations to a previous or existing client.

1.3. Service is confidential

The agency ensures that it provides a confidential service and that it collects and stores client information in a manner that respects the client's privacy and maintains the client's confidentiality, subject to the agency's legal obligations (including under the Privacy Act 1988).

This will be achieved by:

- 1.3.1.** Ensuring that clients waiting in reception areas cannot inadvertently access or see the personal information of other clients that may be collected at that point or is visible on computer screens.
- 1.3.2.** Ensuring client interviews are able to be conducted without being overheard by other clients, staff or members of the public.
- 1.3.3.** Ensuring client registers and client files are kept securely and are only accessed by staff members who have been authorised to do so.
- 1.3.4.** Ensuring staff do not communicate about the client with a third party unless:
 - The client has authorised that communication, or
 - The appropriate supervisor in the service has authorised the communication due to the need to protect the client, a staff member or another person, from imminent risk of serious harm.
- 1.3.5.** Informing the client why the collection of information is necessary, how that information is stored and for how long, and how the client can access the information if they wish.
- 1.3.6.** Collecting only such personal information from clients as is necessary to assess the client's needs, provide financial counselling services and meet reporting requirements to funding bodies.
- 1.3.7.** Ensuring that hard copy and electronic information is stored securely.

1.4. Service is accessible

The agency ensures that its services are accessible and welcoming to all clients, including people from culturally and linguistically diverse backgrounds, people with disabilities and other people with special needs.

This will be achieved by:

- 1.4.1. Providing a range of access options including telephone, office visit and, in appropriate circumstances or where required by funding agreements, broader access options including outreach services, video conferencing, Skype or web chat.
- 1.4.2. Ensuring interpreters are used where they are required.
- 1.4.3. Facilitating reasonable adjustments so that people with disabilities can access the service, for example by making appropriate changes to building access.
- 1.4.4. Ensuring reception areas provide a welcoming and comfortable environment.
- 1.4.5. Greeting clients in a courteous helpful manner that conveys respect.
- 1.4.6. Agreeing to clients' requests to have a support person present unless it is inappropriate, for example, where there may be a conflict of interest.

1.5. Service is equitable

The agency ensures that clients are treated in a fair and non-discriminatory manner.

This will be achieved by:

- 1.5.1. Ensuring all clients are treated with respect.
- 1.5.2. Ensuring staff are able to provide culturally appropriate services to Aboriginal and Torres Strait Islander clients and to clients from culturally and linguistically diverse backgrounds.
- 1.5.3. Ensuring staff have an understanding of how to work with clients with special needs, for example people affected by domestic violence, homelessness, mental health issues, or addiction.
- 1.5.4. Making reasonable adjustments to meet the special needs of clients.

1.6. Service complies with licensing relief

The agency ensures that it complies with the licensing relief for the agency, under both the Corporations Act 2001 (ASIC Class Order CO3/1063) and the National Consumer Credit Protection Regulations 2010 (Regulation 20).

This will be achieved by ensuring that the agency:¹

- 1.6.1.** Does not charge any fees or receive any remuneration arising from the financial counselling service.
- 1.6.2.** Does not run, and is not associated with, a financial services business.
- 1.6.3.** Ensures its financial counselling staff do not provide any financial product advice or credit activity advice outside the terms of the appropriate licensing exemptions.
- 1.6.4.** Ensures its financial counsellors are members of, or eligible for membership of, the relevant State or Territory financial counselling association.
- 1.6.5.** Ensures its financial counsellors have adequate skills and knowledge to deliver the financial counselling service.

1.7. Service complies with Code of Ethical Practice

The agency ensures that the financial counsellors employed comply with the Australian Financial Counselling Code of Ethical Practice.

This will be achieved by ensuring that:

- 1.7.1.** The financial counsellor has a hard copy of the Code or the agency makes an electronic copy of the Code available.²
- 1.7.2.** The financial counsellor has access to appropriate training about the Code.³
- 1.7.3.** If ethical dilemmas arise, that the Code is one mechanism used to help resolve them.

¹ This section essentially reflects the wording in the licensing relief for agencies offering financial counselling services: ASIC Class Order CO3/1063 re an Australian Financial Services Licence and s 20(5) of the National Consumer Credit Protection Regulations 2010 re a Credit Licence.

² The Code is also available for download from the website of Financial Counselling Australia.

³ This could for example be provided in-house. FCA is also planning to develop online training modules based on the Code of Ethical Practice in the future.

1.8. Service integrates casework with policy and systemic advocacy

The agency ensures that casework experience is used to inform its policy and advocacy activities and that of other advocacy bodies.

This will be achieved by:

- 1.8.1.** Encouraging and supporting financial counsellors to identify policy issues and advocacy opportunities arising from their casework.
- 1.8.2.** Encouraging and supporting financial counsellors, in ways consistent with the agencies own policies and practices, to contribute to policy development and advocacy opportunities with other organisations.

STANDARD 2 CLIENTS: INTAKE, CASEWORK, REFERRAL AND COMPLAINT HANDLING

2.1. Use appropriate intake procedures

The agency uses a systematic and comprehensive intake procedure for all financial counselling clients that assesses the client's broader needs and ensures that financial counselling is offered only when it is the best option for the client.

This will be achieved by:

- 2.1.1. Having a documented process that describes how
 - clients' needs are assessed
 - clients' cases are prioritised, including identifying urgent matters and how they will be dealt with
 - services are matched to clients' needs
- 2.1.2. Ensuring staff inform the client about the services the agency is able to offer and support the client to make an informed choice about whether to participate in the service.
- 2.1.3. Ensuring staff refer the client for other services as appropriate to address broader needs.

2.2. Provide casework in a way that builds client capacity

The agency delivers a service that builds the capacity and self-sufficiency of the client in managing their current and future financial issues.

This will be achieved by ensuring:

- 2.2.1. The service maximises the client's participation in planning, decision-making and the resolution of issues, so that the client determines the course of action.
- 2.2.2. That staff assist the client to further understand the cause of their financial problems, identify changes to minimise further financial problems and build financial capability

2.3. Conduct casework according to good financial counselling practice

The agency ensures that the casework it conducts reflects good financial counselling practice.

This will be achieved by ensuring that:

- 2.3.1. The agency provides a range of resources and tools to assist staff to provide a service that reflects good financial counselling practice including triage tools⁴ and checklists.
- 2.3.2. In each case, consideration is given as to whether the client is liable for the debts that are alleged to be owing, and if owing, whether the amount is correctly calculated.
- 2.3.3. The agency supports the financial counsellor to act as an advocate when negotiating with third parties.
- 2.3.4. Where appropriate, the agency works collaboratively with other support workers who are assisting the client.
- 2.3.5. The agency has procedures in place to deal with the situation where the client's ability to provide instructions is uncertain.
- 2.3.6. The service provided is within the confines of a financial counselling service and does not exceed it.
- 2.3.7. The agency has appropriate procedures in place to review the file work conducted by financial counsellors.

2.4. Provide appropriate referrals

The agency provides an effective referral service for clients who need other services in addition to financial counselling or where financial counselling is not the most appropriate service.

This will be achieved by:

- 2.4.1. Maintaining up to date information about legal, health, social and support services that are able to accept referrals.
- 2.4.2. Liaising with legal, health, social and support services to develop referral pathways to assist clients to access those services.
- 2.4.3. Using warm referrals to assist clients to contact other services in cases where that is necessary.⁵

4 Triage refers to the process of obtaining information from the client in order to assess eligibility for the service, as well as the urgency of the matter.

5 A 'warm referral' occurs when the financial counselling service contacts the other service, for example to make an appointment. The service, with the client's consent, may also pass on any relevant information

2.5. Provide a complaint handling mechanism

The agency has an effective system for handling client complaints.

This will be achieved by:

- 2.5.1. Having a documented complaint handling process that is fair, accessible, responsive and efficient.⁶
- 2.5.2. Ensuring that clients are aware of their right to make a complaint and how to go about it.

⁶ See Commonwealth Ombudsman, 'Better Practice Guide to Complaint Handling' 2009 for a guide. Available at <http://www.ombudsman.gov.au/docs/better-practice-guides/onlineBetterPracticeGuide.pdf>

STANDARD 3 HUMAN AND PHYSICAL RESOURCES

3.1. Engage qualified financial counsellors

The agency engages qualified financial counsellors who have appropriate training and experience or who, once employed, obtain the relevant qualification.

This will be achieved by ensuring that each staff member who provides financial counselling services for an agency:

- 3.1.1. Has undergone induction training with the agency.
- 3.1.2. Is a member of, or is eligible to be a member of, the financial counselling association in the state or territory in which the financial counsellor works.⁷
- 3.1.3. Holds a Diploma of Community Services (Financial Counselling) or is actively studying for this qualification.
- 3.1.4. Has the level of skills and knowledge sufficient to provide good quality financial counselling services having regard to the type of service that person provides and having regard to the level of financial counselling expertise and the level of professional supervision available to that person.
- 3.1.5. Is committed to offering services that are non-judgmental and in the best interests of the client and adequately understands both the personal and systemic causes of financial hardship and the impact financial difficulty can have on an individual's life.

⁷ The associations are: Financial Counselling Tasmania, Financial and Consumer Rights Council (the Victorian body), Financial Counsellors ACT, Financial Counsellors Association of NSW, Financial Counsellors Association of Queensland, Money Workers Association of the NT, Financial Counsellors Association of WA, South Australian Financial Counsellors Association.

3.2. Support professional development

The agency supports the professional development of financial counsellors who deliver services on its behalf. In particular the agency ensures that financial counsellors are provided with opportunities for ongoing professional development and professional networking.

This will be achieved by:

- 3.2.1. Providing access to the necessary information resources so that financial counsellors can maintain and improve their skills and knowledge.
- 3.2.2. Supporting financial counsellors to continue their professional development by encouraging their attendance at professional development seminars, courses, conferences and other events that meet the requirements for membership set by state and territory financial counselling bodies. This support should include release from usual duties to attend such events during ordinary working hours and payment of reasonable costs for such events.
- 3.2.3. Supporting financial counsellors to participate in state and territory financial counselling bodies. This support should include supporting staff to attend professional development opportunities, professional networks or conferences organised by these bodies and, where appropriate, supporting staff to take up positions of responsibility within professional associations.
- 3.2.4. Supporting financial counsellors to participate in reflective practice, including facilitating access to programs outside the agency.

3.3. Provide supervision

The agency provides adequate professional financial counselling supervision for financial counsellors and fosters a culture of reflective practice.

This will be achieved by:

- 3.3.1. Providing professional supervision⁸ which covers both technical (casework) and counselling skills to financial counsellors at the level required for membership of state and territory financial counselling bodies.
- 3.3.2. Where such professional supervision is not available within the agency, covering the costs of establishing regular, ongoing, qualified external professional supervision relationships for financial counsellors working within the agency.⁹

8 Staff managing financial counsellors are sometimes described as providing 'supervision'. However this is a different use of the word and refers to the line management function.

9 We note that some agencies have entered into arrangements with each other so that supervision is provided on a quid pro quo basis between them.

3.4. Provide adequate physical resources

The agency ensures that financial counsellors have access to adequate physical resources in order to do their jobs.

This will be achieved by ensuring that each financial counsellor has adequate access to:

- 3.4.1.** A telephone
- 3.4.2.** A computer with access to the internet
- 3.4.3.** A scanner, photocopier and locked filing cabinet
- 3.4.4.** A space to interview clients that maintains privacy and confidentiality

STANDARD 4 OCCUPATIONAL HEALTH AND SAFETY

4.1. Provide support to staff dealing with difficult clients

The agency provides professional and personal support to staff in dealing with difficult or aggressive clients.

This will be achieved by:

- 4.1.1. Ensuring there are policies, procedures and training in place to support staff in dealing with difficult client interactions
- 4.1.2. Providing regular opportunities for debriefing and, where necessary, critical incident debriefing

4.2. Provide a safe workplace¹⁰

The agency provides a physical environment that is healthy and safe and suitable for the requirements of financial counselling.

This will be achieved by:

- 4.2.1. Providing a safe physical environment. In particular, all areas used for contact with clients should be subject to a risk assessment, and appropriate steps taken to minimise or eliminate risks to safety, for example, due to aggressive behaviour by clients.
- 4.2.2. Each agency should ensure that they have policies and procedures that cover the safety and security of staff working outside of the office.

4.3. Ensure workloads are manageable and appropriate

The agency ensures that the workload of each staff member is manageable having regard to the level of skill, experience and any special employment arrangements for that staff member.

This will be achieved by:

- 4.3.1. Ensuring workloads generally, as well as caseloads specifically, are reasonable and established in consultation and negotiation with the financial counsellor.

10 Agencies of course also have obligations under relevant workplace health and safety legislation.

STANDARD 5 RECORD KEEPING

5.1. Maintain a client record system

The agency has in place a system for opening, maintaining and closing client files.

This will be achieved by agencies:

- 5.1.1. Opening a file for each client.
- 5.1.2. Maintaining a central record of each file opened that allocates a unique identifier such as a number, code or name to each file.
- 5.1.3. Maintaining an orderly system for the storage of files so that files can be easily located and retrieved.
- 5.1.4. Maintaining a diary or bring-up system to ensure that important dates and time limits are identified and that files receive regular attention.
- 5.1.5. Maintaining a system for the closure of files to ensure that files are reviewed prior to closure.
- 5.1.6. Notifying clients in writing that their file has been closed, explaining why the file has been closed, how the file will be stored and for how long, enclosing any relevant correspondence and confirming, where feasible, that creditors have been notified.
- 5.1.7. Where feasible, notifying creditors that the client's file has been closed, that the agency is no longer acting for the client and any third party authorities are revoked.
- 5.1.8. Maintaining an archiving system that allows closed files to be retrieved within a reasonable period of time.
- 5.1.9. Ensuring that records are kept for the period of time required by the legislation that applies to those records.

5.2. Keep complete and legible files

The agency keeps complete and legible records in relation to each matter where it provides financial counselling services.

This will be achieved by ensuring files contain:

- 5.2.1. All relevant information about the client, including their personal details and any special requirements.
- 5.2.2. All information relevant to the case, including information on the client's income, expenditure, assets, liabilities, numbers and ages of dependents and housing and any other data as required.
- 5.2.3. Copies only of all documents provided by the client, with the originals returned to the client.
- 5.2.4. Copies of authorities signed by the client to allow the agency to contact third parties on the client's behalf.
- 5.2.5. Copies of any signed instructions by the client in relation to the conduct of the matter, or notes of discussions with the client confirming their instructions.
- 5.2.6. Copies of all correspondence (including letters, emails, facsimiles) sent or received on behalf of the client.
- 5.2.7. Copies of all documents prepared for or on behalf of the client.
- 5.2.8. Notes made by the financial counsellor of all contacts with the client.
- 5.2.9. Notes made by the financial counsellor of all contacts made with third parties on behalf of the client.
- 5.2.10. Notes of any research conducted on behalf of the client.
- 5.2.11. Copies of any agency checklists or forms used on this file.

STANDARD 6 ACCOUNTABILITY

6.1. Reporting to Funders

The agency fulfils the reporting requirements of its funders.

This will be achieved by ensuring that:

- 6.1.1. The agency submits reports to its funders in the required format and within the required time frames.
- 6.1.2. The agency advises funding bodies of any material changes to the organisation or service which may affect service delivery as soon as possible.¹¹

6.2. Data collection and monitoring

The agency collects and monitors data so that it has an understanding of the effectiveness of its financial counselling services.

This will be achieved by ensuring that the agency collects and analyses information concerning:

- 6.2.1. The quality of the service delivered including, where appropriate, the results of file reviews.
- 6.2.2. The productivity of the service, including, where appropriate, the number of clients contacting the agency, the number of files opened, the number of files finalised, the time spent on each file.
- 6.2.3. Levels of unmet demand for the service.
- 6.2.4. Demographic information about the clients who use the service.
- 6.2.5. Feedback from clients about the service including, for example, follow-up client surveys after a file has been closed or client evaluation forms.
- 6.2.6. The outcome for the client as a result of service.
- 6.2.7. Systemic issues that are identified in the course of service delivery.

¹¹ Examples of changes that may be material include: delivery locations, changes or loss of key personnel, changes to the organisation's constitution or governance impacting on the service.

6.3. Evaluation

The agency participates in evaluation concerning the effectiveness of its financial counselling services.

This will be achieved by:

- 6.3.1.** Conducting evaluation on a regular basis concerning service design, delivery and outcomes, including consideration of effectiveness and efficiency.
- 6.3.2.** Acting on relevant client feedback or other stakeholder feedback to change and improve service delivery.
- 6.3.3.** Participating in external evaluations of the financial counselling sector more broadly, where appropriate.

STANDARD 7 COMMUNITY DEVELOPMENT

7.1. Working with the community

The agency works with the community to actively represent the needs of people experiencing financial difficulties (where funding agreements permit this activity)

This will be achieved by ensuring that:

- 7.1.1. The service adopts a planned approach to working with the community based on the identified local, regional and state-wide community needs.
- 7.1.2. Strategies used in advocacy and community education about financial issues are appropriate for the purpose and the audience.

7.2. Building partnerships and networks to support service delivery

The agency builds strong partnerships and networks to support service delivery.

This will be achieved by ensuring that:

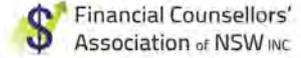
- 7.2.1. The agency participates in community networks and forums.
- 7.2.2. The agency targets its networking activities to those services that are relevant to supporting the delivery and accessibility of financial counselling services.

NATIONAL STANDARDS FOR

Membership & Accreditation

AUSTRALIAN STATE AND TERRITORY
FINANCIAL COUNSELLING ASSOCIATIONS

MARCH 2020



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This document sets out national standards for membership and accreditation of financial counsellors in Australia.

This is the second version of the standards and supersedes the 2015 version.

Financial counselling is a profession, with financial counsellors providing essential support and advocacy to people in hardship. The national membership standards are the basis for the shared identity of the profession and are underpinned by the Australian Financial Counselling Code of Ethical Practice. To this end, we have common standards for entry into, and ongoing membership of, the profession.

Having common standards ensures that financial counsellors are competent and remain so, and that clients will receive a consistent, high quality service.

The standards have been agreed by the State and Territory financial counselling associations:

- Financial Counselling Tasmania (FCT)
- Financial Counselling Victoria (FCVic)
- Financial Counsellors Association of NSW (FCAN)
- Financial Counsellors ACT (FC-ACT)
- Financial Counsellors Association of QLD (FCAQ)
- South Australian Financial Counsellors Association (SAFCA)
- Financial Counsellors Association of WA (FCAWA)

Financial counselling is a national profession and the development of national standards is consistent with this.

Interaction of the Standards with the Regulatory Framework

There are two types of licence that may apply to the work of financial counsellors.

- An Australian Financial Services Licence if you give advice about financial products. This obligation is imposed by the ***Corporations Act 2001***.
- An Australian Credit Licence if you provide credit services. This obligation is imposed by the ***National Consumer Credit Protection Act 2009***.

The Australian Securities and Investments Commission operates both of these licensing schemes.

Financial counselling services are exempt from holding both of these licences, but the exemptions are subject to strict conditions. Broadly, the exemptions for both licences require that the financial counselling agency:

- Does not charge any fees or receive any remuneration arising from the financial counselling service
- Does not provide any financial product advice or credit activity outside the exemption
- Ensures that its financial counsellors have appropriate training and adequate skills and knowledge
- Ensures that its financial counsellors are a member of, or eligible for membership of, a financial counselling association.

The national standards are therefore an important link with the exemption from licensing for agencies.

For more information: see [Fact Sheet 2](#) on the FCA Website.

Membership Categories	Affiliate (non-voting) Associate Accredited or Full
Qualification	Diploma of Financial Counselling
Professional Development	If working as a financial counsellor, 20 points per membership year
Supervision	If working as a financial counsellor, as a minimum: <ul style="list-style-type: none">➤ Employed 0.5 FTE or more – 10 hours per membership year; or➤ Employed less than 0.5 FTE – 6 hours per membership year.
Experience	24 months full time or 36 months part time experience for accredited/full membership (Full time is defined as working for 30 hours or more)
Ethics	Must adhere to the Australian Financial Counselling Code of Ethical Practice

The three categories of membership are:

1. affiliate
2. associate
3. full/accredited.

State/Territory associations may also have additional categories of membership for financial counsellors, for example, life membership. They may also provide for membership for other professionals, such as financial capability workers.

Affiliate (non-voting)	An individual working in the financial counselling sector in a related role OR Actively studying for the Diploma of Financial Counselling or has completed the Diploma of Financial Counselling - but is not working as a financial counsellor.
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Associate	Working as a financial counsellor AND Actively studying for the Diploma of Financial Counselling OR Holds the Diploma of Financial Counselling and has not yet had 24 months full-time experience, however meets the requirements for continuing professional development and supervision.
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Accredited or Full Members	Has had 24 months full-time experience or 36 months part time working as a financial counsellor (including while studying if relevant) AND Holds the Diploma of Community Services (Financial Counselling) AND If working as a financial counsellor, meets requirements for continuing professional development and supervision OR If not working as a financial counsellor, meets requirements for continuing professional development.
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All members	<ul style="list-style-type: none">➤ All members agree to abide by the Australian Financial Counselling Code of Ethical Practice➤ All members agree to abide by relevant State/Territory rules
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Note: Some states may have other membership categories, such as financial capability workers.

Continuing Professional Development

Continuing Professional Development (CPD) is the reinforcement or acquisition of skills or knowledge relevant to the workplace.

Application

CPD requirements apply to associate members and full/accredited members.

Amount

A financial counsellor must complete **20 points of CPD per annum**.

Three categories

There are three categories of CPD.

Technical – e.g. content knowledge relevant to legal issues, banking, fines, EDR/IDR, superannuation, hardship, insurance, completion of Statements of Financial Position

Skills – e.g. counselling, mental health, communication (written, verbal), interviewing, cultural awareness, suicide prevention/training and negotiation

Ethics – e.g. conflict of interest, boundaries, counselling relationships, cultural awareness, options- client choices; appropriate referral to other services

CPD Components

The rules for how the various CPD components can be made up are as follows.

- There must be at least one activity from each of the three CPD categories of technical, skills and ethics.
- At least 3 CPD points must be derived in an interactive, face-to-face setting. This may be via video.
- A maximum of 10 points can be derived from any one CPD activity.
- Attendance at a plenary session of a conference is not CPD, unless training is delivered as a part of the plenary (as occurs from time to time at the state conference for the Financial Counsellors Association of NSW).

There are also specific restrictions as set out in the CPD table following.

Points Table for CPD

CPD TYPE	Points
Face to face full day training block	6 points
Face to face half day training block	3 points
Preparation and delivery of a training session relevant to the sector	4 points
Online interactive activities e.g. webinar, elearning, online modules	1 hour equivalent to 1 point (max 4 points per online activity)
Audio-lecture / podcast/ webinar recording (listen/watch only)	1 point
Online questionnaires developed by financial counselling associations that test current knowledge	1 point
Reading article about technical and educative aspects of financial counselling	1 point (max 2 points in a membership year)
Research project contributing to policy work	3 points
Delivery of a training session relevant to the sector where the material has already been developed	2 points
Membership of a State/Territory financial counselling association board or FCA Representative Council	2 points maximum
Contribution of an article on a relevant topic to media / newsletter / association material	1 point
Supervisors only – provision of professional supervision to a financial counsellor	1 point per person supervised (max 4 points)

Applies to:

- Associate members
- full/accredited members

Requirement for Supervision

If working as a financial counsellor, as a minimum:

- Employed 0.5 FTE or more – 10 hours per membership year; or
- Employed less than 0.5 FTE – 6 hours per membership year.

Requirements to be a Supervisor

To be a financial counselling supervisor a person must hold the Diploma of Financial Counselling and have:

- Three years FTE financial counselling experience OR
- Another suitable qualification as approved by a State or Territory financial counselling association.

A supervisor must also have completed a suitable course in professional supervision acceptable to their State or Territory association.

Definition of Supervision

Professional supervision supports the work of a financial counsellor. The supervision process provides a forum to discuss casework, clinical aspects of the role and the the counsellor's emotional and psychological wellbeing.

- Professional supervision is an equal relationship founded on mutual trust and respect.

Line management supervision is a different process to professional supervision.

- Line management is undertaken by a person or persons to whom the financial counsellor reports.
- Line management includes oversight of the casework undertaken by the financial counsellor as well as ensuring the financial counsellor meets organisational goals and complies with standards.

Mutual recognition

A financial counsellor will join the relevant State/Territory association where they spend the majority of their working time.

A member in one State/Territory will be expected to transfer membership to another State/Territory if they re-locate.

Governance

State and Territories will continue to resource a CPD Advisory Group.

Review

The FCA Representative Council will review the standards as necessary.

Appendix 6 – Statement of Financial Position

This is the test version of the Standard Statement of Position. Thanks for trialling it for us.

Enter information in the Worksheet. The Worksheet is for financial counsellors only and goes into a lot of detail - more detail than the banks require. The first thing to decide is the budget frequency in cell M16 on the Worksheet.

Data entered into the Worksheet will be automatically summarised in the Statement of Position.

Only send the Statement of Position to the Financial Institution. You can either save this worksheet as a pdf format to email or print it off separately for post or scan. (If you email the whole version, you'd also be sending the Worksheet.)

To save to pdf format, select 'save as' and in the 'save as type' box scroll down and select pdf. Check the 'options' box to make sure that only the 'active' worksheet is being saved (and not the whole workbook).

When you fill in the Worksheet for the first time, you'll see that it separates day to day expenditure, from debt repayments/loans. All of the loan expenditure eg mortgages, leases/rentals are in a separate section. The first time you try the Worksheet it may take a while to work through, but we hope that after that you'll find it easy to use.

In the assets and debts sections, there are drop down menus to indicate who owns assets or owes debts eg Borrower 1 or Joint etc. If you're only filling this in for one person, don't worry about these. There is a category of "other" to cover those more unusual situations that sometimes crop up eg Borrower 2 owns an asset with say their brother. You'd need to explain these special situations in a covering email/letter.

Any feedback - positive and glitches - fiona.guthrie@financialcounsellingaustralia.org.au (Click opposite)

And apologies now for the glitches. We've tried to find them, but you can't be sure until someone else does some testing.

STATEMENT OF FINANCIAL POSITION

Date

01-June-2017

CLIENT DETAILS

	Borrower 1	Borrower 2
Name		
Address		
Phone		
Dependants (specify ages)		
Date of Birth		
Current Employment		

HOUSEHOLD INCOME - WEEKLY / FORTNIGHTLY / MONTHLY / ANNUALLY

	Borrower 1		Borrower 2		SHOW TOTALS
	Amount	Frequency	Amount	Frequency	Fortnightly
After Tax Salary					\$ -
Centrelink (before any deductions)					\$ -
Family Tax Benefit					\$ -
Child Support					\$ -
Rental Income or Board					\$ -
Other income (specify below)					\$ -
Total per borrower	\$ -	Fortnightly	\$ -	Fortnightly	
TOTAL HOUSEHOLD INCOME					\$ -

LIVING EXPENSES - WEEKLY / FORTNIGHTLY / MONTHLY / QUARTERLY / ANNUALLY

Residential	Borrower 1		Borrower 2		Fortnightly
<i>(Note: include mortgage payments in the debts section)</i>	Amount	Frequency	Amount	Frequency	
Housing Costs					\$ -
Rent					
Rates, body corporate/strata fees					
Home/Contents insurance					\$ -
Utilities					\$ -
Electricity					
Gas					
Water					
Telcos and communication					\$ -
Mobile					
Internet					
Landline					
Pay TV					
Repairs and Maintenance					\$ -
Other					\$ -
Total Residential Expenses					\$ -
Transport	Borrower 1		Borrower 2		Fortnightly
Motor Vehicle Costs					\$ -
Petrol					
Registration					
Repairs/Service/Tyres					
Insurance					
Tolls					
Roadside Assist					
Parking					
Public Transport/Taxis etc					\$ -
Other					\$ -
Total Transport Expenses					\$ -
Education and Children	Borrower 1		Borrower 2		Fortnightly
Children					\$ -
School fees					
School excursions					

STATEMENT OF FINANCIAL POSITION

Date

01-June-2017

Sport and music etc					
Uniforms and clothing					
Child care / Pre-school					
Child support payment					
Pocket money					
Self education					\$ -
Other					\$ -
Total Education and Children Expenses					\$ -
Personal and Family	Borrower 1	Borrower 2			Fortnightly
Food and clothing					\$ -
Food and groceries					
Lunches, take away, dining					
Clothing and shoes					
Other					
Health					\$ -
Health insurance					
Doctors and specialists					
Chemist					
Optometrist, dentist					
Other					
Family and Personal					\$ -
Haircuts and grooming					
Gambling, lotto, other					
Cigarettes and tobacco					
Alcohol					
Newspapers and magazines					
Gym					
Christmas hampers					
Funeral plans					
Gifts					
Savings					
Other					
Personal insurance					\$ -
Pets					\$ -
Other (inc sports, hobbies, subscriptions)					\$ -
Total Personal and Family Expenses					\$ -
TOTAL LIVING EXPENSES (residential + transport + education and children + personal and family)					\$ -

ASSETS

Property	Owned By	Details	Estimated Value
Residential			
Investment			
Other Assets	Owned By	Details	Estimated Value
Motor vehicle (make/model/year)			
Motor vehicle (make/model/year)			
Investments			
Savings			
Superannuation			
Household Furniture (incl. whitegoods, computers & electronics)			
Tools of trade			
Other			
TOTAL ASSETS			\$ -

DEBTS

Owed by	Name of Cr	Complete as many boxes as possible.				
Loans Secured by Property	Balance Owed	Payment Frequency	Contract Payment	Current Payment	Proposed Payment	Proposed Term
Address of Property:						

STATEMENT OF FINANCIAL POSITION

Date

01-June-2017

Loans Secured by Other Assets	Balance Owed	Payment Frequency	Contract Payment	Current Payment	Proposed Payment	Proposed Term
Details of security						
Unsecured Loans/Overdrafts	Balance Owed	Payment Frequency	Contract Payment	Current Payment	Proposed Payment	Proposed Term
Credit/Store Cards or Layby	Balance Owed	Payment Frequency	Contract Payment	Current Payment	Proposed Payment	Proposed Term
Utilities/Telco Debts	Balance Owed	Payment Frequency	Agreed Payment	Current Payment	Proposed Payment	Proposed Term
Lease/Rental Contracts	Balance Owed	Payment Frequency	Contract Payment	Current Payment	Proposed Payment	Proposed Term
Other Payment Obligations	Balance Owed	Payment Frequency	Contract Payment	Current Payment	Proposed Payment	Proposed Term
TOTAL DEBTS	\$ -					
TOTAL CURRENT & PROPOSED PAYMENTS	Fortnightly		\$ -	\$ -		

SUMMARY

Summary of financial position		
Total Income	\$0	
Total Living Expenses	\$0	
Total Income Less Total Living Expenses (before repayments)		\$0
Less Current Repayments Being Made	\$0	
Current Surplus/Deficit		\$0
Proposed Payments	\$0	
Adjusted Surplus/Deficit		\$0

Note: If the proposed payments have not been entered then the adjusted Surplus/deficit will show zero balance.

CLIENT DETAILS

	Borrower 1	Borrower 2
Name		
Address		
Phone		
Dependants (specify ages)		
Date of Birth		
Current Employment		

HOUSEHOLD INCOME - WEEKLY / FORTNIGHTLY / MONTHLY

Show totals:

	Borrower 1		Borrower 2		Fortnightly
	Amount	Frequency	Amount	Frequency	
After Tax Salary					\$ -
Centrelink (before any deductions)					\$ -
Family Tax Benefit					\$ -
Child Support					\$ -
Rental Income or Board					\$ -
Other income (specify below)					\$ -
Total per borrower	\$ -	Fortnightly	\$ -	Fortnightly	
TOTAL HOUSEHOLD INCOME					\$ -

LIVING EXPENSES - WEEKLY / FORTNIGHTLY / MONTHLY / QUARTERLY

Residential	Borrower 1		Borrower 2		Fortnightly
	Amount	Frequency	Amount	Frequency	
Housing Costs (rent, rates etc)	\$ -		\$ -		\$ -
Home/Contents insurance	\$ -		\$ -		\$ -
Utilities (electricity, gas, water)	\$ -		\$ -		\$ -
Communication (phones, internet, Pay TV)	\$ -		\$ -		\$ -
Repairs and Maintenance	\$ -		\$ -		\$ -
Other	\$ -		\$ -		\$ -
Total Residential Expenses					\$ -
Transport	Borrower 1		Borrower 2		Fortnightly
Motor Vehicle Costs	\$ -		\$ -		\$ -
Public Transport/Taxis etc	\$ -		\$ -		\$ -
Other	\$ -		\$ -		\$ -
Total Transport Expenses					\$ -
Education and Children	Borrower 1		Borrower 2		Fortnightly
Children	\$ -		\$ -		\$ -
Self education	\$ -		\$ -		\$ -
Other	\$ -		\$ -		\$ -
Total Education and Children Expenses					\$ -
Personal and Family	Borrower 1		Borrower 2		Fortnightly
Food and clothing	\$ -		\$ -		\$ -
Health (inc medical, optical, dental, insurance)	\$ -		\$ -		\$ -
Family and Personal (inc grooming, entertainment)	\$ -		\$ -		\$ -
Personal insurance	\$ -		\$ -		\$ -
Pets	\$ -		\$ -		\$ -
Other (inc sports, hobbies, subscriptions)	\$ -		\$ -		\$ -
Total Personal and Family Expenses					\$ -
TOTAL LIVING EXPENSES (residential + transport + education and children + personal and family)					\$ -

ASSETS

Property	Owned By	Details	Estimated Value
Residential			
Investment			
Other Assets	Owned By	Details	Estimated Value
Motor vehicle (make/model/year)			
Motor vehicle (make/model/year)			
Investments			
Savings			
Superannuation			
Household Furniture			
Tools of trade			

STATEMENT OF FINANCIAL POSITION

Date

Other			
TOTAL ASSETS			\$ -

DEBTS

Owed By	Name of Creditor						
Loans Secured by Property		Balance Owed	Payment Frequency	Contract Payment	Current Payment	Proposed Payment	Proposed Term
Address of Property:							
Loans Secured by Other Assets		Balance Owed	Payment Frequency	Contract Payment	Current Payment	Proposed Payment	Proposed Term
Details of security							
Unsecured Loans/Overdrafts		Balance Owed	Payment Frequency	Contract Payment	Current Payment	Proposed Payment	Proposed Term
Credit/Store Cards or Layby		Balance Owed	Payment Frequency	Contract Payment	Current Payment	Proposed Payment	Proposed Term
Utilities/Telco Debts		Balance Owed	Payment Frequency	Agreed Payment	Current Payment	Proposed Payment	Proposed Term
Lease/Rental Contracts		Balance Owed	Payment Frequency	Contract Payment	Current Payment	Proposed Payment	Proposed Term
Other Payment Obligations		Balance Owed	Payment Frequency	Contract Payment	Current Payment	Proposed Payment	Proposed Term
0							
0							
0							
TOTAL DEBTS		\$ -					
TOTAL CURRENT & PROPOSED PAYMENTS			Fortnightly	\$ -	\$ -	\$ -	

SUMMARY

Summary of financial position			
Total Income		\$0	
Total Living Expenses		\$0	
Total Income Less Total Living Expenses (before repayments)			\$0
Less Current Repayments Being Made		\$0	
Current Surplus/Deficit			\$0
Proposed Payments		\$0	
Adjusted Surplus/Deficit			\$0

Note: If the proposed payments have not been entered then the adjusted Surplus/deficit will show zero balance.

CREDITORS LIST

Name: _____

Date: _____

CREDITOR NAME/ACCOUNT NUMBER	CREDITOR PHONE/CONTACT	WHOSE NAME	TYPE OF DEBT	BALANCE OWING	ARREARS \$	WEEKLY/FORTNIGHTLY PAYMENT	GUARANTOR or SECURITY	NOTES
			TOTAL	\$ -	\$ -	\$ -		

This form collects personal and private information. Information is being requested for the purpose of providing financial counselling. It will be placed in the Clients case file, and is to be accessed only by authorised personnel. Please contact the Privacy Officer of Community Services on 08 8202 5180 for more information or to view the Uniting Communities Privacy and Personal Information policy and Community Services procedures for handling and accessing private information.

Assets, Liabilities & Equity

Name: _____

Date: _____

A: ASSETS		B: LIABILITIES		Equity in Asset (A-B)
Description	\$		\$	\$
Property		Home Loan		
Residential		Mortgage		\$ -
Investment		Mortgage		\$ -
Other Assets		Other Credit		
Motor vehicle (make/model/year)		Car loan		\$ -
Investments				\$ -
Savings				\$ -
Superannuation				\$ -
Household Furniture (incl. whitegoods, computers & electronics)				\$ -
Tools of trade				\$ -
Other				\$ -
TOTALS	\$ -		\$ -	
Total current value of assets (A)			\$ -	
Less Total Liabilities (B)			\$ -	
Equity (A - B)			\$ -	

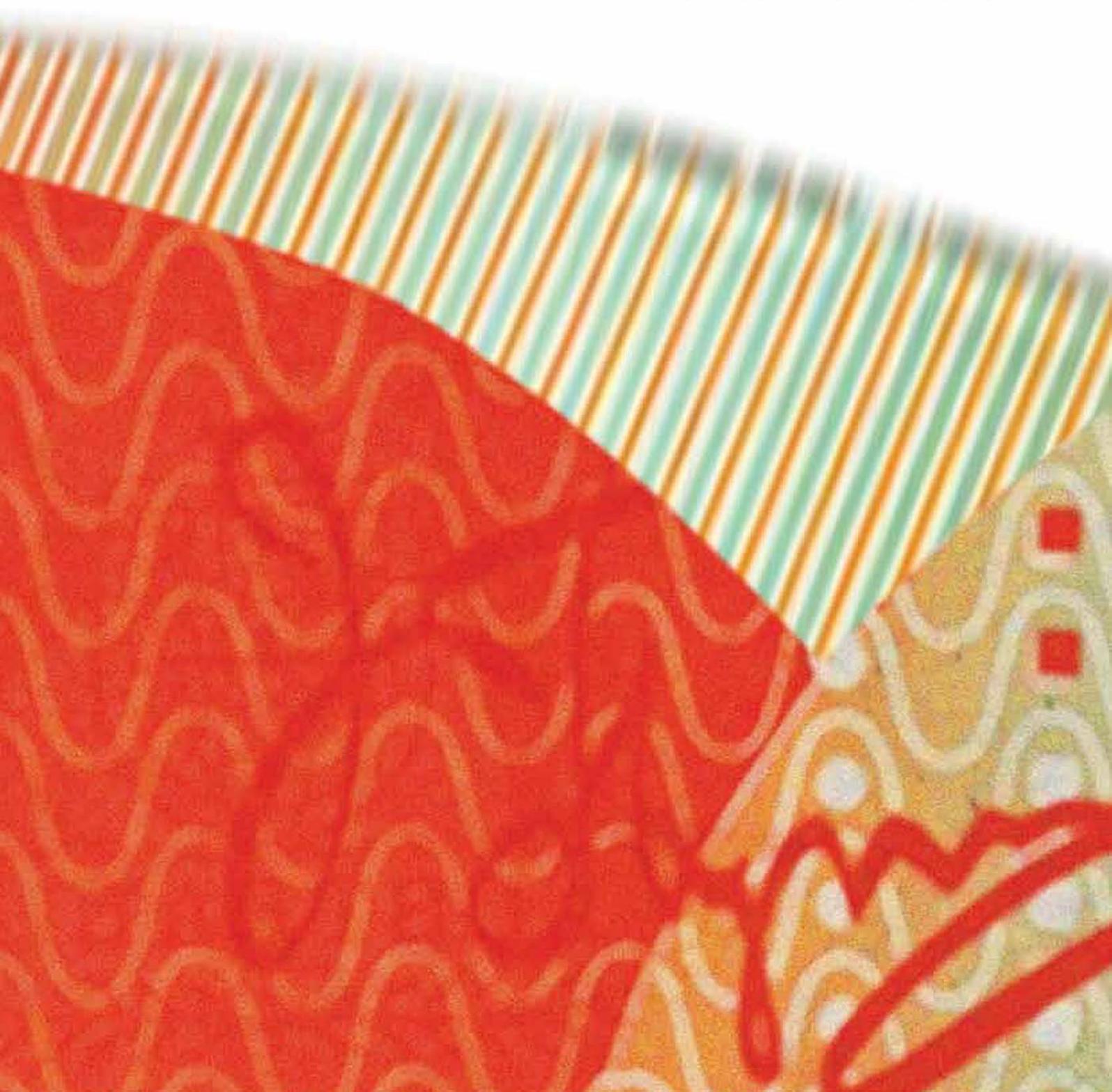
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THE AUSTRALIAN FINANCIAL COUNSELLING

CODE OF

ethical

PRACTICE



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The code

This code was produced by the National Financial Counsellors Resource Service (NFCRS) of Wesley Mission with funding from the Financial Counselling Foundation.

The Financial Counselling Foundation was established by Financial Counselling Australia in 2009, with funds provided to FCA by ANZ, Commonwealth Bank, NAB, Westpac and Abacus. The purpose of the Foundation is to provide grants to build the capacity of the financial counselling sector. An independent advisory committee, which includes industry and consumer representatives, makes funding recommendations.

The code is the result of extensive consultation with all of the state and territory financial counselling bodies in Australia, as well as the peak body, Financial Counselling Australia. The code was adopted by Financial Counselling Australia in February 2012. The code will be reviewed and updated as necessary in the future.

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Preamble

Financial counsellors assist people who are experiencing financial difficulty. Financial counsellors listen carefully to their clients' particular stories and, using tools such as money plans and creditor lists, work with clients to gain a clearer picture of their financial situation. Financial counsellors then provide their clients with a set of available options, discussing the advantages and disadvantages of each, and clients use this information to make their own choices about how to best resolve their financial problems. Financial counsellors support their clients throughout this process and will act as advocates for their clients when appropriate. Their work involves a skill set including counselling skills, advocacy, and technical knowledge in the area of financial issues. Financial counsellors are skilled at negotiating with creditors and agencies on behalf of their clients, and often refer to other agencies such as community legal services, housing bodies and other services as required. Financial counsellors can also be involved in group or class advocacy, community development and education, social action and reform. Financial counsellors are not financial planners, - financial advisers or legal practitioners and are not general welfare assessment workers. Most financial counsellors work in community organisations, although some work in government agencies and local government. It is fundamental that financial counselling services are offered free of charge, and are confidential, non-judgmental, and independent.

The financial counselling model prevalent in Australia seeks to incorporate ideas of empowerment, advocacy and the development of principles of consumer rights for low-income earners and/or other vulnerable consumers. This approach maintains a discreet distance from finance service providers, in order to avoid the potential for conflicts of interest. In most instances, financial counsellors are members of the relevant State or Territory association of financial counsellors (see appendix for full list of associations). Financial Counselling Australia (FCA) is the peak body for financial counsellors in Australia.

Financial counsellors have a common aim to assist clients to overcome their financial issues and have general broad agreement as to ethical values, principles and behaviours. This Code of Ethical Practice is produced to standardise and clarify these ethical and practice standards, and thus maintain and raise the overall standard and standing of financial counselling across Australia. The Code was created in consultation with representative financial counsellors from across Australia (see Appendix 3 for further information).

Use and Implementation of the Code

The Code of Ethical Practice expresses the values and responsibilities that are an important aspect of the financial counselling profession. It is intended to assist financial counsellors to act ethically in the performance of their professional practice and to protect the rights and responsibilities of clients, other financial counsellors, colleagues, workplaces and the community. The Code provides frameworks to guide financial counsellors in areas of common ethical dilemmas, within which professional judgement must be applied to determine the best practice in each situation.

It has two sections – a Code of Ethics and a Code of Practice.

- The Code of Ethics sets out the ethical values which guide financial counselling.
- The Code of Practice provides guidance about appropriate behaviour in a number of ethical situations commonly experienced by financial counsellors.

It is important to note that the scope of work done by financial counsellors throughout Australia is varied and this Code may not cover every situation which may arise in day to day work. Where the Code of Practice does not provide explicit advice, financial counsellors should use their professional judgement and the Code of Ethics to inform their decisions, and should seek out professional advice as appropriate.

To ensure the effective implementation of this Code of Ethical Practice, and that the information contained is relevant and current, FCA shall review and revise the Code every five years (or at its discretion) and in collaboration with the State and Territory associations.

FCA shall appoint a single person to hold overall control of this document; the Executive Director of FCA will oversee and record changes, managing the master document, and is responsible for dissemination of the currently valid version of this code. See Table 1 in Appendix 5 which records the person(s) who have carried, and currently carry, the responsibility of overall control of this document.

The Code of Ethics

This section of the Code of Ethical Practice establishes the values and principles that underpin the role of financial counsellors. It incorporates the underlying principles that govern current understanding of ethical behaviour within all helping professions in Australia. Professional financial counselling practice should be based on a commitment to these ethical principles and informed by the accompanying Code of Practice.

Respect

Financial counsellors respect the right of all those they come in contact with professionally to have their own beliefs and opinions. They ensure that their own belief systems, and the belief systems of their employer¹, do not impose on others.

Empowerment

Financial counsellors empower their clients to take control of their own financial situation. They encourage clients to make informed choices and to determine their own courses of action.

Non-discrimination

Financial counsellors adhere to the principles of equality, fairness and consistency. Financial counsellors do not condone or engage in discrimination² based on age, gender, race, culture, ethnicity, religion or spirituality, sexual orientation, language, health, social background, relational, physical, emotional, intellectual or educational ability, or socio-economic status.

Boundaries

Financial counsellors maintain professional relationships with their clients at all times. The responsibility to establish and maintain effective client-counsellor boundaries lies with the financial counsellor. Financial counsellors understand the extent of their role and do not go beyond their skill base or competence.

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- 1 In this Code the term 'employer' refers to the employing organisation of the financial counsellor and/ or the auspicing body.
 - 2 Except where positive discrimination is lawful and appropriate (e.g., under funding guidelines).

Confidentiality

Financial counsellors value and respect client confidentiality at all times, but also abide by any legal limitations to confidentiality.

Conflicts of interest

Financial counsellors act in the best interests of their client, and do not put their own interests or the interests of others (e.g., creditors or employers) ahead of the client's interests. Financial counsellors will identify any conflicts of interest and seek to resolve them.

Advocacy

Financial counsellors may act as an advocate for their client, if this is what the client wishes. The nature of that advocacy will be determined by the client.

Professionalism

Financial counsellors strive to work to the highest standard of practice. Financial counsellors work within their professional competence, skills, training and experience and stay up to date with relevant professional developments. Financial counsellors work with peers and allied professions to share knowledge and resources, and demonstrate competence, honesty, reliability, authenticity and transparency in their professional relationships.

Community Engagement

Financial counsellors engage with the broader community, and recognise the wider social issues that impact on financial difficulties and situations. They are sensitive to the family, cultural and social contexts of their communities. Financial counsellors value working collaboratively with local community services to best support clients.

Social Justice

Financial counsellors acknowledge that everyone has the right to access safe financial products from ethical vendors, and to be treated fairly if they find themselves in financial difficulty. Financial counsellors therefore recognise that they have a role to play in identifying unfair market practices and working to prevent these problems in the future.

The Code of Practice

This section of the Code of Ethical Practice provides specific guidance on issues that may affect financial counsellors. Ethical practice is described in six domains in relation to:

- the self (the financial counsellor)
- clients and their families
- colleagues
- the workplace
- the profession, and
- the wider community.

1. Responsibilities to Self

Financial counsellors have a number of responsibilities toward themselves. These maximise the likelihood that the financial counsellor is able to provide effective financial counselling to clients, and to ensure that their physical, mental and emotional state does not impair their ability to provide competent services.

1.1 Self-care

Financial counsellors shall respect their own needs as an individual and avoid burnout by practising self care and a healthy life balance. This includes maintaining a manageable workload and seeking assistance early when job demands cause distress or anxiety.

1.2 Reflective practice

Financial counsellors engage in reflective practice and aim to identify and acknowledge personal values and beliefs that may be imposed on clients and that may hinder their capacity for good professional judgement. Conscientious reflection involves the financial counsellor in monitoring and reviewing their work and being vigilant for signs of counter-transference, a process by which the financial counsellor's own issues and problems are unconsciously imposed on the client. Financial counsellors shall discuss any issues that may interfere with the client-counsellor relationship with their clinical and/or technical (casework) supervisor.

1.3 Skills and knowledge.

1.3.1 Knowledge

Financial counsellors shall gain sufficient knowledge to practise as a financial counsellor, and shall strive to continuously improve their understanding of current knowledge and information relevant to the profession.

1.3.2 Continuing professional development (CPD)

To practice with expertise and competence, financial counsellors shall continue to develop their professional skills and capabilities after completing formal training and accreditation. Financial counsellors shall abide by current requirements set out by their relevant State or Territory association.

1.3.3 Supervision

Financial counsellors should have regular technical (casework) supervision and also clinical supervision³. These may be provided separately or provided together by the one supervisor. Line management supervision is not considered to be casework supervision. Supervisors shall meet the State or Territory association supervisory standards.

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3 Clinical supervision is defined as supervision related to counselling, psychotherapy, and other mental health disciplines as well as many other professions engaged in working with people. For financial counsellors, clinical supervision involves the supervisory oversight of professional practice and development, as distinct from case work supervision which is limited to matters related to cases, and line supervision, which is linked to meeting key performance indicators in the workplace.

2. Responsibilities to Clients

Financial counsellors have a number of responsibilities when working with clients to ensure the service provided meets the clients' needs.

2.1 Priority of client's interests

Financial counsellors respect and represent their client's chosen course of action. At times, clients may choose a course of action that the financial counsellor believes is not in their best interest. In this case, the financial counsellor shall explain why they believe such an action is not in the client's best interests but shall respect the client's right to self-determination and work with their choices. Financial counsellors may negotiate or advocate on the client's behalf, which may require a greater priority of the client's interests than simple mediation between a client and creditor.

2.2 Empowerment

Financial counsellors empower the client to manage their own financial situation. Financial counsellors will seek to assist clients to recognise and develop their own strengths and abilities by providing support, options, resources and promoting skills. Empowerment can be achieved by initially assisting with tasks beyond the scope of the client's presenting abilities and supporting the client to assume increasing responsibility and management of their financial affairs as their own skills develop.

2.3 Informed consent.

2.3.1 Service agreement

Financial counsellors provide adequate information to their clients so that clients understand the nature and scope of the financial counselling service and the role of the financial counsellor as an independent professional. This allows the client to provide informed consent to proceed with the financial counselling process.

2.3.2 Client's right to determine choices

Financial counsellors work with the client to gather accurate and current information on relevant aspects of the client's financial, social and legal situation. This information is used to assist the client to make informed decisions about their financial circumstances and options.

2.3.3 Client's representative

Clients have the right to nominate someone they trust to make decisions on their behalf if the client anticipates they may be unable to make informed decisions in the future

2.4 Confidentiality.

2.4.1 Confidentiality agreements

Clients are entitled to have their affairs treated in confidence, except as mandated by law. Clients should be informed of the confidential nature of the financial counselling relationship, as well as any potential exceptions to the confidentiality agreement, before agreeing to financial counselling.

2.4.2 Maintaining confidentiality

Financial counselling sessions must not be listened to or observed by anyone, or recorded by visual or audio technology, unless the client has given informed consent.

2.4.3 Proper use of information

Client information is collected and used only for the purposes of providing financial counselling services and for the provision of necessary secondary services (e.g., for supervision, quality control and funding body purposes). Where reasonable and possible, personal information should be collected directly from the client. When information is required to be collected from or given to a third party, the client will be informed and provide their consent.

2.4.4 Use of interpreters

When using an interpreter, the financial counsellor shall take reasonable steps to ascertain that the client is comfortable with, and consents to, the interpreter being used. The interpreter should be asked to keep confidential any information disclosed in the context of the financial counselling process they are involved in.

2.4.5 Disclosure of information to third parties other than colleagues

Personal and detailed information about a client shall not be disclosed to a third party without the client's understanding and informed consent, unless required to do so by law. Third parties may include creditors, other professionals or agencies, other services within the acting agency, known persons to the client (such as friends or relatives), or any other person. Before a financial counsellor contacts a creditor they shall have a signed authority from the client.

2.4.6 Consultation with supervisors and other professionals

Financial counsellors may consult with other professionally competent persons about how to assist with a client's financial situation (e.g. another financial counsellor, a lawyer, or an employee of ITSA). The identity of the client shall not be disclosed to the other professional unless required by law, professional practice or with the client's consent⁴.

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⁴ For information regarding referrals see clause C.2. Referrals (Responsibilities to Colleagues).

2.4.7 Exceptions to confidentiality

Maintaining client confidentiality is a fundamental obligation of the financial counselling relationship. However, there are circumstances where the law or ethical obligations impose exceptions to confidentiality. Examples of this are when a court or tribunal has ordered during the process of legal proceedings that information be divulged or a document be produced from the client's files. Another example is if the client has communicated a serious risk of imminent harm to themselves, to other persons known to the client, or to the general public. In deciding whether or not to break client confidentiality, the financial counsellor should consider whether it is appropriate to notify the client of the disclosure.

In deciding the extent to which client information may need to be disclosed to third parties without client consent, financial counsellors should consider:

- i. The requirements of any legal or ethical obligation,
- ii. The potential benefits of disclosure of the information, The potential harm to the client or others that may result from the disclosure, and
- iii. The potential harm if information is not disclosed.

2.5 Relationships.

2.5.1 Clients that are known personally

Generally financial counsellors are discouraged from agreeing to work with clients who are personally known to them. Where there is limited alternative access to services (for example in remote areas), financial counsellors may accept clients that are known personally to them. Financial counsellors should minimise risk by setting clear and professional boundaries, negotiating to resolve any conflicts of interest, and seeking guidance from a supervisor.

2.5.2 Physical contact

Financial counsellors shall be mindful of making physical contact with clients which may violate professional boundaries and cause damage to or compromise the professional relationship. Financial counsellors are aware of and sensitive to the ways in which clients may interpret physical contact, with reference to social, cultural and gender differences.

2.5.3 Sexual conduct

Financial counsellors will not engage in any form of sexual conduct with current clients, nor will they accept clients with whom there has been a sexual relationship in the past.

2.5.4 Self - disclosure

Financial counsellors shall be cautious of disclosing personal information about themselves to clients and must ensure any disclosure is solely for the benefit of the client and not for the benefit of the financial counsellor. Financial counsellors are responsible for the foreseeable consequences of personal disclosure and should reflect on these outcomes before making the decision to self- disclose.

2.6 Conflicts of interest.

2.6.1 Identifying and resolving conflicts of interest

Financial counsellors avoid circumstances which could undermine or compromise their professional integrity and/or have the potential to bias the financial counsellor's judgement and adversely affect the client's best interests. If a financial counsellor has a conflict of interest with regards to a particular client, the financial counsellor should seek the advice of their supervisor and refer to the policies of the employer, their relevant State or Territory association, and/or the FCA. In some cases it would be appropriate for the client to be referred to another financial counsellor or service.

The criteria for conflict of interest can be defined as:

- a. Financial gain or personal interest arising in regard to carrying out professional duties (for example, when the financial counsellor has a personal or family relationship with the creditor of the client, or when the financial counsellor has received funding from the creditor of the client for another purpose);
- b. Opposing legal interests in the resolution of an issue for two or more parties (for example, when a person who guarantees a debt has different interests to the person borrowing the money. Other examples of parties whose interests may differ are a creditor and a debtor, or a husband and wife who are undergoing a separation);
- c. When expected duties compromise a financial counsellor's ethical obligations to their profession, agency or funding body (for example, where the financial counsellor is asked by an employer to write a submission which supports the de-regulation of gambling or payday lending).

2.6.2 Remuneration

Financial counsellors do not charge a fee for service or seek any form of remuneration from clients or creditors. Financial counsellors shall avoid any financial arrangements or other inducements which may influence their provision of services. Financial counsellors should be aware of the ASIC licensing exemptions that apply to financial counselling agencies.

2.6.3 Gifts or financial inducements

Generally gifts should be discouraged in order to place the needs and interests of clients before the personal interests of the financial counsellor. When declining gifts, financial counsellors should do so in a manner that is respectful of cultures or social practices where gift-giving is customary. In any case, financial counsellors should only give or accept gifts with a low value.

Financial counsellors should not allow their professional duties to be influenced, or to be perceived to be influenced, by any consideration, gift or advantage offered by or to clients, colleagues and other industry representatives. Financial counsellors shall refer to the guidelines and policies from their employer, and if uncertain, the financial counsellor should seek advice from their supervisor.

2.6.4 Duplication of services

If a financial counsellor learns that the client is being assisted by another financial counsellor for the same presenting problem, they should advise that it is inappropriate for more than one financial counsellor to act on their behalf at the same time. The client has the right to choose which financial counsellor they wish to work with.

2.6.5 Multiple clients

Financial counsellors may be required to assist more than one client in relation to a particular financial situation, and should always act on behalf of, for the best interests of, and with the informed consent of, all clients in every instance.

- In providing services to families or any group consisting of two or more individuals, the financial counsellor shall be aware of and explain the limits of confidentiality to each client. Each client should be given the opportunity to make enquiries about and consider their financial counselling options before consenting.
- Financial counsellors must be mindful of conflicts of interests when providing financial counselling to multiple clients (for example joint account holders or co-debtors).
- If a conflict arises between the interests of two or more clients, financial counsellors should discontinue financial counselling for both or all parties, as there may be a conflict of interest in trying to meet the needs of both or all parties (for example where a couple separates during the financial counselling process). The financial counsellor should then assist all parties to find appropriate financial counselling assistance.

2.6.6 Referral by industry

Financial counsellors whose clients are referred by a creditor shall ensure that this creditor is not favoured in any way. In particular, debts should be pro-rated equitably and without favour to the referring creditor or organisation.

2.6.7 Funding

It is of paramount importance that financial counselling services are independent of credit providers. If a financial counsellor is concerned that industry funding, resources, joint projects and/or sponsorship may impact their capacity to provide an independent service that upholds the principles of this Code of Ethics, the financial counsellor should refer to the policies of FCA or their State or Territory association.

2.7 Case management.

2.7.1 Identifying options

Financial counsellors work with the client to identify options that may assist them to resolve their financial difficulties. Such options should be discussed after making an assessment of the client's financial and legal situation, and, where appropriate, after obtaining up to date information or support (for example, through a Financial Counsellors Resource Service or community legal service). Financial counsellors shall ensure that the client understands the likely consequences of each option, and is assisted to make an informed choice about the best option for their situation.

This is best facilitated by asking the client to tell the financial counsellor in their own words what they understand the options to be, and what they understand the consequences of

each option to be. Clients should then be given time to reflect and choose their preferred option/s. For example, a financial counsellor would not assist a client to file for bankruptcy on a first visit except in exceptional circumstances.

2.7.2 Client authority

Financial counsellors obtain written consent from clients before formally advocating on their behalf. They shall only act on a client's instructions and will not undertake actions not specified by the client. Where possible, clients shall be kept informed of significant developments in any matter entrusted by the client.

2.8 Client records.

2.8.1 Client contact history

Financial counsellors maintain records and files in a manner whereby the client would not be disadvantaged if, of necessity, another financial counsellor, or the client themselves, assumed management of the case. Financial counsellors will record the dates of each financial counselling session, and concise, clear and relevant information after every contact with the client or relevant others. Financial counsellors will avoid including personal opinions and comments.

2.8.2 Ownership of files

Documents and other records produced by the client remain the property of the client, but financial counsellors may photocopy them for their own records. Documents prepared by the financial counsellor for agency records, such as case notes, are the property of the financial counsellor's employer. Documents prepared by the financial counsellor for the client, are the property of the client (although the financial counsellor/agency would usually take a copy). Documents prepared by a third party relating to the client belong to the client. Other bodies may have legal access to the client files (see item B.4.7.).

2.8.3 Client access

A client may request access to information for which the financial counsellor holds responsibility. Most financial counselling agencies will be bound by the *Privacy Act 1988*. Even if not legally bound, financial counsellors should adhere to the standards in this Act as an appropriate benchmark. Under this Act the client has the right to gain access to such information within 30 days of receipt of a written request to the file holder. A client may request an amendment to their records, or provide a statement for inclusion in their file.

2.8.4 Storage and access of files

Storage and access to client files shall be guided by employer policies and with the confidentiality of client information of paramount concern. Such information shall be secure against loss, misuse, or unauthorised access, use, modification or disclosure.

2.9 Termination or Interruption to Services.

2.9.1 Informing and assisting the client

Financial counsellors make all reasonable efforts to facilitate the continuation of financial counselling for the client when services are interrupted due to illness, annual leave, relocation or other reasons relating to the circumstances of the financial counsellor or the employer. Financial counsellors should, where possible, discuss with the client any issues involved with termination or interruption to services, assist the client with the process, and refer the client to alternative services if required.

2.9.2 Ceasing to act

A financial counsellor shall terminate or interrupt services at their discretion, with client agreement wherever possible, when:

- a. The services are no longer necessary for the client (for example when all work requested by the client has been completed, or when the client is no longer benefitting from the service);
- b. When the client has failed to attend appointments and does not respond to a reasonable amount of communications;
- c. When the client is not in a capacity to engage in financial counselling at the time (for example, physical or mental incapacitation due to intoxication or illness, or when there are more significant and urgent matters to be dealt with of a temporary or continuing nature);
- d. When the client is unable to constructively participate in the financial counselling process.
- e. Where possible and appropriate, a termination of service should be put in writing.

2.9.3 Client right to terminate

The client has the right to discontinue services, engage another service or seek a second opinion at their own choosing.

2.9.4 Notification

The financial counsellor shall inform the client in writing that they have ceased to act on the client's behalf, and where necessary and appropriate, shall inform other persons and/or creditors, preferably after gaining the client's consent.

3. Responsibilities to Colleagues

Financial counsellors have a number of responsibilities when working with colleagues and professional associates to work towards mutual and professional aims.

3.1 Collaboration

Financial counsellors respect, support and encourage other financial counsellors and colleagues, and freely share knowledge and resources, within the limits of confidentiality and privacy.

3.2 Referrals

In order to make appropriate referrals, financial counsellors maintain professional and current contacts with colleagues, other agencies, health practitioners and therapeutic, community and/or government support services. Financial counsellors shall ensure that referrals are relevant and justifiable for the interests and needs of the client's situation, and should explain the process of contacting referral services where appropriate.

3.3 Boundaries

Financial counsellors have a responsibility to maintain appropriate boundaries with colleagues, supervisees, students, research participants and others directly involved in a professional relationship with the financial counsellor.

3.4 Conflict resolution

Financial counsellors have an obligation to seek to resolve conflicts with colleagues in a direct but respectful and considerate manner.

3.5 Reporting misconduct

If a financial counsellor becomes aware of a colleague's misconduct, they shall act in accordance with the following:

- A financial counsellor is encouraged to bring to the attention of a colleague any concerns they have about that person's ethical conduct or professional judgement;
- A financial counsellor will recommend, where appropriate, to those directly affected by another financial counsellor's alleged misconduct, that they notify that person's employer or that financial counsellor's relevant State or Territory association;
- A financial counsellor, who, after reflection, considers a colleague to have seriously breached this Code in a way that constitutes a serious risk to the well-being of a client, colleague, or any member of the public, should discuss that financial counsellor's alleged misconduct with their supervisor, manager, or the relevant State or Territory association to determine the appropriate course of action;

- The criteria for risk which may result in a financial counsellor being reported for misconduct includes, but is not limited to:
 - a. Practising while intoxicated by alcohol or drugs;
 - b. Engaging in sexual misconduct within professional practice;
 - c. Conduct which places clients or the public at risk of substantial harm; or
 - d. Significant departure from accepted professional standards.

3.6 Supervising and training

Financial counsellors ensure that all supervision and training they provide to a colleague or financial counsellor-in-training is in accordance with this Code of Practice and the supervision and training guidelines of their relevant State or Territory association.

4. Responsibilities to the Workplace

Financial counsellors have a number of responsibilities when working within the financial counselling workplace to meet the requirements of the organisation and protect the employer from liability arising through fault or negligence by the financial counsellor.

4.1 Workplace policies

Financial counsellors shall act in accordance with, and where appropriate contribute to, policies and procedures of the employer. This includes occupational health and safety policies and any other organisational codes of practice. Financial counsellors are encouraged to discuss this Code of Ethical Practice with their employers to help inform workplace policies and procedures.

4.2 Occupational health and safety

Financial counsellors work with their employer to ensure a safe and healthy working environment for themselves and their clients. Financial counsellors shall not place themselves in a situation of risk (for example, seeing clients when alone in an office building or continuing a counselling session with verbally or physically aggressive persons). Financial counsellors and their agencies should ensure a safe physical environment and have policies and guidelines in place for dealing with actual or potentially hazardous situations. Financial counsellors will also work with their employer to ascertain a fair workload in order to minimise the risk of burnout and overwork.

4.3 Statistical data

Statistics and information required by funding bodies and the financial counsellor's agencies or associations, or for any other purposes, shall be provided with protections for maintaining client confidentiality. At the very least, data shall be de-identified in a way that ensures that no client can be personally identified from the data provided.

4.4 Feedback and complaints

Financial counsellors shall follow client feedback and complaint policies and procedures implemented in the workplace. In dealing with complaints from a client, a financial counsellor shall focus on working towards a positive resolution.

5. Responsibilities to the Profession

Financial counsellors have a number of responsibilities to the financial counselling profession, including to support its aims and values, and to act as a representative of the profession.

5.1 Professional Integrity

Financial counsellors respect the image and protect the integrity of the occupation by maintaining a high standard of personal conduct and conducting themselves in a professional and ethical manner at all times.

5.2 Professionalism

Financial counsellors shall not bring the profession into disrepute through any act or omission in their capacity as a financial counsellor. Financial counsellors shall not misrepresent their qualifications, training, experience or ability to produce a particular outcome.

5.3 Responsibility

Financial counsellors have an awareness of their responsibilities and any likely consequences of their actions taken on behalf of clients. Financial counsellors shall take responsibility for the reasonably foreseeable consequences of their actions and be mindful to prevent harm occurring as a result of their conduct.

5.4 Competency

Financial counsellors shall become and remain proficient in the practice of the occupation, with reference to the FCA Minimum Practice Standards policy and the accredited training standards as required by the relevant State or Territory association membership. A financial counsellor shall not offer counselling or information beyond the scope of financial counselling and their own qualifications, training, expertise and experience. If uncertain, the financial counsellor should consult with a casework supervisor, another financial counsellor or manager, a financial counselling resource service, or refer to other professionals if the matter is outside their area of financial counselling expertise.

5.5 Communication

Financial counsellors communicate effectively with clients, colleagues and industry contacts, and have the ability to compose letters, reports and written communications which are appropriate to the situation. Financial counsellors are professional in all forms of communication, including face to face contact, telephone contact, and online communication which may include: email, social networking sites, blogging, and instant messaging. Financial counsellors shall comply with the policies of their employer regarding use of social and electronic media. When making public statements through traditional, electronic or social media financial counsellors shall be aware of the potential audience of this information and maintain professionalism at all times.

5.6 Accreditation

Financial counsellors shall be accredited according to the training and membership requirements of the financial counselling association in that financial counsellor's State or Territory and maintain and ensure renewal of this accreditation each year.

5.7 Research

Financial counsellors who undertake research projects should monitor and evaluate their practices to be consistent with national directives for best research practice, and should seek opportunities to be conversant with current consumer and community research. Those undertaking research should adhere to the guidelines set out in the Australian Code for Responsible Conduct of Research.

6. Responsibilities to the Wider Community

Financial counsellors have a number of responsibilities as members of the wider community, and to share with professionals in the general aim of working towards the greater social good.

6.1 Contribution

Financial counsellors work with other professions, where possible, to share knowledge and resources to the greater benefit of the community, and to promote the integration of services in a way that enables greater client access to appropriate and comprehensive services.

6.2 Non-discrimination

Financial counsellors practice in an appropriate manner and are respectful of, and responsive to, the specific needs relevant to the social, cultural, linguistic, spiritual, and sexual and gender diversity of clients and consumers.

6.3 Legal obligations

Financial counsellors comply with current Federal and State or Territory laws that are relevant to their professional responsibilities. Financial counsellors must not assist or encourage clients to break the law.

6.4 Social factors

Financial counsellors support social change that promotes the general welfare and self-determination of families and individuals. Financial counsellors shall advocate, where appropriate, for the right of all Australians to be treated fairly by industry, for economic and legislative systems that are fair to the vulnerable and disadvantaged in Australian society, and the development of social environments that optimise financial health and wellbeing among communities, families and individuals.

6.5 Social welfare

Financial counsellors shall not excuse or condone known instances of abuse or neglect, whether towards children, the elderly, or persons living with domestic violence. Financial counsellors should encourage those involved to contact the relevant authority to report the situation, however a financial counsellor must also honour the client's right to confidentiality and to self-determination.

6.6 Community knowledge

Financial counsellors will consult with, seek guidance from, and support, local community members, mentors and advisors. Financial counsellors shall, where appropriate, promote community participation in the development, and advocacy of financial counselling policies and services, and provide community education about financial issues.

Appendix 1

Relevant Documents

Reference list

C. Livingstone, E. Kotnik & S. King (2008). *Comparing Australian and International Approaches to Financial Counselling Service Models: A literature review*. Monash University: Department of Health Science.

Organizational Codes of Conduct (2003) – Council of Standards Australia

S. Longstaff (1994). 'A statement about codes of ethics and conduct' in *Preston, N (ed) Ethics for the Public Sector.* :

S. Longstaff (1994). 'Developing codes of ethics and conduct: Some thoughts on how to make codes of ethics work' in *Preston, N (ed). Ethics for the Public Sector.* :

S. Longstaff (1994). 'Developing codes of ethics: Why codes fail' in *Preston, N (ed). Ethics for the Public Sector.* :

Codes of Ethics and Codes of Conduct

Code of Conduct for Financial Counsellors (not dated) – South Australian Financial Counsellors' Association (Inc.) (SAFCA)

Code of Ethics (2007) – Australian Psychological Society (APS)

Code of Ethics (2010) – Australian Association of Social Workers (AASW)

Code of Ethics (2010) – Psychotherapy and Counselling Federation of Australia (PACFA)

Code of Ethics (not dated) – The Financial Counsellors' Association of NSW (Inc.) (FCAN)

Code of Ethics and Good Practice (2002) – Counsellors and Psychotherapists Association of NSW (CAPA)

Code of Ethics for Problem Gambling Treatment and Support Services (2005) – NSW Responsible Gambling Fund

Code of Professional Conduct (not dated) – Australian Financial Counselling and Credit Reform Association (FCA)

Code of Professional Conduct (not dated) – Financial Counsellors' Association of Queensland (Inc.) (FAQ)

Code of Professional Conduct (2010) – Financial Counsellors' Association of Western Australia (Inc.) (CAWA)

Credit Reporting Code of Conduct (1996) – Office of the Australian Information Commissioner

Industry Funding Policy (2005) – Australian Financial Counselling & Credit Reform Association (AFCCRA)

Minimum Practice Standards (not dated) – Australian Financial Counselling & Credit Reform Association (AFCCRA)

Service Standards and Professional Conduct Rules (not dated) – Financial and Consumer Rights Council (Inc.) (FCRC)



Appendix 2

State and Territory Financial Counselling Associations

The peak bodies for Financial Counsellors in Australia are currently:

- New South Wales - The Financial Counsellors' Association of NSW (Inc.) (FCAN)
- Northern Territory - Money Workers Association of Northern Territory (MWANT)
- Queensland - The Financial Counsellors' Association of Queensland (FCAQ)
- South Australia - The South Australian Financial Counsellors' Association (Inc.) (SAFCA)
- Tasmania - Financial Counselling Tasmania (FCT).
- Victoria - The Financial and Consumer Rights Council (FCRC)
- Western Australia - The Financial Counsellors' Association of Western Australia (Inc.) (FCAWA)

Appendix 3

How the Code was created

The Australian Financial Counselling Code of Ethical Practice (The Code) was created with reference to FCA's Minimum Practice Standards and Code of Professional Conduct, the NSW Responsible Gambling Fund (RGF) Code of Ethics, and to all pre-existing financial counselling codes of ethics and codes of practice or conduct in use within financial counselling associations. The Code was written using information on best practice for codes of ethics and ethical conduct from the St James Ethics Centre and the Australian Standard Organizational Codes of Conduct. It refers to National legislation and guidelines such as the Privacy Act and National Mental Health Practice Standards, as well as State and Territory legislation where relevant. This Code also acknowledges the codes of ethics and codes of conduct for allied health professions in Australia, including those of the Australian Psychological Society (APS), the Psychotherapy and Counselling Federation of Australia (PACFA), and the Australian Association of Social Workers (AASW), who have each granted their permission for this acknowledgement.

The Code was created in consultation with representative financial counsellors from across Australia and in conjunction with ethicists, psychologists, lawyers, and counsellors, who provided diverse perspectives on the principles of best practice in the field of counselling generally, and within the profession of financial counselling specifically.

Appendix 4

Responsibility for the Code

Table 1 - Records the person(s) who have carried, and currently carry, the responsibility of overall control of this document.

NAME	POSITION	DATE STARTED	DATE CEASED
Fiona Guthrie	Executive Director, FCA	February 2012 (date Code adopted)	

Table 2 - Records changes made to this Code

CHANGE	NAME	POSITION	DATE

RISK MANAGEMENT GUIDE

SECOND EDITION

A guide to risk management in legal practice for Community Legal Centres and other Legal Assistance Services that are members of Community Legal Centre Associations

Includes the Mandatory Standards of NACLC's National Professional Indemnity Insurance Scheme, which are also Standards for Certification and Accreditation under the National Accreditation Scheme for Community Legal Centres



Publication details

The *Risk Management Guide: A guide to risk management in legal practice for Community Legal Centres and other Legal Assistance Services that are members of Community Legal Centre Associations* (the Guide) is published by the National Association of Community Legal Centres (NACLC) for the use of community legal centres (CLCs) and other legal assistance services in Australia that are full members of a state or territory association of CLCs and thus come under the NACLC umbrella (collectively, 'centres').

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Publication background

The first edition of this more detailed and substantive Guide, titled *Risk Management and CLC Practice: A guide for community legal centres in delivering legal and related services*, was published in 2011, replacing the earlier *National Risk Management Guide* published in July 2005 by NACLC. The 2005 Guide included *The Professional Indemnity Insurance Risk Management Guide* (July 2005), based on the NSW Combined Community Legal Centre Group *PII Compliance Manual* (2002) and a section setting out background information about PII and the Scheme structure in part based on and adapted from chapters 1 and 2 of the *Practice Guide for NSW Community Legal Centres* (2002). The copyright in these earlier publications is acknowledged.

The 2011 edition of the Guide significantly rewrote and added to the 2005 publication. For the first time it identified Mandatory Standards, distinguishing them from recommended good practice actions that it also included. It was developed with the assistance of many people in the sector, in particular Bill Mitchell from Townsville Community Legal Service Inc; Julia Hall and Jill Anderson from NACLC; Justin Finighan, NACLC IT and CLSIS consultant; and members of the National Professional Indemnity Insurance (PII) Network. Its editing was by Jill Anderson, NACLC, and Ian Close, Outside Communications; graphic design was by Justin Archer Design. A few sections of the Guide were revised in December 2012, with only those updated pages being reprinted.

The revision undertaken for this second edition of the Guide was undertaken by Kiri Libbesson, Insurances Coordinator at NACLC, and members of the National PII Network, particularly Catherine Eagle, longstanding member and the Network Chair, with significant input from Amanda Alford and Julia Hall at NACLC, as well as others across the sector. Significant changes have been made to this version and any superseded versions of the Guide should not be relied on or used as a reference source.

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Disclaimer

The Guide is a tool and resource for use by those centres that provide legal and other professional and related services.

It should not be assumed that it covers every aspect of risk management that may be relevant to any **particular** centre's legal practice or other services delivered by that centre. Each centre delivers its services differently and within a different context and must devise and apply risk management strategies appropriate to its own particular situation.

The Guide also does not cover every aspect of organisational risk management. There are significant aspects of centre governance, organisational management and operations that are not addressed in this publication and which should be the subject of separate specific risk management policies, procedures and practices. This Guide should be only one of a suite of complementary risk management policies and practices for centres.

The principal lawyers and others responsible for centre legal work and service delivery, including the employer centres themselves, must satisfy themselves that their legal practices and related services are complying with all relevant legal and professional obligations. The Guide at times refers to relevant law, but it is not and does not purport to be a complete compilation of the law applicable to lawyers' legal and ethical obligations, the management of legal practices or other professional services, in any or all jurisdictions, and should not be relied upon as such.

As a national resource, it is not possible to refer to every state and territory distinction, and users are responsible for ascertaining and complying with the particular requirements of their own jurisdiction.

The Guide is one of a range of management and governance resources developed and produced by NACLC to support CLCs and other legal assistance providers. It also includes the Mandatory Standards of NACLC's National Professional Indemnity Insurance (PII) Scheme. Only legal assistance services that are full members of a state or territory association of CLCs are eligible to participate in this Scheme and participation is contingent on the service demonstrating annually satisfactory compliance with the Mandatory Standards. Regardless of their participation in the National PII Scheme, all full members are required under the National Accreditation Scheme for CLCs, to satisfactorily comply with the NACLC Accreditation Criteria, which include the Mandatory Standards set out in this Guide.

This Guide is not for distribution outside the CLC sector. It is provided free by NACLC to centres that are members of state or territory associations of CLCs and to a very limited number of sector stakeholders at NACLC's discretion and on a confidential and restricted basis.

Acknowledgement of Country

NACLC acknowledges the traditional custodians of the lands across Australia and particularly the Gadigal people of the Eora Nation, traditional custodians of the land on which the NACLC office is situated. We pay deep respect to Elders past and present.

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B	<i>National Professional Indemnity Insurance Policy Schedule</i>
C	<i>Professional Indemnity Insurance Notification Form</i>
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Sample documents:

F	<i>Email Policy: sample</i>
G	<i>Conflict of Interest in Service Delivery Policy: sample</i>
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I	<i>File Destruction Checklist (Qld): sample</i>
J	<i>Letters of Engagement/Client Agreements (NSW & Vic): samples</i>
K	<i>Information Barrier Policy: samples</i>

Important Information about Changes in Services Terminology

Background

Funding and program management for CLCs has undergone significant change in recent years, in particular as a result of the commencement of the National Partnership Agreement on Legal Assistance Services 2015-2020; the publication of the National Legal Assistance Data Standards Manual; and the development of the Community Legal Assistance Services System (CLASS).

This edition of the Guide has been written taking into account these developments.

The National Legal Assistance Data Standards Manual

In 2015, the Commonwealth Attorney-General's Department published a National Legal Assistance Data Standards Manual (DSM), which can be found at <https://www.ag.gov.au/LegalSystem/Legalaidprogrammes/Pages/National-Legal-Assistance-Data-Standards.aspx>.

The DSM has the aim of introducing common client and service data recording across all four legal assistance services. It was developed in consultation over some years, with representatives of each of the respective legal assistance services.

The DSM contains, among other things, a new system of classification of 'Services' and new definitions of each Service type. Under the NPA, state and territory governments must report to the Commonwealth on benchmarks and performance indicators that refer to Services as defined by the DSM.

CLASS

For many years, the great majority of CLCs (those funded under the former joint Commonwealth and state and territory funding program, the Community Legal Services Program), recorded their client and service data in a database owned by the Commonwealth Attorney-General's Department, called Community Legal Services Information System (CLSIS). State and Commonwealth Program Managers were able to access and obtain reports on de-identified service data and accountability information for their jurisdiction's CLCs. A few years ago, the Family Violence Prevention Legal Services (FVPLS) were also required to record and provide reports in CLSIS.

CLSIS is an old data system and the Commonwealth Attorney-General's Department decided to fund NACLCL to develop a new data system for the CLCs and FVPLS, which will supersede CLSIS.

At the time of writing, NACLCL expects that CLCs' and FVPLS' data will be migrated into CLASS in February 2017.

Importantly, CLASS is based on the DSM, and uses its terms and definitions for recording client and service data. This will support and facilitate centre reporting to government, and state or territory governments accessing reports for provision to the Commonwealth in accordance with their obligations under the NPA.

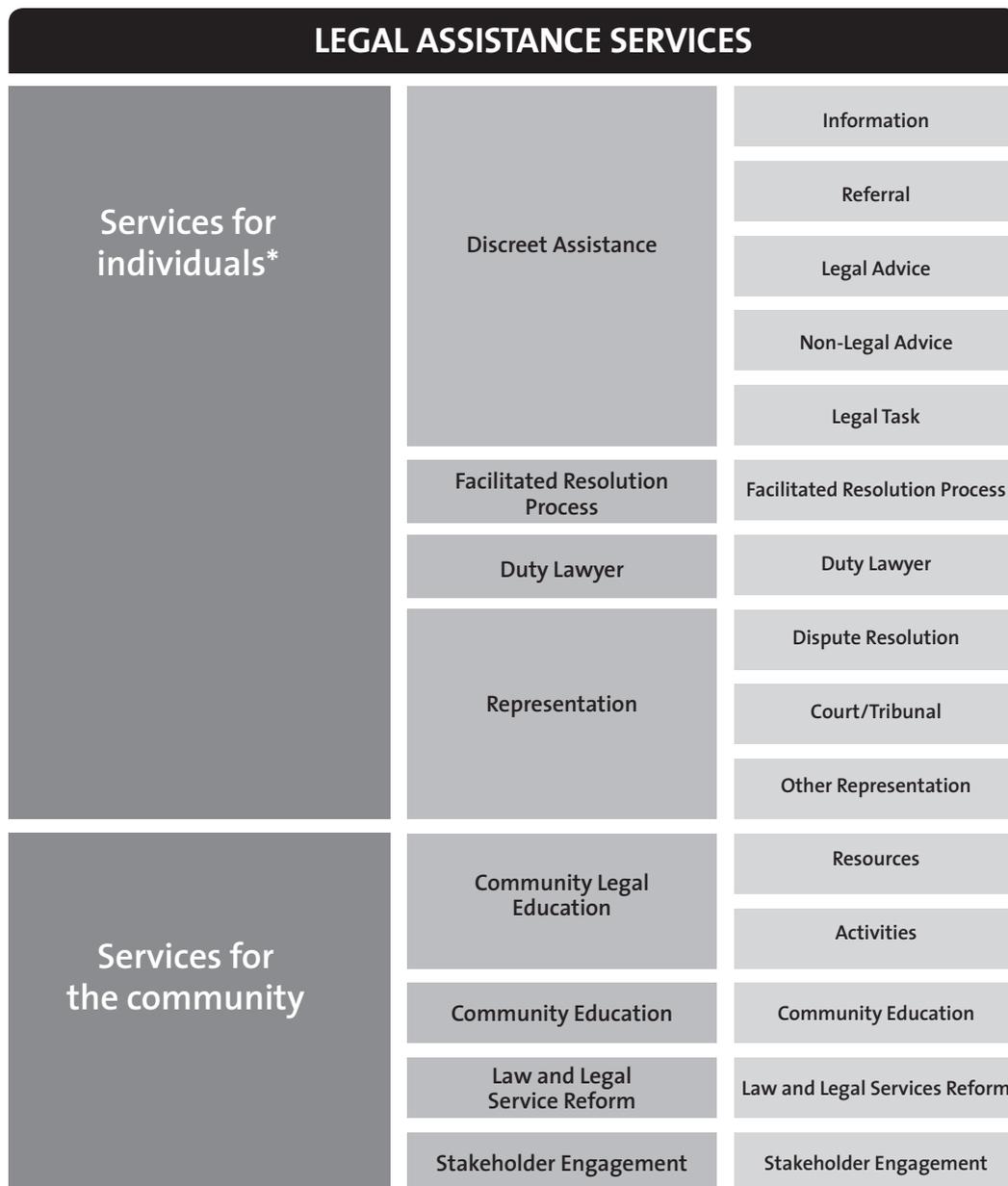
Effect of the new Services Definitions on the Guide

Historically, CLCs have tended to think and refer to their work as one-off assistance (advice, information and referral), or ongoing work, commonly called 'casework'. CLSIS uses these terms.

In CLSIS, these terms are quite broad, for example, 'Advice' can be legal or other advice, and may also include providing some related support, such as drafting a letter, so long as the assistance is a discrete service. The CLSIS term 'Casework' includes representation, acting as a duty lawyer at court, and providing ongoing assistance (including when not acting for that person) and/or acting on behalf of a client in respect of a problem, but because it is not only concerned with providing ongoing assistance in a representational capacity it can cover both legal and non-legal casework.

The DSM has more categories of services and new definitions. Centres must understand and use this new terminology to ensure that they record their services accurately and consequentially their reports to funders are accurate. The following diagram from page 3 of the DSM provides an overview of the categories of services used within the DSM.

FIGURE 1: Legal assistance services



* This includes services for individuals, groups and organisations.

To support centre understanding of the new terminology and the move to the new DSM definitions, this Guide refers either to the individual Service names in the DSM, or when making the distinction between one-off and/or ongoing assistance, uses the terms ‘Discreet Assistance’ and ‘Ongoing Assistance’. It is important to note that both those terms contain several different types of services under the new classification system.

The Glossary included in this Guide identifies the services defined in the DSM and the definition for each Service. It is important to consult the DSM itself as it contains critical information on the way to record and ‘count’ each service, and some fact situations as examples of different types of services. In addition, centres should be alert to updates to the DSM as it could be further clarified in the future.

GLOSSARY OF TERMS

Advice	<p>As defined in the CLSIS Data Dictionary, and used in this Guide, is:</p> <p style="padding-left: 40px;">when a service provider helps a client to select between options about the client’s own problems. Advice includes but is not limited to legal advice. It may be counselling, advocacy, support and/or legal advice.</p> <p>The DSM only includes one Advice service type, ‘Legal Advice’.</p> <p>Centres have historically recognised that some professional and other expert workers who are not lawyers may give advice within their area of expertise. Such advice would not fall within the Legal Advice service type as defined in the DSM, but might otherwise be categorised as a ‘Non-Legal Support Service’, as appropriate.</p>
Branch office	<p>A location other than the main centre office where the centre provides services <i>and</i> where records (for example, casework files and advice records) are stored on the premises (as distinct from an outreach service where, typically, records are not stored but kept at the main office of the centre). A branch office will typically have staff located on the premises (who are centre employees). It may or may not operate full time.</p>
Casework	<p>Casework is the term that has previously been used to refer to any matter for which the centre is providing ongoing assistance and/or acts on behalf of a client in respect of a problem (as opposed, in that model to providing a one-off advice, information or referral). Typically, a file is opened. In CLSIS, Casework was classified as Minor (0-5 hours), Medium (6-20 hours) or Major (over 20 hours). Ongoing work that would formerly have been called ‘casework’ is now under the DSM either Representation Services or ongoing Non-Legal Support Services (Non-Legal Support Services can also be a discrete service so the reference to ongoing is important). Under the DSM, Representation Services are where a Service Provider takes carriage of a matter in an ongoing, representative capacity. Refer to the DSM definitions of Representation Services, Dispute Resolution Service, Court/Tribunal Service and Other Representation Services, which are included in this Glossary.</p>
Centre	<p>Legal assistance service providers that are full members of a state or territory CLC association and therefore come under the NACLCLC ‘umbrella’. These may be CLCs, Aboriginal and Torres Strait Islander Legal Services (ATSILS) or Family Violence Prevention Legal Services (FVPLS).</p>

CLASS	Community Legal Assistance Services System (replacement for CLSIS)
CLC	Community Legal Centre
Client/litigation agreement or letter of engagement	Whenever a Representation Service or other ongoing legal service is to be provided by a centre it is recommended that the centre provide the client with written information confirming the nature and extent of the work that the centre has agreed to do on behalf of the client. This may be done by way of a letter of engagement or a client/litigation agreement . In some cases, for example where work is undertaken on a duty lawyer basis, or done quickly to meet a deadline, this may not be practical. In those cases it is desirable to provide the client with written confirmation of the work that was undertaken as soon as is possible afterwards
CLSIS	Community Legal Services Information System – the Commonwealth-owned database for CLC and FVPLS client and service data that has operated for several years, but will no longer be available to users after 31 March 2017
CLSP	The Community Legal Services Program (CLSP) was a joint funding program of both the Commonwealth and State and Territory Governments. The Commonwealth CLSP was a dedicated program within the Australian Attorney-General's Department that funded and coordinated CLSP funding and program management for CLCs prior to 1 July 2015. The majority of Commonwealth funding to CLCs is now delivered through the NPA (see below). The current CLSP retains the same name but has been revised to be delivered as a nationally focussed discretionary grants programme, administered by the Attorney-General's Department. In addition, some states and territories refer to their state CLC funding programs as CLSP
Community Education (<i>DSM pp 14-15</i>)	<p>Community Education (CE) (as distinct from Community Legal Education, defined below) aims to resolve non-legal associated issues, social welfare, learning outcomes and personal development of people involved in the legal process and experiencing disadvantage. The focus is on addressing related non-legal problems that directly impact upon a person's ability to access or participate in the justice system, to prevent legal matters escalating. These programmes and sessions are often facilitated by non-lawyers such as client support officers.</p> <p>CE promotes learning and social development work with groups in the general community using a range of formal and informal methods. A common crucial feature is that programmes and activities are developed in discussion with communities and participants. The purpose of community education and development is to help build the capacity of people and groups of all ages and the</p>

community through their actions by improving quality of life and control over personal circumstances. Central to this is a person's ability to participate in the justice processes and become aware of their individual rights and responsibilities.

There are a range of skills and approaches for engaging local communities/groups and in particular disadvantaged people. These include less formal educational methods, community activities and group skills. Community development enables community members to be better informed and to have an active voice in seeking solutions for the issues affecting their circumstances/lives.

Examples of CE include:

- managing finances
- self-esteem and healthy relationships sessions
- behavioural programmes
- empowerment/leadership programmes
- access to services; housing, social services, support programmes
- parenting programmes
- group therapy.

Community Legal Education (CLE)
(*DSM p 13*)

Community Legal Education (CLE) is provided to the general community, community services, community groups, organisations or schools. These services inform and build individual and community resilience by enhancing:

- awareness and understanding about the law and how to identify, prevent and deal with problems
- awareness of the help available from legal and support services.

Community Legal Education Activities
(*DSM p 14*)

CLE Activities are delivered to raise awareness and educate other service providers, community groups, organisations, schools, or the general community about the law and how to recognise, prevent and deal with legal problems. CLE Activities may be delivered through a variety of formats, including:

- workshops, presentations and meetings in person
- web-based and electronic media.

Community Legal Education Resources
(*DSM p 13*)

CLE Resources involve the development or substantial amendment of publications and resources that provide:

- information about the law and legal system
- information about legal and support services
- guidance for identifying, preventing or dealing with particular legal problems.

Examples of CLE Resources include: booklets; pamphlets; self-help kits; legal information websites; development of CLE Activities (for example, modules, workshops or presentations).

CLE Resources may be developed to be delivered via a variety of media including: printed/hard copy;

audio products; DVD/video; web based; workshops or presentations.

Court/Tribunal Service
(*DSM p 11*)

A Court/Tribunal Service relates to any ongoing representation for any matter before a court, tribunal or inquiry, where a Service Provider provides legal representation to a Service User, and takes carriage of a matter in an ongoing, representative capacity. This includes court/tribunal based alternative dispute resolution.

A Court/Tribunal Service does not include services provided by a duty lawyer or assistance to self-representing parties where a Service Provider does not take carriage of a matter in an ongoing, representative capacity. This type of service is counted as a Legal Task, Legal Advice or Duty Lawyer Service, as appropriate.

Cross-check

This refers to the mandatory peer review procedure that occurs annually to monitor each centre's compliance with the Mandatory Standards of the Guide and to support continuous improvement in risk management in centres' practices. All centres that are full members of a state or territory CLC association are cross-checked. See in particular **Ch 9**.

Discrete Assistance
(*DSM p 4*)

Discrete Assistance is the provision of unbundled, discrete, legal and non-legal services to Service Users [i.e. **Information Services, Referral, Legal Advice Services, Non-Legal Support, and Legal Task**].

These intermittent services differ from Representation Services, where a Service Provider takes carriage of a matter in an ongoing, representative capacity.

Discrete Assistance may be provided at any location (for example, in a Service Provider's office or in an outreach location).

They may also be delivered in a range of modes: in person; telephone; letter; email, mail or fax; video conference; online chat.

Dispute Resolution Service
(*DSM p 10*)

This service involves the legal representation of a Service User in a Facilitated Resolution Process, or an alternative dispute resolution process. This service type does not include court/tribunal based alternative dispute resolution, which is incorporated in the definition of Court/Tribunal Services.

A Dispute Resolution Service includes preparation for, and representation at, a Facilitated Resolution Process. It also includes the work involved in recording agreement following a Facilitated Resolution Process.

Assistance provided to self-representing parties preparing to attend Facilitated Resolution Processes should be categorised as Legal Task or Duty Lawyer Service as relevant.

DSM	National Legal Assistance Data Standards Manual, which was published by the Commonwealth Attorney-General's Department to introduce common client and service data recording across all four legal assistance services.
Duty Lawyer Services (DSM p 9)	Duty Lawyer Services are legal services provided by a duty lawyer to a Service User at a court or tribunal.
Facilitated Resolution Process (DSM p 8)	<p>A Facilitated Resolution Process is where a Service Provider conducts an activity (for example a conference) to assist the parties to resolve or narrow issues in dispute. Generally, a facilitated resolution process will involve a screening process and the provision of an independent, suitably qualified professional to facilitate resolution of the issues in dispute.</p> <p>A Facilitated Resolution Process may be provided:</p> <ul style="list-style-type: none"> • in person at any location • by telephone or videoconference.
Financial counsellor	Financial counsellors are required to comply with professional association codes, a system of accreditation by state or territory associations (in most jurisdictions) and to meet the exemption (from licensing) requirements under the ASIC Class Order for the Financial Services Reform Act 2001 (Cth) and the exemption requirements under the National Consumer Credit Protection Act 2009 (Cth).
Information Services (DSM p 4)	<p>An Information Service is the provision of information to a Service User in response to an enquiry about:</p> <ul style="list-style-type: none"> • the law, legal systems and processes, • legal and other support services to assist in the resolution of legal and related problems. <p>The information provided is of general application. An Information Service involves a direct communication and/or a provision of material by a Service Provider to a Service User. Information Services do not include administrative tasks such as booking appointments for Legal Advice sessions.</p>
Law and Legal Service Reform (DSM pp 15-16)	<p>Law and Legal Service Reform include activities undertaken to change the law and legal process, or to improve the provision of legal assistance services. These activities often seek to improve equitable access to, and the effectiveness of, the justice system for the benefit of particular disadvantaged groups within the community and the Australian community as a whole.</p> <p>Law and Legal Service Reform activities may include:</p> <ul style="list-style-type: none"> • participation in research, analysis and evaluation activities (including programme evaluation) • developing papers about legal assistance services and systems • developing submissions to government, parliamentary body or other inquiry to provide factual information

and/or advice

- strategic advocacy, such as law reform work.

Law and Legal Service Reform activities focus upon resolving systemic issues affecting the ability of people facing economic, social and other disadvantage to access or receive justice. While in some cases, this involves services delivered to a disadvantaged client, these services focus upon maximising benefits for the wider community or a vulnerable group within the community.

Lawyer	For the purpose of this Guide and the Cross-check Questionnaire (see Appendix D), the terms lawyer or legal practitioner refer only to a legally qualified person who holds a current practising certificate.
Legal Advice Services (DSM p 6)	A Legal Advice Service is the provision of fact-specific legal advice to a Service User in response to a request for assistance to resolve specific legal problems.
Legal Task (DSM p 7)	<p>A Legal Task is where a Service Provider completes a discrete piece of legal work to assist a Service User to resolve a problem or a particular stage of a problem.</p> <p>Examples of a Legal Task include:</p> <ul style="list-style-type: none"> • preparation or assistance with the drafting of documents (such as a will) • writing a letter to another party asking them to do something or stop doing something, or • advocating on behalf of a Service User without taking ongoing carriage of the matter. <p>If a Service Provider takes carriage of a matter in an ongoing, representative capacity, including representing a Service User in court or tribunal proceedings, this is no longer a Legal Task but a Representation Service.</p>
Management Committee	This refers to the Management Committee or Board of the centre. The Management Committee must work with the Responsible Person to make sure that all staff and volunteers are familiar with relevant parts of this Guide.
NACLC	National Association of Community Legal Centres
NAS	National Accreditation Scheme for CLCs
Nominated Person	A Nominated Person is a person who has been delegated responsibility (by the Responsible Person) for performing certain roles of the Responsible Person with regard to managing and supervising some part/s of the legal practice. For example, a Nominated Person may be appointed to supervise advice given and/or work undertaken in a particular area of the centre's practice. A Nominated Person should be a centre employee who is a lawyer who has suitable experience and expertise to perform the roles delegated to them. However if this is not possible (for example because of a centre's

resource constraints or expertise needs), a non-lawyer, and/or volunteer or other person may be appointed as a Nominated Person provided:

(a) in the opinion of the Responsible Person, the person has suitable expertise and experience to properly carry out the responsibilities delegated to them, and

(b) the Responsible Person notifies their PII representative and state or territory association in writing of the appointment of the person, the responsibilities delegated and the expertise and experience of the person that makes them suitable to perform those roles. See in particular **3.5.29-33**.

Non-Legal Support Services
(DSM p 6)

A Non-Legal Support Service is provided by an appropriately qualified or experienced person (either through an internal or external appointment) to a Service User in response to a request for assistance to resolve specific, non-legal problems. Examples include general counselling, financial counselling, trauma-informed counselling, Aboriginal and Torres Strait Islander community liaison, and mental health assessments and support.

Non-Legal Support Services can either be a discrete or an ongoing service.

NPA

National Partnership Agreement on Legal Assistance Services 2015-2020. Since 1 July 2015, the great majority of Commonwealth funding to CLCs has been delivered under the NPA.

Ongoing Assistance Services

Ongoing Assistance is a term used within this Guide to refer to those Services for Individuals where a centre takes carriage of a matter in a continuing capacity, for example, Representation Services.

Other Representation Services
(DSM p 12)

Other Representation Services relates to any matter where the Service Provider:

- takes carriage of a matter in an ongoing, representative capacity, but due to the nature of the matter it does not proceed to a court, tribunal or inquiry, or
- is not required to appear before a court, tribunal or inquiry.

Other Representation Services do not include assistance to self-representing parties where a Service Provider does not take carriage of a matter in an ongoing, representative capacity. This type of service is counted as a **Legal Task, Legal Advice or Duty Lawyer Service**, as appropriate.

Practising certificate

A practising certificate is evidence provided by the relevant legal profession body that the lawyer is entitled to practise as a lawyer for the specified period, usually a year, with or without specified conditions. Lawyers should

be familiar with the legal practice legislation and Rules of the relevant state or territory, and ensure that all legal, professional regulatory and ethical requirements are met. See also **Registered Migration Agent**.

PII	<p>Professional Indemnity Insurance</p> <p>The National PII Policy is the master insurance policy arranged and negotiated by NACLCL for the benefit of participating centres.</p> <p>The National PII Scheme is the framework in which the National PII Policy operates, and with which participating centres must comply. This framework incorporates the cross-check process, which is also a requirement for accreditation under the NAS. See Chapter 4.</p>
Referral (DSM p 5 and 35)	<p>A Referral is when a Service Provider determines that a Service User can be assisted by another individual or organisation and provides the User with the contact details to that service. In the DSM a Referral may be recorded as a Simple Referral or a Facilitated Referral.</p>
Registered Migration Agent	<p>Only Registered Migration Agents, whether they are lawyers or not, can provide 'immigration assistance' as defined by the <i>Migration Act 1958</i> (Cth). The Responsible Person is responsible for ensuring that the formal requirements of relevant legislation such as this are met.</p>
Representation Services (DSM p 10)	<p>Representation Services are where a Service Provider takes carriage of a matter in an ongoing, representative capacity.</p> <p>[This includes: Dispute Resolution Service; Court/Tribunal Service; and Other Representation Services.]</p>
Responsible Person	<p>Each centre appoints a Responsible Person who must ensure that the Guide is implemented. The Responsible Person should be a centre employee who is a lawyer with an unrestricted practising certificate. In those jurisdictions in which the legal profession laws require the employment of a principal solicitor the centre shall appoint that person as the Responsible Person. Where there is no such legislative requirement the managing or senior employed lawyer should be appointed as the Responsible Person. If this is not possible, either temporarily or in the longer term, a centre can negotiate with their state or territory PII representative and CLC association to approve an alternative arrangement that is also acceptable to the relevant regulatory body. See in particular 3.5.21-28.</p>
Restricted practitioner	<p>All state and territory legal profession laws provide for 'restricted practising certificates' where the lawyer holding the certificate can only practise in certain ways and/or is subject to certain conditions.</p>

RMG	Risk Management Guide
Services for Individuals	This is a term used within the DSM to refer to services provided to individuals, groups and organisations, as opposed to Services for the Community , such as CLE.
Services for the Community	Services for the Community is a term used within the DSM to refer to services such as Community Legal Education, Community Education, Law and Legal Service Reform, and Stakeholder Engagement .
Service Provider (DSM p 2)	This is a legal assistance service provider [i.e. a centre], or an individual acting on behalf of the legal assistance service provider, that delivers a service to a Service User.
Service User (DSM p 2)	This is an individual, group or organisation that receives a service from a Service Provider [i.e. a client].
Specialist, auspiced or hosted service, program or project	The terms ‘auspiced service/project’ or ‘hosted service/project’ refer to a project or program, which has, or to some extent can be seen as having, its own separate identity. A ‘specialist service/project’ of a CLC is generally an integral part of the centre’s core service delivery, such as the Women’s Domestic Violence Court Advocacy Services (WDVCAS), Tenancy Advice and Advocacy Services, Welfare Rights and Financial Counselling services. Such a service/project is usually funded separately and specifically. See in particular 7.10 .
Stakeholder Engagement (DSM p 16)	Stakeholder Engagement activities may include the following activities: <ul style="list-style-type: none"> • participating in national, state, territory and local forums to improve the co-ordination and delivery of legal assistance services • participating in national, state, territory and local bodies to represent the interests of the legal assistance providers and Service Users • making and implementing collaborative arrangements with other legal and non-legal service providers to integrate and improve coordination across the legal assistance system.

CHAPTER 1

Introduction to the Guide

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1.1 Purposes of the Guide

This Guide:

sets out the NACLC national policy framework for risk management of legal practice and related services delivery in CLCs

provides information about the NACLC National Professional Indemnity Insurance (PII) Policy and the NACLC National PII Scheme and its requirements

sets minimum risk management Mandatory Standards for centres that are full members of a state or territory CLC association (see below)

provides additional **recommended** risk management guidelines and procedures that are good practice and can be adopted by centres wishing to improve their standards and quality assurance beyond the level of the required minimum Mandatory Standards.

1.2 Getting the most from the Guide

1.2.1 The simple way to get the most from the Guide is to read it from cover to cover and become familiar with its content. As a first step it is recommended that all staff, Management Committee members, and volunteers at least read Chapter 2 concerning the Mandatory Standards in the Guide. It is recommended that each centre develop an internal **training plan** around the Guide, or amend their existing training plan, for staff, volunteers and Management Committee members. You may want to hand out copies of relevant key parts to each of these different groups at induction and on training occasions, which at a minimum would include Chapter 2 (Mandatory Standards) and the centre's conflict of interest policy and other relevant policies (for example, the electronic communications policy). The Guide is an invaluable induction and training tool.

1.2.2 Some centres may wish to develop a formal implementation plan directed to awareness raising, training, development or refinement of relevant policies and monitoring of policy implementation.

1.2.3 If you have trouble understanding any parts of the Guide or how to implement the policies or procedures it contains, contact your state or territory professional indemnity insurance representative (PII representative). The current PII representatives and their contact details are listed on the NACLC website (look under 'Insurances').

1.2.4 If you have a CLC practice risk management issue, the Guide is a ready reference to point your centre in the right direction. The more familiar you and others working in your centre are with the Guide, the more effective it will be in supporting you in establishing and maintaining good practice risk minimisation for your centre.

1.3 Centres need other risk management policies too

1.3.1 Remember, the Guide is not a complete risk management strategy for a centre. Its focus is on the totality of centre practice that includes management of the legal practice and related service delivery. **It does not only apply to lawyers.** For example, there are the requirements that the Responsible Person or a Nominated Person must: check the advice and casework records of all volunteers, including non-lawyers; check at least a significant proportion of the advice and casework of employed non-lawyers such as financial counsellors, tenancy workers and social workers; and check the content of public statements such as centre media releases. Information in the Guide that may also be relevant to non-lawyers includes sections that deal with relevant administration and management issues including supervision and document management and retention/destruction.

- 1.3.2** As the Guide does not cover all the risk management policies or procedures that a centre's management should or may wish to have in other areas (for example, in the areas of governance and financial management), it should be one of a number of complementary risk management documents and strategies developed and implemented by each centre.
- 1.3.3** As part of the National Accreditation Scheme for CLCs (NAS), NACLCL provides access to an online platform that centres use to assess themselves against the requirements of the NAS: the *Standards and Performance Pathways* (SPP). The SPP is accessible by registered centres via the NACLCL website.
- 1.3.4** Additional risk management resources and templates are available from the 'Reading Room' in the SPP. Centres can also subscribe to *Management Support Online* (MSO) through BNG NGO Services Online, which provides additional resources for organisational management. For information on the MSO see the NACLCL website.

1.4 National compliance regime

- 1.4.1** Originally, the Guide set out the prescribed requirements for compliance with the NACLCL National PII Scheme and was used primarily for assessing compliance for that purpose. Over time, the Guide expanded to provide a detailed policy framework for risk management of legal practice and related service delivery in CLCs, setting out a broader national risk management policy. It grew to include good practices that were recommended for adoption by centres that had the resources to adopt and adhere to standards above baseline compliance.
- 1.4.2** Nationally consistent risk management of legal practice and related service delivery is one pillar of the NACLCL and state and territory associations' drive for national, consistent quality assurance of all CLCs across Australia.
- 1.4.3** In addition to the standards set out in this Guide, centres may also be required under funding agreements to comply with service standards or other requirements that may pertain to the management or supervision of legal services and/or non-legal services.

Membership rules and accreditation

- 1.4.4** The obligation on centres participating in the National PII Scheme to comply with the Guide's Mandatory Standards has been specifically reinforced by provisions in the common membership rules adopted by all CLC state and territory associations.
- 1.4.5** From October 2010, NACLCL and the state and territory associations of CLCs began rolling out a sector-led quality assurance certification and accreditation process: the National Accreditation Scheme for CLCs (NAS). The second phase of the NAS commenced in early 2016.
- 1.4.6** Full members of state and territory CLC associations are required to participate in the NAS and demonstrate that they satisfactorily comply with or they are actively working towards satisfactory compliance with, the NACLCL Accreditation Criteria. The NACLCL Accreditation Criteria include the 17 NAS Standards listed in the *NAS Guidelines* and the Mandatory Standards of this Guide.
- 1.4.7** As a result, the Mandatory Standards of the Guide apply directly to all full member centres, regardless of whether the centre is in the NACLCL PII Scheme or not. The NAS Standards in the *NAS Guidelines* include a Primary Requirement that the centre participates in and successfully completes the annual cross-check process prescribed in this Guide.

- 1.4.8 A list of the Mandatory Standards in the Guide, with cross-references to relevant commentary, appears at Chapter 2. It is important that all those involved in the management and governance of centres understand the expectations that the state and territory associations of CLCs and NACLCL have with respect to risk management. It is not only the responsibility of the Responsible Person (usually the principal solicitor). Centre coordinators and Management Committees or Boards must ensure that they and all staff, including volunteers, are familiar with all its relevant requirements and that centre staff have the support they need to ensure satisfactory compliance.

1.5 Consequences of non-compliance

- 1.5.1 Usually, if a centre does not meet a particular standard/s in the Guide an action plan to improve is agreed between the centre and the cross-checker/ PII representative. This would include a timeframe, which may be amended if necessary following further discussion. The Scheme's aim is to *support centres'* legal practices to achieve compliance. Where this has been unsuccessful and there is serious ongoing non-compliance with Mandatory Standards of the Guide, it can lead to exclusion from the National PII Policy and Scheme. See the discussion of decision-making and dispute resolution at 3.6, and in particular the procedure and relevant considerations relating to non-compliance with the RMG at 3.6.13-25.

- 1.5.2 As the Mandatory Standards in the Guide are incorporated in the NACLCL Accreditation Criteria, it follows that non-compliance could ultimately mean that a centre's membership may be reviewed by the state or territory association of CLCs, and in extreme cases membership could be suspended or terminated. Each state and territory association has rules about membership that include rules for accepting, and suspending and terminating membership of the association in the event of breach.

1.6 Information about insurance

- 1.6.1 The Guide provides information about insurance as a component of risk management. It provides detailed information about the National Professional Indemnity Insurance Policy (National PII Policy) negotiated by NACLCL. That policy insures participating centres against the risks associated with legal and legal related service delivery. The Guide includes a copy of the National PII Policy and some commentary about the scope and terms of that policy: see **Ch 4, Appendix A and Appendix B**.

- 1.6.2 Professional indemnity insurance (PII) insures against risks such as providing incorrect advice or missing a critical deadline. The most commonly encountered areas of notifications or claims under the Policy are:

- being out of time to commence or avoid legal action
- conflict of interest
- incorrect advice
- general complaints and service dissatisfaction
- lost/damaged files
- failure to advise (of an issue)
- defamation.

The relative incidence of each of the notification or claim types changes from year to year, but overall few claims are made.

1.6.3 Following the Guide will not only ensure compliance with the National PII Scheme requirements, it will provide your centre with a legal practice risk management plan and quality assurance strategy that offers benefits to the centre, its workers and management, and to its clients, as one substantial element of the centre's overall risk management plan.

1.7 National standards and 'national' legislation?

1.7.1 The Guide contains a set of risk management Mandatory Standards for centres that deliver legal and related services and some recommended good practice suggestions for those centres interested and able to implement additional improvement strategies, that apply to centres across Australia.

1.7.2 The Guide contains a set of risk management Mandatory Standards for centres that deliver legal and related services and some recommended good practice suggestions for those centres interested and able to implement additional improvement strategies, that apply to centres across Australia.

1.7.2 At the time of writing, state and territory legal profession laws still govern many aspects of legal practice and practitioners, including some of the baseline expectations between clients and their lawyers. Where possible the Guide highlights and reflects these references, but principal solicitors must ensure that they are acquainted with and they and the legal practice complies with their own jurisdiction's requirements.

1.7.3 Steps have been taken to nationalise regulation of the legal profession in Australia and this potentially affects all legal practices including centres. At the time of writing a number of jurisdictions have agreed to participate in the national scheme. The Legal Profession Uniform Law came into operation in Victoria and New South Wales on 1 July 2015¹, and with it the Uniform Rules, such as the *Legal Profession Uniform General Rules 2015*. The Uniform Law and Uniform General Rules replaced the Legal Profession Act and Regulations in both States on 1 July 2015. It is very important that centre staff keep apprised of developments, including in relation to the adoption of the Uniform Law and Rules in other states and territories, or changes to their own jurisdiction's Rules.

1.7.4 The Guide is not an alternative to compliance with legal profession laws; it operates in a complementary way. The Guide takes account of relevant aspects of the main legislation existing at the time of writing and provides commentary about how centres should operate within that regulatory context.

¹ *Legal Profession Uniform Application Act 2014 (Vic); Legal Profession Uniform Law Application Act 2014 (NSW)*.

CHAPTER 2

Mandatory Standards

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Context and scope

2.1 This chapter

This chapter summarises the Mandatory Standards in the Guide. It must be read in the context of the whole Guide. This chapter provides cross-references to the more detailed information contained elsewhere in the Guide.

2.2 The Guide

2.2.1 See **Ch 1** for general information about the role and purpose of the Guide. The Guide sets minimum Mandatory Standards for centres that are in the National PII Scheme. These standards also apply to centres not in the Scheme that are full members of a state or territory CLC association. See **1.1**, and **1.4**.

2.2.2 The standards in the Guide apply also to any branch office, to any specialist, auspiced or hosted service, project or program that is, in a legal sense, part of or accountable to a centre (see **7.10**) and to any centre that is part of a multi-program agency.

2.2.3 All workers, volunteers and Management Committee members must be familiar with the Mandatory Standards of the Guide. These requirements apply to all legal and related service delivery and to some other aspects of the work of the centre (for example, media releases and advocacy). See in particular **3.1**.

Mandatory Standards

2.3 Supervision of centre practice by the Responsible Person

2.3.1 Each centre must appoint in writing at least one Responsible Person to perform the roles set out in the Guide and must advise their state or territory CLC association and their PII representative of the name of this person and also of any change in their position within 14 days of any such change. See the detailed information, including as to the qualifications of Responsible Persons, at **3.5.21-28**.

2.3.2 When the Responsible Person is unable to fulfil the role for any significant period for any reason the centre must make arrangements for another suitably qualified and experienced person to be responsible for the centre's compliance with the Guide. This should be a centre employee who is a lawyer with an unrestricted practising certificate, or another suitable lawyer with an unrestricted practising certificate. If this is not possible, the centre will need to negotiate with their state or territory PII representative together with the state or territory CLC association and obtain approval for an alternative arrangement. See **3.5.25-26**, and **7.2.6**.

2.4 Delegation of responsibility to a Nominated Person/s

2.4.1 It may be necessary and appropriate for the Responsible Person to delegate responsibility to one or more Nominated Persons with sufficient qualifications, expertise and experience. See in particular **3.5.29-33** and **7.2**. The appointment of a Nominated Person must be in writing and the Responsible Person must make clear the nature and extent of the responsibilities delegated.

2.4.2 A centre must advise their state or territory CLC association and their PII representative within 14 days of the name of any person appointed as a Nominated Person and also of any change in their position. Where a Nominated Person is not a centre employee and/or not a lawyer, the centre must in addition

notify their PII representative and state or territory CLC association of the responsibilities delegated to the person and the expertise and experience of the person that makes them suitable to perform those roles.

- 2.4.3 All Nominated Persons of a centre must participate in the annual cross-check process.

2.5 General responsibilities of centres

See in particular **3.5.35-40**.

- 2.5.1 An individual centre must: support centre staff and volunteers to ensure compliance with the Guide's Mandatory Standards; develop, maintain and regularly review and amend as necessary, policies and procedures to minimise risk of claims; have written guidelines and procedures about the type of work the centre will and will not take on and ensure that workers and Management Committee members are familiar with these and all other relevant documents including relevant parts of this Guide.
- 2.5.2 A centre must provide the Responsible Person with support *and resources* to ensure the Guide is implemented.
- 2.5.3 A centre must recognise and respect the professional obligations of its workers, and support and resource its workers to meet those obligations. See **3.5.38-40**.
- 2.5.4 A centre must participate in any mandatory meetings and training and induction activities held by the PII Committee or the PII Network.

2.6 Insurance, notifications and claims

See generally **Ch 4**.

- 2.6.1 A centre must have professional indemnity insurance that satisfies the requirements of the relevant state and territory legal profession regulatory bodies and the terms of relevant legislation in the jurisdiction. See **4.9**. A centre may obtain such insurance by participating in the National PII Scheme. See **Ch 4**.
- 2.6.2 A centre must list and/or describe all its services in its PII application, including any specialist, auspiced or hosted project, program or service (see **7.10**), branch office, clinical legal education program (see **7.12**), Duty Lawyer Service (see **7.13**) or service provided pursuant to contract, for example with a Legal Aid Commission (see **7.14**).
- 2.6.3 A centre participating in the National PII Scheme must cooperate fully in the insurance renewal process by completing all details on the appropriate renewal form, including providing information on any services or activities performed by the centre outside the scope of the 'Business Activities' described in the 'Proposal' form (which is in line with the 'Professional Services' as defined in the PII Policy Schedule), and disclosing any new or altered relevant information. See in particular **4.6.21-24**.
- 2.6.4 To be covered by the Policy, a centre must notify the broker/insurer in writing as soon as possible and while the Policy is in force about a claim or loss and about a potential claim (any fact/s or circumstance/s that might give rise to a claim). See in particular **4.7**. Wherever possible these steps should be taken in the following order:
- talk to the state or territory PII representative or if that person cannot be contacted and the matter is urgent, to another state or territory PII representative

- discuss possible notification with the insurance broker
- notify the broker who will forward the notification to the insurer; or, if notifying the insurer directly (for example, because of urgency) send a copy of the notification to the broker.

A copy of any notification must be given to the PII representative. The PII representative must also be advised of the outcome of any notification/claim that is made.

2.6.5 A centre must not make any admissions of liability. See **4.7.18-20**, and **7.2.9-10**.

2.7 Legal profession regulation

See generally **Ch 5**.

2.7.1 A centre must comply with the requirements of the legal profession laws operating in their state or territory, or in all state and territories in which their staff practise.

2.7.2 Any person practising as a lawyer at a centre must be admitted to practice and have a current practising certificate. Where relevant, they must ensure that they are on the relevant rolls of court. See **5.5.1-3**.

2.7.3 Where the law of a state or territory provides for 'supervised' practice and a lawyer in a centre is subject to a condition of supervised practice, the Responsible Person at the centre must ensure that reasonable supervision is provided. See **5.5.4-6**, **3.5.24** and **7.2.1-6**.

2.8 Trust money, controlled money and transit money

2.8.1 Centres that accept money from or on behalf of clients - as controlled monies or on trust - must ensure that there are adequate, appropriate and legally compliant procedures for dealing with and accounting for it. Centres must comply with all requirements of their state or territory legal profession laws and rules of their legal profession regulatory body in this regard. See **5.5.11**.

2.8.2 Where legal profession legislation in a particular jurisdiction provides for the receipt of transit money, a centre receiving transit money must deal with it as required by the relevant legislation. See **5.5.12-14**.

2.9 Immigration assistance and Registered Migration Agents

2.9.1 A person, whether a lawyer or not, must not provide 'immigration assistance' unless that person is a Registered Migration Agent. See **5.5.15**. The Responsible Person must ensure that the requirements of the *Migration Act 1958* and associated regulations are met.

2.9.2 A centre worker or volunteer who is a Registered Migration Agent must comply with the Migration Agents Registration Authority's code of conduct. See **6.5.1**.

2.10 Financial counsellors

Any person practising as a financial counsellor at a centre, whether as an employed worker or volunteer, must comply with the relevant professional association code operating in the jurisdiction, be accredited by the relevant state or territory association, meet the exemption requirements under the ASIC Class Order for the *Financial Services Reform Act 2001* (Cth) and meet the exemption requirements under the *National Consumer Credit Protection Act 2009* (Cth). See **6.3**.

2.11 Social workers and other professionals

- 2.11.1 A centre worker or volunteer who is a qualified social worker and is a member of the Australian Association of Social Workers (AASW) must comply with the codes set out by the AASW. See **6.4**.
- 2.11.2 Other similarly qualified workers must also comply with relevant industry codes where they hold membership of professional associations. See **6.5**.

2.12 Duty of confidentiality

- 2.12.1 Centre workers, volunteers, students and Management Committee members must comply with all ethical, contractual and other legal duties of confidentiality. See **6.6**. These duties are owed to all of the centre's clients including those of any specialist, auspiced or hosted service/project (see **7.10**) and branch office of the centre.
- 2.12.2 Any statutory or contractual requirements for the privacy protection of personal information must be met. See **8.19**.

2.13 Conflicts of interest

See generally **Ch 6**.

- 2.13.1 A centre must avoid conflicts of interest – real and, as far as is practicable, potential and perceived.
- 2.13.2 A centre must have a policy dealing with conflicts of interest and conflict checking. The policy must cover any branch office and any specialist, auspiced or hosted service of the centre. See **Ch 6** generally and in particular **6.7.6-7**, **8.2** and see **Appendix G** for an example.
- 2.13.3 All staff (employed and volunteer) and management must be trained to identify potential and actual conflicts of interest and about understanding and applying their centre's conflict of interest policy and procedures. The subject must be covered during the orientation of new staff (employed and volunteer) and Management Committee members who will have any contact with clients, and reinforced regularly. See in particular **6.7.7**, **6.7.20-27**, **6.7.50**, and **8.7.9-10**.
- 2.13.4 A centre must conduct a full conflict of interest check **before** giving Legal Advice (whether the advice is given in person, on the telephone, or in any other form) **or** providing any other Discrete or Ongoing Assistance Services where there is a solicitor/client relationship. See **Ch 6** generally and in particular **6.7.46-73**. A full conflict check requires the client's name/s *and* the name/s of the other party or parties to be checked in the centre's client database/s. There are some very limited situations where a *full* conflict check is not required. These are set out at **6.7.58-69**.
See also **8.2**, **8.3.7-8** and **Appendix G**.
- 2.13.5 Conflicts checks must cover the whole of a centre's service operations including within each and across all branch offices and all specialist, auspiced or hosted projects, programs or services (see **7.10**) if those offices, services, programs or projects ever provide Services to Individuals (other than Information or Referral). See in particular **6.7.49**.
- 2.13.6 If a conflict of interest is discovered, the person/client should be told that the centre is unable to provide a service and they should be referred appropriately. The centre must be mindful of the solicitor's duty of protecting client confidentiality, the client's right to client legal privilege and privacy obligations, as applicable. See **6.7.73**.

- 2.13.7 A centre must record on every client file and advice record that a conflict check has been done. In the situation set out at 6.7.67, where a conflict check was not done of the name of the other party before providing the advice, that fact and the reason/s for it should be noted. See **6.7.71-72** and **8.3.7-8**.
- 2.13.8 A centre that is a 'program' within a multi-program agency must have specific procedures to avoid and manage conflicts of interest and in particular must have: an 'information barrier' that complies with the legal profession laws operating in the relevant state or territory and that has been approved by the relevant state or territory CLC association in consultation with the PII representative and the National PII Network; a written policy available to clients that supports this information barrier; inclusion of key aspects of the policy in staff employment contracts; regular training on the policy; regular review of the effectiveness of the policy and its implementation by a nominated staff member. In addition, staff can only be transferred between programs under controlled circumstances. In order to avoid perceived conflicts of interest, the centre must have a distinctive name and its own distinctive letterhead and branding on other communications that clearly differentiates the centre from the other programs of the agency. See **6.7.74-79**, and the sample Information Barrier Policy at **Appendix K**.
- 2.13.9 Where, in the course of giving Information or Referral or another service that is provided under a solicitor/client relationship, to a person, a centre obtains confidential information of a kind or to a degree that would or should preclude the centre from advising or acting for another person in the same or a related matter or from advising or acting against the person in a future matter, the client/person and other party information must be entered into the centre's database used for conflict checking. See in particular **6.7.20-22**.

2.14 Practice supervision: general

- 2.14.1 The Responsible Person must ensure that reasonable and appropriate **supervision** is provided to all workers and volunteers providing services for the centre. See **7.2**, **3.5.24** and **5.5.4-6**. This includes appropriate supervision of workers and volunteers providing services in any branch office and any specialist, auspiced or hosted service or project: see **7.10**.
- 2.14.2 A Responsible Person may delegate some or all of their supervisory responsibility to one or more Nominated Persons who have appropriate qualifications, expertise and experience. See **7.2** and **3.5.29-33**.
- 2.14.3 If the Responsible Person or other supervisor is on leave, or resigns from the centre and there is no immediate replacement, the centre must make arrangements for another suitably qualified and experienced supervisor. See in particular **7.2.6** and **3.5.25-26**.
- 2.14.4 **Checking Discrete Assistance (other than Information and Referral) and Ongoing Assistance Services**
- 2.14.4.1 The Responsible Person or a Nominated Person must check all Legal Advice and other Discrete and Ongoing Assistance Services (other than Information or Referrals) performed by **volunteer lawyers and volunteer non-lawyers** including in any branch office and any specialist, auspiced or hosted service, program or project. Where a volunteer is a Nominated Person, their legal or non-legal services must be checked by a Responsible Person who is a lawyer with an unrestricted practising certificate or principal certificate (however described) or other employed lawyer who has an unrestricted practising certificate. If this is not possible, the centre will need to negotiate with their state or territory

- PII representative and CLC association to obtain approval for an alternative arrangement. Checking must be done as soon as possible after the delivery of the service.
- 2.14.4.2 The Responsible Person or a Nominated Person must check, as a minimum, a significant proportion of Non-Legal Support Services performed by **employed non-lawyers** (including seconded non-lawyers), including in any branch office and any specialist, auspiced or hosted service, program or project. This includes the work of a Nominated Person who is not a lawyer.
- 2.14.4.3 The Responsible Person or a Nominated Person must check, as a minimum, a sample of all types of Services performed by **employed lawyers** (including seconded lawyers), including in any branch office and any specialist, auspiced or hosted service, program or project, on a regular, frequent and random basis. This includes the work of the Nominated Person/s themselves and also that of the Responsible Person unless the Responsible Person is the principal or senior solicitor at the centre and has an unrestricted practising certificate.
- See in particular **7.2.7-8, 7.2.11, 7.10, 7.11** and **3.5.24**.
- 2.14.5 If it becomes apparent that incorrect or incomplete advice has been given to a client, the Service Provider responsible must be alerted, the client must be advised of the correct advice and the new advice must be recorded. The Responsible Person should consider whether the person may possibly have a claim against the centre bearing in mind the imperative not to admit liability unless they have the consent of the insurer: see **7.2.9-10** and **4.7.18-20**.
- 2.14.6 Any employee or volunteer providing Legal Advice or other legal services or Non-Legal Support Services must have timely access to the Responsible Person or the appropriate Nominated Person. See **7.2.11**.
- 2.14.7 **File management:** for Ongoing Services, the day-to-day management or supervision of each file must be the responsibility of an employed worker. See **7.2.12**.
- 2.14.8 **File review:** a centre must have a comprehensive and accessible file review system which must ensure that all files are regularly reviewed both by the responsible lawyer or other Service Provider and by the Responsible Person or a Nominated Person. The system must record in each file and in the system itself: the review date, the limitation date with appropriate forewarnings, any other critical dates, the employed worker responsible for the file and file reviews conducted. The system must ensure that action to be taken in a matter on a particular date, including file review, is not missed due to the absence of a particular person. See detail at **7.4** and see **8.8.5**.
- 2.14.9 **Electronic communications policy:** a centre must have a policy that deals with use of electronic communications that must, as a minimum, set out the disclaimer to be used, the procedure for responding to email inquiries and requests for advice, the treatment of confidential information, and the requirement that emails relating to clients receiving ongoing assistance be printed out and placed in their file and/or stored on their electronic file. If the centre provides Advice by email, the electronic communications policy should incorporate the relevant Mandatory Standards in the Guide that apply to the giving of Advice, for example, data entry, conflict of interest checks, file opening, checking advice. The Responsible Person or Nominated Person (if any) must ensure that there is an electronic communications policy that staff and volunteers know about it and check that it is being followed. See **7.5, 8.5.8-10** and **Appendix F**.

- 2.14.10 **CLE, CE and materials:** the Responsible Person or Nominated Person (if any) must check any brochures, publications or other Community Legal Education (CLE) or Community Education (CE) materials produced by a centre (including specialist, auspiced and hosted services, programs or projects and branch offices, if any) for accuracy and legal risk prior to their distribution: see **7.6** and **7.9-10**. The Responsible Person or Nominated Person must ensure that the content of CLE and CE sessions is accurate and complies with relevant laws (for example, defamation). Materials must contain a disclaimer. Workers conducting CLE sessions must not give Legal Advice during the course of those sessions and must make clear that information provided in the session is general legal information and not Legal Advice. See **7.6**.
- 2.14.11 **Checking Law and Legal Service Reform or policy reform materials:** the Responsible Person or Nominated Person (if any) must check any Law and Legal Service Reform or policy reform materials produced by the centre, (including specialist, auspiced and hosted services, programs or projects and branch offices, if any) prior to publication or distribution to ensure they are legally accurate and any risk of defamation has been considered. See **7.7** and **7.9-10**.
- 2.14.12 **Checking media statements:** the Responsible Person or Nominated Person (if any) must check all media releases and statements prior to their publication and make sure that workers who may speak to the media are aware of issues around defamation laws. See **7.8** and **7.9-10**.
- 2.14.13 **Branch offices:** centres operating branch offices must ensure that they comply with relevant legal profession laws and that staff in branch offices are suitably qualified, supervised and trained in and comply with, any risk management processes and policies including this Guide. See **7.2.18**.
- 2.14.14 **Workloads:** the Management Committee and Responsible Person must ensure that centres do not take on more work than staff can reasonably and safely handle, that ongoing casework and file load is kept within reasonable limits and that workloads are monitored to ensure they are kept at a manageable level and that adequate supervision can be and is being provided. See **7.3**.
- 2.14.15 **Volunteers:** all new volunteers must participate in a training and orientation program and receive an orientation package that includes information about this Guide and its requirements and how to access it, and about relevant policies and procedures of the centre (including the Conflict of Interest policy), including office procedures, and service intake guidelines. See **7.11**. See also **7.12**, **6.7.7**, **6.7.29-37**, **6.7.80-82**, and **7.5**.
- 2.15 Specialist, auspiced or hosted services, programs and projects and auspiced centres**
- See generally **7.10** and see **3.5.24**.
- 2.15.1 A specialist, auspiced or hosted service, program or project that is in a legal sense part of and ultimately controlled by the centre must comply with the Mandatory Standards of this Guide and be supervised by the centre's Responsible Person and/or Nominated Person/s (if any). See discussion at **7.10**.
- 2.15.2 Any client services provided by the service/project must be opened as a record of the centre, the service/project must use centre letterhead (which may have a subheading in the name of the service/project), service/project workers must sign correspondence over their stated position and the service/project must be included in the annual cross-check of the centre.

- 2.15.3 Where a centre is an auspiced service of a larger entity, specific procedures must be put in place to avoid and manage conflicts of interest. See **2.13.8** above and see **6.7.74-79**.

2.16 Guidelines about centre work

Each centre must have written guidelines about the type of work – Services for Individuals (for example, Legal Advice, Legal Task, Non-Legal Support Services, Representation Services) and Services for the Community (for example, CLE and CE and Law and Legal Service Reform) they will and will not take on. See **3.5.37** and **8.1**.

2.17 Intake - records and procedures

- 2.17.1 This paragraph and paragraph **2.17.2** do not refer to contact with a person that only entails providing Information and/or Referral. The following information must be recorded for all potential or actual clients² at the point of initial contact: client's name (including alternative spellings/other names used etc), date of birth, contact details, date instructions received, type of matter, indication that a conflict check has been performed and, unless within the very limited exceptions at **6.7.58-68**, name/s of other parties. See **8.3**.
- 2.17.2 There must be a unique client identifier for every client. Where a file is opened it must have a unique file number. All Legal Advice and other Service records and files must be readily retrievable. Centres must have a central file register and a filing system that allows all client records to be located by name and number and their status (open/closed) recorded. See **8.3.11** and **8.10**.
- 2.17.3 **CL SIS, CLASS and other data systems:** For the period that the centre is using the Community Legal Services Information System (CL SIS) or Community Legal Assistance Services System (CLASS), it must implement the access and usage standards and protocols, including data security and data protection measures, required for that system. Centres must ensure that workers and volunteers receive appropriate CLASS training (due to its imminent decommissioning, CL SIS training has ceased). Centres that use databases other than CLASS must also implement the usage standards and data protection measures described in this Guide. See **8.7**.

2.18 Instructions

This paragraph does not refer to contact with a person that only entails providing Information and/or Referral, or any other Discrete Assistance where there is not and will not be a solicitor/client relationship. All legal and related problems must be recorded legibly and in sufficient detail so that the nature of the matter and client's enquiry is clear. Copies of relevant documents should be attached to the Legal Advice or other Service record. See **8.4**.

2.19 Legal Advice and other Discrete and Ongoing Assistance Services

See **8.5** and **8.6**.

- 2.19.1 A record of all Legal Advice, Legal Task, Non-Legal Support Services and, where a Referral or other Information is given at the same occasion, a record of those Services, must be noted in sufficient detail on the matter file or advice record/

² Where your centre is providing Legal Advice or other Services to a centre volunteer or employee, or to another centre, the recipient of the Legal Advice or other Services will be considered a 'client' if it would be so regarded if it was an individual. Full intake procedures will need to be followed in such circumstances as they would be with any other client, both for compliance with this Guide and to ensure the insurance cover is not jeopardised. See **4.6.30-31** and **6.7.88**

sheet, the name of the person giving the Legal Advice or other Service must be recorded and the record must be signed and dated by the person giving the Legal Advice or other Service. Electronic records must clearly record who provided the Legal Advice or other Service and the date it was provided. See **8.5.3** and **8.5.7**.

- 2.19.2 Clients must be advised of all relevant limitation dates or limitation periods and this advice must be recorded. See **8.5.4-6**.
- 2.19.3 The professional basis of the Legal Advice or other Service must be disclosed and people who are not legally qualified or who are legally qualified but not presently holding a practising certificate must not hold themselves out as a lawyer or a practising lawyer, and must actively take steps to ensure that a client of the centre does not infer that they are a lawyer, or a practising lawyer. See **8.5.1-2**.
- 2.19.4 **Email Advice and Advice by other forms of electronic communication:** if a centre gives Advice by email or any other form of electronic communication the Mandatory Standards in this Guide apply to giving the Advice in the same way as to Advice in person, by telephone or by written communication. This must be reflected in the centre's electronic communications policy. See **7.5** and **8.5.8-10**.
- 2.19.5 **Advice to third parties**
See **8.5.11-15** and **6.7.23-26**.
- 2.19.5.1 A centre must not provide Advice to a third party (that is, to a person who requests advice on behalf of another person) unless there are exceptional circumstances, for example:
- it is a person who clearly acts with the client's consent or with clear delegated authority from an organisation
 - it is a person representing the client in a professional capacity, for example, a solicitor, a social worker, welfare worker and/or financial counsellor the client is incapacitated or hospitalised
 - the client lacks the capacity to give instructions, or
 - a power of attorney or guardianship is held (and the centre has sighted these documents).
- 2.19.5.2 Before providing Advice to a third party, the advisor should ascertain whether it is possible to communicate directly with the ultimate client. If it is not, there should be some recorded evidence that the advisor has used their best endeavours in the circumstances to confirm that the third party is acting in the best interests of the client and that there is no reasonable basis for thinking that there is a conflict of interest between the third party and the client.
- 2.19.5.3 If the centre intends to provide Advice, the ultimate client's name and the name/s of other parties must be obtained so a conflict check can be performed and details entered on the relevant database.
- 2.19.6 **Retention and destruction of Advice records:** centres must keep every record of an Advice and other Discrete or Ongoing Assistance where there has been a solicitor/client relationship for at least 7 years from the date the Service was provided. Generally after that time the record may be destroyed, without notice to the client. However, before doing so centres should consider whether in a particular instance there are circumstances warranting a longer period of retention. Before destroying any documents or copies of documents attached to an Advice or other Service record a centre must consider whether those documents ought to be returned to the client, for example, are they originals and/or any other documents

which belong to the client and to which the client is entitled. See **8.5.16-18**. (In relation to retention and destruction of casework files, see **2.20.14** below and **8.14**.)

2.20 Files (paper and electronic records)

- 2.20.1 **Central file register:** a centre must have, maintain and use a central file register in some form. See **8.3.11-12**, and **8.10**.
- 2.20.2 The central file register must record when a file has been opened (and see **2.17.2** above) and closed. See **8.8.2**, and **8.13.1-2**.
- 2.20.3 A **letter of engagement** or **client/litigation agreement** must be provided to the client in circumstances where this is required by legal profession legislation operating in the relevant jurisdiction. See **8.8.3-4**, and **Appendix J**.
- 2.20.4 **Record key information**
- 2.20.4.1 The following information must be recorded prominently on or at the front (for example, inside the front cover) of all files for Ongoing Assistance: full name, address and telephone number (if any) of client; full name of the other party; indication that a conflict of interest check has been done; problem type; file number; limitation date (see **8.8.5**); other critical dates (if any); review dates; name of worker responsible for file. Centres should consider client confidentiality when determining what information will appear on the outside cover of a file. See **8.8.6**.
- 2.20.4.2 The following information must be recorded in the file when a new file is opened: outline of the client's problem; outline of the Advice given (if any); date file opened; date instructions first received; date Advice given (if any). See **8.8.7**.
- 2.20.4.3 Centres must comply with file management requirements of any applicable legal profession laws. See **8.8.8**.
- 2.20.5 **File notes** must be made of all telephone or face-to-face attendances with the client or any other person spoken to in relation to the matter. These must be put on the file. See **8.8.9** for details.
- 2.20.6 **Communications:** records must be made and kept of all incoming and outgoing client-related calls and other communications. See **8.8.10**.
- 2.20.7 **Documents:** copies of all correspondence, court documents, and any other documents, and records of any administrative or financial records including evidence of disbursements must be kept on the hard copy file and electronic records must be stored in an electronic file dedicated to the particular client matter. See **8.8.11-13**.
- 2.20.8 **Client information security:** centres must protect client confidentiality and client legal privilege by ensuring that unauthorised (including inadvertent) access to, and unauthorised imparting of, client information does not occur. Physical and electronic files must be securely maintained. Strong passwords should be required to access any computer on a centre's network or data system. Where data is retained locally, all centre data must be backed up daily or as frequently as possible and at least weekly. Where the centre is using CLASS, or any other cloud-based system, it must have satisfied itself that the system has a back up system or stores the information in more than one secure location inside Australia. Centres using a cloud-based system are encouraged to consider also maintaining and recording local records where possible. Mobile devices (for example, smart 'phones, laptops) containing client information should be strongly password protected. Portable data storage devices (for example, USB flash drives) containing client information should be securely managed and stored. See **8.9** and **8.7**.

- 2.20.9 **File movements:** if files are taken out of the centre (for example, to court) the centre and relevant centre worker must take all reasonable and practicable steps to maintain the security of the file/s, to minimise the risk of a file being damaged or lost and to maintain client confidentiality. See **8.10**.
- 2.20.10 **File ownership:** centre staff and volunteers do not own client files and must not treat them as their property. When the employment or volunteer relationship ends, the files remain with the centre or must be returned immediately. See **8.12**.
- 2.20.11 If a third party (including a funder) seeks access to a file, the Responsible Person or the centre must, absent the client's consent, claim client legal privilege on behalf of the client. See **8.12**, and **8.15**.
- 2.20.12 **Wills:** if a centre retains an original will of a client, it must not be kept on the file but in a secure place with a Wills/Safe Custody Register (however described) that complies with applicable legal profession legislation. See **8.14.10**.
- 2.20.13 **Closing files:** before a file is closed, it must be reviewed by the Responsible Person or a Nominated Person, the client must be given written advice as described in **8.13.1** and the administrative processes described at **8.13.1-2** must be completed.
- 2.20.14 **Archiving and destruction**
- 2.20.14.1 Closed files (hard copy) must be stored in a secure environment away from public or unauthorised access, including inadvertent access. They should be archived in such a way as to allow necessary access. See **8.14.1**.
- 2.20.14.2 Files must be kept for (at least) the period prescribed by applicable legislation (usually 7 years from the date the file is closed, however the Responsible Person should be familiar with the types of legal matters that require longer periods, and the prescribed periods). Where a file is not to be destroyed this should be clearly marked on the file. See **8.14**. (See **8.5.16-18** in relation to the retention and destruction of Advice records.)
- 2.20.14.3 Client files that are in electronic form must be retained for (at least) the period prescribed by relevant legislation. CLSIS and CLASS records must be retained indefinitely and not deleted from the respective database. See **8.14.2-5**.
- 2.20.14.4 A centre must comply with any legislative requirements in their jurisdiction in relation to archiving and destruction of files including requirements about obtaining client consent. See **8.14**.

2.21 Cross-checking

See **Ch 9** and **Appendix D**.

- 2.21.1 A centre must participate in an annual cross-check procedure. This includes a cross-check of any branch office and any specialist, auspiced or hosted service, program or project that is in a legal sense part of and controlled by the centre.
- 2.21.2 Any centre worker carrying out a cross-check must sign an undertaking that any client and centre information obtained during the cross-check process will be kept confidential as part of the PII process.

CHAPTER 3

Risk Management for Community Legal Centres

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3.1 What is CLC practice?

3.1.1 In this Guide, we have used the term ‘practice’ to cover **both legal and non-legal practice and all the related services that the centre may provide**. These may include:

- areas of centre practice that do not involve Legal Advice and Representation Services
- Law and Legal Services Reform or policy reform submissions and campaigns
- Community Legal Education Resources and Activities
- related media releases.

This diversity reflects the broad and holistic nature of CLC work, and therefore must also be seen as the range of activities that could give rise to liability, and are the ‘Professional Services’ for which NACLC has negotiated its national professional indemnity insurance for centres.

3.1.2 While many of the issues arising are interconnected and interrelated they are dealt with under chapter headings that represent key issues for centres.

3.2 What is risk management?

3.2.1 Risk management is the identification, assessment, and prioritisation of risks followed by coordinated and economical application of resources to minimise, monitor, and control the probability and/or impact of unfortunate events. It is the subject of several international standards including ISO/DIS 31000 (2009) *Risk management – Principles and guidelines*.

3.2.2 Risk management falls into two key areas:

- risk assessment
- operational risk management.

The Guide is primarily about operational risk management, although of course all centres and NACLC and the National PII Network as operators of the National PII Scheme itself, are concerned with risk assessment.

3.3 Why manage risk?

3.3.1 This is a good question with a number of simple answers:

- to protect clients and others who could be damaged by centres’ operations
- to protect centres and their staff and volunteers
- to protect the interests and reputations of community legal centres
- to protect the interests of stakeholders and partners, such as funding bodies and supporters.

3.3.2 The more a centre thinks about possible risks and how to avoid them when planning and delivering its services, the less likely it is that those risks will be realised and the client service will be better quality.

3.3.3 Of course, centres will also want to protect themselves and their staff. Centres will not want to incur liability through mistakes or potentially risky activities and they will want to be covered by their insurance policies because mistakes and accidents do happen. Insured centres are expected to do everything they can to avoid and mitigate risks. The National PII Policy says:

Loss Prevention

You shall, as a condition to **Cover** under this **Policy**, take all reasonable steps to prevent any act, error, omission or circumstance which may cause or contribute to any **Claim** or loss which may be **Covered** under this **Policy**.

- 3.3.4 It is important to understand that something going wrong or an incident being mishandled at one centre can have an adverse effect on other centres and even on the whole sector. An increase in insurance premiums is one possible consequence. Unfavourable media and political comment or consequence can be another that has the potential to adversely reflect on and affect the whole sector.

3.4 The National PII Scheme and its risk management strategies

3.4.1 The National PII Scheme's risk management strategies include:

- setting and assessing centres' compliance against minimum operational and organisational risk management Mandatory Standards, and
- the publication of this Guide which lists the Mandatory Standards but is also an organisational development and quality assurance and improvement tool with its optional but recommended additional good practices that can further improve a centre's legal practice and related services risk management.

- 3.4.2 In short, centres are encouraged to comply with all aspects of the Guide. Some aspects such as attendance at meetings and participation in cross-checks are monitored by state and territory CLC associations and state and territory PII representatives. The good practice aspects are monitored in part by the cross-checks but primarily by the centre itself through the ongoing processes contained in the Guide. This is further supported through the NAS process, whereby improvement actions are included in their agreed Improvement Plans developed as part of their participation in the NAS.

3.5 Stakeholders and roles within the National PII Scheme

3.5.1 There are a multitude of stakeholders with an interest in centre practice risk management, including:

- clients and potential clients of centres
- individual centres
- the CLC sector and the legal assistance sector as a whole
- funding bodies
- state and territory associations of CLCs
- NACLCL

Those that operate within the National PII Scheme each have their own role and responsibilities. It is important to understand each of the roles in the context of the national CLC sector and the National PII Scheme's framework. It is also important that the levels of accountability within each role are well understood.

NACLCL

- 3.5.2 NACLCL is the national peak body for CLCs in Australia. NACLCL is the coordinator and principal policyholder of the NACLCL National PII Policy and the PII Scheme. NACLCL's purpose is to assist disadvantaged and marginalised people obtain access to legal services by, among other things, supporting centres to provide

quality services. It fosters good practice and continuous improvement among centres and plays a leadership role in promoting and protecting the interests of centres. NACLCL's members are the state and territory CLC associations. NACLCL is a registered charity, and a company limited by guarantee, governed by a Board of Directors. NACLCL also has an Advisory Council, which is made up of representatives appointed by the state and territory associations of CLCs, an Aboriginal or Torres Strait Islander woman and man, and may also include additional people.

Role

- 3.5.3 In consultation with its member associations and the CLC sector, NACLCL leads the development and maintenance of good-practice national risk management policies and strategies that work effectively for centres and their clients.
- 3.5.4 NACLCL has overall responsibility and control of the National PII Scheme, that role includes responsibility for:
- negotiation of the terms of the Policy with the broker and the insurer, and for the ongoing administration of the Policy with the broker
 - negotiation and payment of the premium
 - seeking contribution to the cost of the Policy from government or other possible appropriate sources
 - promoting a nationally consistent approach to risk management and the application of this Guide
 - reviewing, improving, updating and amending this Guide in consultation with the National PII Network
 - decisions to include or exclude a centre from the National PII Scheme and cover under the Policy, taking into account the recommendations and advice of the National PII Network or other bases (for example, failure to satisfactorily comply with the NACLCL Accreditation Criteria under the NAS, or breach of CLC association membership rules)
 - decisions in relation to financial expenditure and administration, or that have or may have a financial effect on the Scheme or on NACLCL
 - decisions that require or have an effect on NACLCL resources
 - decisions around major policy issues or directions of the National PII Scheme
 - making decisions as part of the dispute resolution procedure (see 3.6)
 - decisions as required on important questions of interpretation of the Guide or the PII Policy, and/or the nationally consistent application or implementation of the Guide
 - maintaining and operating the Excess Fund (see 4.4.13-18).

Accountability

- 3.5.5 NACLCL is accountable through its Board to its members – the state and territory associations of CLCs.

The National PII Network

- 3.5.6 The National PII Network (sometimes referred to as the National PII Committee) is one of the major national networks of centres supported by NACLCL. The National PII Network comprises a PII representative from each state and territory, appointed

or elected by their respective associations (see **3.5.11**), and a NACLC staff member. The quorum for decision-making is 4 members. Decisions can be made by a simple majority although the Network uses its best endeavours to resolve matters by consensus.

Role

3.5.7 The role of the National PII Network includes:

- reviewing and recommending improvements to the PII Policy
- exercising delegated authority from NACLC to administer the National PII Scheme and develop and implement or maintain its processes and documents
- making recommendations or reports to NACLC and providing advice as required/necessary
- promoting a nationally consistent approach to risk management and the application and implementation of this Guide
- considering, planning and implementing preventative strategies and actions, for example, information or education sessions for centre lawyers at the National CLCs Conference, or revision of the Guide
- considering and deciding disputes and issues brought to it by centres, PII representatives and/or state and territory PII committees and/or associations: see **3.6**
- meeting a minimum of four times a year including one face-to-face meeting in conjunction with the National CLCs Conference.
- Decisions involving financial expenditure, use of NACLC resources, and/or major policy issues or directions, are excluded from the National PII Network's decision-making role (they remain with the NACLC Board).

Accountability

3.5.8 The National PII Network is accountable to NACLC in regard to the functions delegated to it as outlined above. Its members are also accountable in some aspects to their own state or territory associations.

State and territory CLC associations

3.5.9 The state and territory associations of CLCs are the members of NACLC and play a very significant role in risk management. They support and coordinate aspects of the PII compliance process and may have some decision-making functions as explained in the Guide. State and territory associations determine their respective membership. The state CLC associations in Victoria, NSW and Queensland have also been authorised by NACLC as Certifiers under the NAS and are decision-makers on applications for Certification or renewal of Certification for full member centres in their respective states.

3.5.10 Responsibility for ensuring that the National PII Scheme is administered at the regional level lies with the state and territory associations. How this is done varies to some degree from region to region although there are some common elements. The state and territory associations also play a role in dispute resolution (see **3.6**) and have other particular decision-making responsibilities: see **3.5.23**, **3.5.25**, and **6.7.76**.

PII representative

3.5.11

Each state and territory CLC association must appoint or nominate annually one **PII representative** to be that region's representative on the National PII Network. (A state or territory association may choose to have two representatives to share the work but they operate as alternates in the context of decision-making.) In practice that person tends to be the workhorse in the administration of the National PII Scheme in their state or territory. Core responsibilities of the PII representative include (but may not be limited to):

- representing the participating centres from their state or territory on the National PII Network
- convening a minimum of two meetings of their state or territory PII committee or similar group each year
- coordinating the administration of the National PII Scheme in their state or territory
- discussing potential notifications with Responsible Persons (ideally) before a notification is made to the insurer
- providing guidance to centres about the insurance Policy, the National PII Scheme and compliance requirements and procedures
- adopting and promoting in their state or territory an approach to risk management and the application and implementation of this Guide that is, as far as is practicable (taking into account any regional differences in law), consistent with that of other states and territories
- bringing (wherever practicably possible, de-identified) information to the National PII Network about issues arising in their state or territory that involve important questions of interpretation of the Guide or the insurance Policy and/or that raise the nationally consistent application or implementation of the Guide and/or are relevant to the National PII Scheme and/or to risk management in centres nationally
- communicating information, strategies and policy from the National Network back to their committee and participating centres
- raising issues of serious concern or non-compliance with the PII committee/ state or territory association/National PII Network and through the National Network with NACLC, as appropriate.
- In some states and territories, PII representatives also take responsibility for a number of the activities listed below in **3.5.12-16**. For further information, see **Appendix E: PII Representatives: Framework, Role and Responsibilities**, which has been prepared to guide PII representatives for their work in that role.

State and territory PII committees

3.5.12

In some states and territories the work of the PII Representative is supported by a **PII committee** (or other working group) comprising a number of centre workers who meet regularly (usually this will be principal solicitors or Nominated Persons). The arrangements of these groups vary in each state and territory, and some of the state-specific arrangements, including the roles and responsibilities of those groups, are set out in **Appendix E**.

3.5.13

For example, in WA and Queensland, the PII Committee is comprised of all the Responsible Persons from all centres that are members of the respective state

CLC association, primarily for information-sharing purposes; and a smaller sub-committee of that group provides more in-depth support to the PII Representative.

- 3.5.14 In Victoria, the 'PII Working Group' is made up of people from six centres who share the workload of supporting the PII Representative. In NSW the PII Committee comprises the Responsible Person (usually the principal solicitor) of each centre participating in the National PII Scheme and the Committee's convenor who is the state or territory PII representative on the national PII Network, has responsibility for performing most of the duties. The ACT and NT do not have a separate PII committee and their respective CLC associations deal with PII matters as needed.
- 3.5.15 For convenience, this guide uses the term 'PII committee' to include all such state and territory-based arrangements.

Additional roles at state or territory level

- 3.5.16 In addition to the core tasks performed by the PII representative (see above), there are a number of other tasks that need to be performed at the state or territory level in order for the National PII Scheme to work and for risk-management to be enhanced within centres. In practice, PII representatives and PII committees take day-to-day responsibility for dealing with legal practice and risk management issues in their region's centres, both generally and as they may affect or relate to the National PII Scheme. PII representatives and committees also have a proactive and preventative role in identifying any common areas where centre procedures could be improved to enhance risk minimisation, for example, by training or the sharing of good practices. While there can be diversity among states and territories in how particular tasks are organised and allocated, ultimately the state or territory association must ensure that a particular person (for example, convenor, PII representative, other committee member) and/or entity (for example, committee, state association) is taking responsibility for each of the following roles:
- administering and overseeing the implementation of the National PII Scheme in its respective state or territory
 - in conjunction with the state or territory association, assessing new centres that apply for admission into the National PII Scheme, and advising the state or territory association and NALC of its assessment in relation to the centre's eligibility for inclusion in the National PII Scheme
 - coordinating the annual cross-check procedure to monitor each centre's compliance with the Mandatory Standards in the Guide. (This procedure is carried out using the *Cross-check Questionnaire* at **Appendix D**, which is completed by staff and volunteers from each centre, assisted by 'cross-checkers' from other centres)
 - assessing cross-check questionnaires
 - in cases where a centre has not sufficiently complied with the requirements in the Guide, identifying and communicating actions which the centre must take within a specified timeframe to comply and/or putting in place mechanisms as a prerequisite for the centre's inclusion in the Scheme

- organising, often with the support of the state or territory association, for practical assistance to be provided to a centre needing support to establish or maintain improved procedures, for example, setting up 'buddy' support where an established centre with more resources may provide assistance and guidance to a newer or less resourced or experienced lawyer or centre
- in the most serious cases where a systemic error is not rectified over time, ensuring the state or territory association and/or the PII Network is aware of any issue that may impact upon that centre's ongoing inclusion in the National PII Scheme.

Confidentiality

3.5.17 Information that is specific to a particular centre that is acquired or exchanged in the administration of the PII Scheme must generally be treated as confidential to the relevant PII representative, state or territory PII committee or National PII Network or NALCLC (as applicable) and is communicated only on a need-to-know basis. Where there is serious and ongoing non-compliance the PII representative and/or committee may have to raise the matter on a need-to-know basis with the state or territory association, the PII Network and/or NALCLC.

3.5.18 This applies also to discussions between a PII representative and a Responsible Person about a particular issue or notification/claim.

Accountability

3.5.19 The PII representative is accountable to the state and territory association that appointed or elected them and also to the National PII Network and NALCLC. See **Appendix E** for further information on the framework, roles and responsibilities of PII representatives.

Conflict of interest of PII representative

3.5.20 Where the PII representative is faced with a possible conflict of interest, for example, where they are assisting with a notification that involves their own centre or a centre where they were previously employed or had volunteer involvement, they should identify their actual or potential conflict of interest, and refer the request for advice or assistance to a PII representative of another state or territory.

Responsible Person

3.5.21 **This is a Mandatory Standard.** Each centre must appoint, in writing, at least one Responsible Person and advise their state or territory CLC association and their PII representative of the name of this person and also of any change in this appointment within 14 days of such change.

3.5.22 The Responsible Person is appointed by their centre usually by its Management Committee or Board. Some larger centres may choose to have more than one Responsible Person.

3.5.23 The Responsible Person should be a centre employee who is a lawyer with a principal practising certificate or unrestricted practising certificate (however described). In jurisdictions where the legal profession laws require the appointment of a principal solicitor, the centre shall appoint that person as the Responsible Person. Where there is no such legislative requirement, the managing or senior lawyer employed by the centre should be appointed as the Responsible Person. In some situations, for example where a centre is unable to employ a principal or senior solicitor for a period or at all, the centre can negotiate with

their state or territory PII representative, together with the state or territory CLC association, to approve an alternative arrangement that complies with the relevant legal profession legislation. For example, where necessary, and provided approval is given, a centre employee who is a junior lawyer or a suitably experienced and trained worker such as a coordinator could be appointed as the Responsible Person and a Nominated Person (for example, a lawyer from another centre, a local firm or from the centre's Management Committee) is appointed to supervise the practice. (See Nominated Person below). This is not an optimal arrangement and should be temporary.

Role

3.5.24 The role of the Responsible Person includes:

- ensuring that the Guide is implemented within the centre including within any specialist, auspiced or hosted service, program or project (see **7.10**)
- being aware of and ensuring compliance with, the contractual requirements of the PII Policy
- developing and implementing policies and procedures to give effect to the Mandatory Standards in the Guide and such of its recommended procedures and good practices as are practicably possible, including ensuring suitable briefing and information is provided at induction of staff and volunteers
- keeping in contact with the PII representative to ensure that they are aware of any professional indemnity insurance and legal practice risk management issues possibly relevant to her or his centre, including discussing any potential or actual notifications
- liaising with the broker/insurer in relation to notifications and claims
- taking overall responsibility for the centre's legal and non-legal practice, including in any specialist, auspiced or hosted service, program or project (see **7.10**)
- determining an appropriate, reasonable level of supervision required by each worker and volunteer in the centre and ensuring that supervision is provided by, wherever practicable, directly supervising the person or where necessary, delegating supervisory responsibility to another Responsible Person or a Nominated Person. See in particular **Chs 7 & 8, 3.5.29-33** and **5.5.4-6**
- ensuring that they or a Nominated Person check all Legal Advice and other Discrete Assistance (other than Information or Referrals), Duty Lawyer and Ongoing Assistance Services performed by volunteer lawyers and volunteer non-lawyers, including in any branch office and any specialist, auspiced or hosted service, program or project (see **7.10**). Where a volunteer is a Nominated Person, his or her legal work must be checked by a Responsible Person who is a lawyer with an unrestricted practising certificate or principal certificate (however described) or other employed lawyer who has an unrestricted practising certificate. If this is not possible, the centre will need to negotiate with their state or territory PII representative and CLC association to obtain approval for an alternative arrangement. See **7.2.7**

- ensuring that they or a Nominated Person check, as a minimum, a significant proportion of the work performed by employed non-lawyers (including seconded non-lawyers), including in any branch office and any specialist, auspiced or hosted service, program or project. This includes the Legal Advice and Non-Legal Support Services (Discrete and Ongoing) of a Nominated Person who is not a lawyer. See **7.2.8**
- ensuring that they or a Nominated Person check, as a minimum, a sample of the different types of legal work (for example, Legal Advice, Legal Task, Representation Services) performed by employed lawyers (including seconded lawyers), including in any branch office and any specialist, auspiced or hosted service, program or project on a regular, frequent and random basis. This includes the legal or non-legal services work of the Nominated Person/s themselves and also that of the Responsible Person unless the Responsible Person is the principal or senior solicitor at the centre and has an unrestricted practising certificate. See in particular **7.2.8**
- ensuring that any and every staff member or volunteer providing Services for Individuals has timely access to the Responsible Person (or the appropriate Nominated Person) and is aware of the procedure to be followed in the event that the Responsible Person (or Nominated Person) is not immediately available and the worker is not sure about the Legal Advice or other Service to be provided or course of action to be taken. See **7.2.11**
- ensuring that the recording of information and file and other record management complies with the requirements of this Guide, including as to opening and maintaining files and closing, archiving and destruction of files. See in particular **Chs 7 and 8**
- ensuring that the centre maintains a comprehensive file review system. See in particular **7.4**
- ensuring that all service data collection is accurate and that data records are secure. See in particular **Ch 8**
- ensuring that all workers and volunteers at the centre are familiar with the relevant provisions of the state or territory laws regulating their profession and that all ethical, contractual, other legal and professional requirements and codes of conduct are met. See in particular **Chs 5 and 6**
- ensuring that any Advice about migration issues is provided only by a Registered Migration Agent, whether or not a lawyer or non lawyer, and that the Advice is provided in accordance with relevant codes of conduct and legislation. See **5.5.15, 6.5.1**
- ensuring that any person practising as a financial counsellor at the centre complies with any professional association codes and systems of accreditation that apply in the jurisdiction and meets the exemption requirements specified by relevant Commonwealth legislation. See **6.3**
- monitoring and reviewing workloads and ensuring in consultation with the centre's manager and Management Committee that the centre is mindful of its resource and other limits and does not take on more work than staff can handle well and without inappropriate strain on workers. See **7.3**

- taking responsibility for legal and other practice management and centre policies and procedures that involve or have an effect on legal practice risk management and/or the services and matters covered by professional indemnity insurance. The Responsible Person will ensure that these policies and procedures take into account the particular circumstances of the centre's community (geographic or of interest) and its clients and potential clients in order to identify and avoid actual and potential risks of conflict of interest³. These policies relate not only to service delivery but also to operational and administrative matters, including file and records maintenance, accuracy, safety and security
- ensuring that the content of any Community Legal Education (CLE) or Community Education (CE) materials and sessions, Law and Legal Service Reform materials, media releases and other publications is correct, that any risk of defamation has been considered prior to publication and that workers and volunteers who speak to the media or deliver CLE or CE sessions are aware of the issues around defamation and other relevant laws, and know how to minimise these risks. See 7.6 to 7.9.

Absence of the Responsible Person

3.5.25 When the Responsible Person is unable to fulfil the role for any significant period for whatever reason, the centre must make arrangements for another suitably qualified and experienced person to be responsible for the centre's compliance with the Guide. This should be a centre employee who is a lawyer with an unrestricted practising certificate. If this is not possible, the centre will need to negotiate with their state or territory PII representative together with the state or territory CLC association and obtain approval for an alternative arrangement. For example, subject to approval and to compliance with relevant legal profession laws, it may be possible for another centre employee or other person (for example, a locum, a member of the Management Committee, a lawyer from another centre) to be appointed as a temporary Responsible Person and, if necessary, to appoint an appropriate Nominated Person to undertake some functions.

3.5.26 The state or territory PII representative must be advised of any change of person holding the position of Responsible Person at a centre. In cases where additional mentoring or support arrangements need to be put in place then action can be taken to achieve this through the state or territory PII representative or committee and the National PII Network.

Accountability

3.5.27 While a Responsible Person who is the principal solicitor has overall responsibility and accountability for the legal practice, the Responsible Person is usually an employee of the centre and is accountable to the Management Committee or Board of that centre. In some cases they may be supervised *as an employee* by the centre's coordinator, but they are not accountable or report to them in relation to the way they manage the legal practice. If their centre is a member of the National PII Scheme, they also have a responsibility to their state or territory PII representative (and committee, where there is one) and through that representative to the National PII Network. They also have obligations to the other members of the National PII Scheme and to NACLC as the primary Insured and contracting party with the insurer. The Responsible Person may consult

³ These policies and procedures and their implementation are open to scrutiny by cross-checkers and the PII representative

their PII representative as they see fit and according to their own judgment and without the need for prior approval from or consultation with their Management Committee or centre coordinator, although the Responsible Person should inform them promptly when appropriate. See also **3.5.38-40**.

- 3.5.28 The Responsible Person has perhaps the most complicated set of accountability requirements and must balance all appropriately.

Nominated Person

- 3.5.29 This is a position that some centres have due to the diversity of client matters or centre services and programs and/or the available experience and expertise at the particular centre. A Nominated Person is appointed by the Responsible Person and is accountable to them in this role. A Nominated Person should be a centre employee who is a lawyer with suitable experience and expertise to perform the role/s delegated to them. However, if this is not possible (for example because of a centre's resource constraints or expertise needs), a non-lawyer and/or volunteer may be appointed as a Nominated Person provided:

- (a) in the opinion of the Responsible Person, the person has suitable expertise and experience to properly carry out the responsibilities delegated to them, and
- (b) the Responsible Person notifies their PII representative and state or territory CLC association in writing of the appointment of the person, the responsibilities delegated and the expertise and experience of the person that makes them suitable to perform those roles.

- 3.5.30 The appointment of any Nominated Person must be in writing and a centre must advise their state or territory CLC association and their PII representative within 14 days of the name of the person/s appointed as a Nominated Person and also of any change in their position.

- 3.5.31 The Responsible Person must make clear in writing when appointing the Nominated Person the nature and extent of the responsibilities delegated. For example, the Nominated Person may be delegated general supervisory responsibility or responsibility over a particular subject area of the centre's practice or a particular advice roster or outreach service. It is essential that the Responsible Person make clear to the Nominated Person the nature of the tasks expected in performing their role, for example, checking advice, signing correspondence, supervising filework and so on, and any tasks that they are not authorised to undertake and who has responsibility for those.

Role

- 3.5.32 The Nominated Person's role depends upon the responsibilities delegated. Most commonly it will be to supervise the Legal Advice or other Discrete Assistance given and/or other work undertaken in the practice or in their particular acknowledged area of expertise in the centre's practice. They will have been 'nominated' or recognised by the Responsible Person as appropriately experienced and expert to be able to supervise others' work in one or more designated areas. For example, an experienced consumer credit lawyer at the centre may be appointed to supervise the centre's work in this area. Or, provided the state or territory association and PII representative have been notified, as outlined above, an experienced (non-lawyer) tenancy advocate may be appointed as the Nominated Person and be given the delegated responsibility for supervising the work of other tenancy workers, or indeed the tenancy work of all workers, including a lawyer who may not specialise in that area.

Accountability

- 3.5.33 The Nominated Person is directly responsible, in this role, to the Responsible Person. It should be noted that the Responsible Person is still ultimately responsible for and accountable for the legal practice notwithstanding the appointment of a Nominated Person. All Nominated Persons of a centre must be available for the centre's annual cross-check and take part in an interview as a part of the cross-check process. See **Ch 9**.

Cross-checker*Role*

- 3.5.34 The role of a principal solicitor or other Responsible Person performing the function of cross-checker includes:
- conducting cross-checks in accordance with the Guide and in such a way as to promote consistent risk management implementation of the Mandatory Standards of the Guide and processes and requirements of the National PII Scheme, organisational support, collegiate respect and professionalism throughout the sector
 - reporting as required to the PII representative and/or PII committee
 - respecting confidentiality, as evidenced by signing and respecting an undertaking on the *Cross-check Questionnaire* that any client and centre information obtained during the cross-check process will be kept confidential within the National PII Scheme administered at the state or territory level.

See **Ch 9** and **Appendix D**.

The centre

- 3.5.35 Existing centres also have a key role in the Scheme and in risk management. Centres contribute to the sector through their daily service delivery and their ability to maintain and consolidate the goodwill and reputation associated with the work of centres. Longer established and better resourced centres can play a leadership and mentoring/buddy role for new or less resourced centres – guiding and supporting them in improving as good-practice centres. Community legal centres share their collective wisdom with their peers and actively foster good practice among new centres.
- 3.5.36 NACLC and the state and territory associations believe that together with individual centres they have a shared responsibility to:
- ensure the best risk management policies and practices operate within centres
 - maintain an effective and affordable insurance scheme for all centres, for the protection of centre clients, the centres themselves, and their workers.
- These goals can only be achieved where all members in the Scheme act to keep that Scheme intact.
- Role*
- 3.5.37 An individual centre must:
- support centre staff and volunteers in their work to ensure that they comply with the Guide's Mandatory Standards or, in the event that it is not possible to comply with one or more standards, contact the PII representative without delay to discuss the issue and agree appropriate actions to be taken to ensure compliance within an agreed and as soon as practicable timeframe

- examine and develop its own policies and procedures to minimise any risk of claims
- upon becoming aware of a claim or potential claim (any fact/s or circumstance/s that might give rise to a claim) against it, as soon as practicable, discuss the claim or potential claim with the PII representative and then if necessary notify the insurers via the broker in writing
- review the practice and take such actions as are necessary to ensure that the Responsible Person can and does make full disclosure to the insurer, via the broker. This obligation is ongoing but is particularly important at the time of submitting an application for renewal and between that time and 30 June each year when the PII Policy is renewed (and a new policy comes into effect). Failure to notify the insurers of a claim or potential claim as soon as possible after becoming aware of it and within the (annual) period of the Policy may affect the cover or extent of the cover available and may result in the insurers refusing to pay some or all of the claim. See **4.7**
- appoint a Responsible Person who will ensure that the Guide is implemented and provide that person with the support and resources to do so. See **3.5.21-28**
- recognise and respect the professional obligations of its lawyers (see **3.5.38** below) and other workers, for example, social workers, and financial counsellors
- have written guidelines about the type of work (Legal Advice and other Discrete Assistance and Ongoing Services⁴, as well as Services for the Community such as Community Legal Education and Law and Legal Services Reform) they will, and will not, take on. See **8.1**
- ensure that all workers and Management Committee members are familiar with these guidelines
- develop and maintain procedures to ensure that the centre complies with the guidelines
- participate in the cross-checks conducted each year and comply with the processes set out in the *Cross-check Questionnaire* (see **Appendix D**).
- participate in any mandatory meetings and training and induction activities undertaken by the PII committee or the PII Network. Centres are strongly encouraged to take advantage of any other PII training opportunities.

Relationship between centre management and lawyers

- 3.5.38 The relationship between centre management (Management Committee and/or employed managers) and centre lawyers can sometimes give rise to confusion and be a point of tension⁵. A lawyer's professional conduct obligations are not overridden by their employment obligations. A centre employer should not direct an employee solicitor to act in a manner that is contrary to their professional obligations (for example, breaching client confidentiality or breaching their duty to avoid conflicts of interest).
- 3.5.39 In practice, issues of conflict may arise between centre lawyers and their managers in interpreting the lawyers' professional obligations. For example:

⁴ In relation to the provision of Ongoing Services, the guidelines should specify the amount or level of assistance that will be provided to clients, and the criteria, priorities or conditions if any.

⁵ Note that other centre staff, such as social workers, may have similar professional obligations and responsibilities. In such circumstances similar principles should be applied.

- management may not understand the legal professional obligations that bind lawyers and may expect or direct them to act in a way that could conflict with those obligations
lawyers may take an overly restrictive view of their obligations or seek to take advantage of an obligation (such as practising with due skill and diligence) to achieve a preferred outcome, for example not practising in an area of law that they do not enjoy.

3.5.40 In order to resolve potential points of confusion and tension it is recommended that:

- the centre clearly understands the professional obligations and responsibilities of lawyers and only uses management processes that are consistent with them. For example, if a lawyer does not have sufficient skills and experience to competently practise in an area of law usually undertaken by the centre, requiring them to practise in that area may breach the lawyer's professional obligations. However, instead of the lawyer simply not practising in the area, the centre may be able to legitimately require the lawyer to take steps to obtain the necessary competency, through professional development or through appropriate supervision or mentoring arranged by the centre the centre supports lawyers to meet their professional obligations by encouraging them to liaise, independently of management if desired, with professional support provided through respective professional associations and the PII representatives
the centre utilises the professional standards supports of their relevant professional associations and/or their PII representatives to clarify issues of concern.

Clients and potential clients

3.5.41 A risk management approach is a client-focused approach. Diligent application of sound risk management strategies by a centre means that a client is less likely to suffer damage from wrong advice or any other mistake or oversight. Having an appropriate PII policy in place and complying with its requirements means that a client can be at least compensated financially for any loss caused by negligence, and engenders confidence among client communities – the centre's potential clients.

Funding bodies

3.5.42 Funding bodies are of course very concerned with risk minimisation in organisations that they fund, and with ensuring quality service delivery. Their own accountability requirements are often reflected in funding agreements and in program standards or guidelines. Centres should have procedures in place to ensure that they comply with any such requirements.

3.6 Decision-making and dispute resolution

Decision-making principles

3.6.1 There are a large number and wide range of decisions that are made in implementing the Guide. It is important to note that NACLC and the National PII Network are committed to implementing the National PII Scheme in an organisational development and supportive framework, while maintaining high professional standards. All decisions are made within a framework that is intended to be consultative and cooperative.

- 3.6.2 All decision-making under the Guide will be open and fair. It is envisaged that decision-making by the National and state or territory PII Networks will generally be done by consensus.
- 3.6.3 Responsibility for day-to-day implementation of the Guide within a centre rests with the centre's Responsible Person, who is in most cases the Principal/Senior Solicitor: see 3.5.21-28 above. This responsibility includes ensuring that all workers and volunteers in the centre are familiar with, and comply with, all ethical, contractual, and other legal and professional requirements and codes of conduct. Both management of the centre and the Scheme's administrators must respect the Responsible Person's responsibility and role. The Guide explicitly recognises as a Mandatory Standard itself that Responsible Persons must comply with any relevant state or territory law and legal profession obligations.
- 3.6.4 The Guide prescribes minimum Mandatory Standards and recognises the discretion that resides in Responsible Persons to decide *how* their centre will effect compliance with those standards, unless the standard itself specifies minimum essential measures. In addition, the Responsible Person may decide to adopt (consistent) risk management measures additional to those in the Mandatory Standards. Decision-making under the Guide should to the greatest extent possible respect the autonomy of individual centres and their Responsible Persons.
- 3.6.5 Other considerations relevant to decision-making under the Guide include:
- it is a national scheme and needs to be administered consistently and fairly
 - it is a risk *minimisation* scheme and risk cannot be completely avoided
 - centres are committed to ensuring equitable access to justice and recognise the importance of endeavouring to provide services to people who would otherwise not have them
 - law reform and policy work are integral to the services and operations of CLCs
 - the diversity of centres as organisations, in their forms of service delivery, operating contexts, target groups etc, must be recognised and the Scheme applied, as far as is practicable, to allow for and support this diversity
 - in some cases the centre is the only service provider available to the individual in that area
 - the legal profession requirements and case law were developed based on consideration only of private law firms operating in quite different contexts. In the absence of clear rules on some situations that occur in centre law practices (in their many variations, and that generally provide other, non-legal, related Services), the Guide attempts to provide a rigorous and legally compliant but workable set of standards for centre services in the community legal assistance services context
 - the law is not always clear on some issues and is open to different interpretations.
- Issues of interpretation and/or nationally consistent application**
- 3.6.6 From time to time issues arise that raise an important question of interpretation of the Guide or the PII Policy, and/or the nationally consistent application or implementation of the Guide. It is important to the success of the National PII Scheme that these kinds of issues are considered at a national level – whether or not there is a 'dispute' about them. Resolving and clarifying such issues when they arise may help to avoid inconsistent and potentially unfair implementation

of the Mandatory Standards and disputes occurring. So, where a PII representative, a centre, a centre's Responsible Person, a state or territory PII committee or state or territory association – or NACLC itself - considers that there may be such an issue, they should bring the issue to the National PII Network as soon as possible for discussion and resolution. Such matters will be resolved by the National PII Network or by the NACLC Board (or its delegate, for example, the CEO) where appropriate, for example, if there is a significant disagreement among the members of the National PII Network, or if determination of the issue concerns a significant policy issue or may have financial consequences for the Scheme/ NACLC. See also **3.6.10** below.

Dispute resolution

3.6.7

Given the great diversity of services and operating contexts as well as the complexity of many of the topics dealt with in this Guide, inevitably there will be some disagreements over the application of the Guide. In practice most disagreements are resolved through discussion and negotiation. Where this doesn't work, there needs to be a clear process for resolving disputes.

3.6.8

This Guide provides for decisions to be made on a range of matters that include decisions:

- that involve an important question of interpretation of the Guide or the PII Policy and/or the nationally consistent application or implementation of the Guide: see in particular Dispute Resolution Procedure 1 below
- to refuse a centre's application to join the National PII Scheme: see Dispute Resolution Procedures (1)-(3) below
- to terminate or not renew a centre's participation in the Scheme⁶ because of serious and ongoing non-compliance with the Guide: see Dispute Resolution Procedures (1)-(3) and **3.6.10-24** below
- to require a centre to take specified action to remedy breaches of the Guide within a certain timeframe: see Dispute Resolution Procedures (1) - (3) and **3.6.10-24** below
- to refuse to approve an information barrier proposed by a centre that is a program within a multi-program agency: see **6.7.76** and Dispute Resolution Procedures (1) and (3) below
- to refuse to approve the appointment of a Responsible Person who does not have an unrestricted practising certificate and/or is not a lawyer employed by the centre: see **3.5.23, 3.5.25** and Dispute Resolution Procedures (1) and (3) below.

⁶ A centre's participation in the PII Scheme also relies on the centre's membership of its state or territory CLC association. Aside from serious and ongoing noncompliance with the Guide, other reasons for which a centre may be excluded from state or territory CLC association membership are outside the scope of this Guide.

- 3.6.9 In practice, many such decisions, especially a decision to terminate a centre's participation in the Scheme, will involve a number of preliminary findings being made along the way to making the final decision. For this reason the dispute resolution procedures below identify the relevant decision maker as well as any requirements for different types or 'stages' of decisions.

DISPUTE RESOLUTION PROCEDURE 1 – for matters concerning an important question of interpretation of the Guide or the PII Policy and/or the nationally consistent application or implementation of the Guide

- 3.6.10 Where a dispute involves an important question of interpretation of the Guide or the PII Policy and/or the nationally consistent application or implementation of the Guide, it may be referred to the National PII Network by a centre⁷ affected and/or by the Responsible Person of a centre affected, by a PII representative, by the relevant state or territory PII committee or CLC association and/or by NACLC. The PII Network will attempt to resolve matters by consensus but if necessary may vote on a matter, in which case, it is decided by a simple majority. Where the affected centre, the centre's Responsible Person, a PII representative, state or territory PII committee or association or NACLC disagrees with the Network's decision, it may request a review by the NACLC Board, which is the final decision-maker. Matters going to the Board must be accompanied by a report and/or recommendations from the PII Network wherever practicable. The NACLC Board will decide the matter and may decide to refer the dispute to a relevant state or territory body for decision. See also 3.6.6.

DISPUTE RESOLUTION PROCEDURE 2 – for matters concerning a decision of a PII representative other than a decision to which Dispute Resolution Procedure 1 applies

- 3.6.11 A dispute concerning a decision of a PII representative, other than a decision to which Dispute Resolution Procedure 1 applies, can be referred to the state or territory PII committee (or equivalent body) if there is one, and if it is not resolved there or if there is no such committee, to the Management Committee/Board of the relevant state or territory association by the centre⁸ affected and/or by the Responsible Person of a centre affected or a member of the National PII Network. If the centre affected, the centre's Responsible Person or a member of the National PII Network disagrees with the decision made, they can refer the dispute to the National PII Network. If the centre, the centre's Responsible Person or a member of the PII Network disagrees with the Network's decision, it may request a review by the NACLC Board, which is the final decision-maker. See the detailed discussion of this process at 3.6.13-25 below.

DISPUTE RESOLUTION PROCEDURE 3 – for matters concerning a decision of a state or territory CLC association

- 3.6.12 A dispute concerning a decision of a state or territory association (whether or not made jointly or in consultation with the PII representative) can be referred⁹ to the

⁷ Where a dispute is referred by 'a centre' rather than by a centre's Responsible Person, the PII Network/committee/association must inform the centre's Responsible Person and request their comments.

⁸ Ibid.

⁹ Ibid.

National PII Network. If the state or territory association, the affected centre, the centre's Responsible Person or a member of the National PII Network disagrees with the Network's decision, it may request a review by the NACLCL Board, which is the final decision-maker. See also the detailed discussion below.

Example: non-compliance and the process of dispute resolution

- 3.6.13 The cross-check process will identify any breaches of the Guide's Mandatory Standards; it should specify the actions required to address each breach, and indicate a timeframe for each required action. In practice, remedial action and timeframes are usually discussed and agreed between the centre and the cross-checker and/or PII representative. Where a centre has actively been working towards addressing the issues raised, but has not been able to complete all actions within the specified timeframes, they should notify the PII representative in advance of the relevant due date, report on progress and any issues that have prevented them from completing the agreed actions, and discuss whether another timeframe can be agreed. Where the centre and PII representative have been unable to agree on an action/s or timeframe/s, the PII representative may impose an action plan including deadlines on the centre.
- 3.6.14 Considerations to be taken into account by a PII representative in deciding what remedial action should be taken and what the timeframe for such action should be, include: those at 3.6.3-5; whether the failure to comply breaches any law or professional code; the level of risk caused by the breach; and the particular circumstances of the centre (for example, resources, relevant effect of location).
- 3.6.15 Minor and even some more important failures by a centre to comply with Mandatory Standards in the Guide - where there is no breach of the law and it has been assessed by the PII representative or National PII Network that there is no or very low risk as a result of the failure - may be permitted for some period, subject to monitoring by the PII representative and a commitment by the centre to address and resolve the breach if, or as soon as, it is practicable.
- 3.6.16 A less resourced centre and/or one operating where other services are not available, is more likely to be given more time to rectify the breach – so long as the centre has taken all action possible to minimise any risk and is addressing the issues raised as agreed with their state or territory PII representative.
- 3.6.17 Serious ongoing non-compliance with the Mandatory Standards of the Guide may lead ultimately to exclusion from the National PII Policy and Scheme. This will only occur if a centre has failed to take appropriate action after reasonable notice. What constitutes reasonable notice will depend on the seriousness of the risk, among other considerations.
- 3.6.18 If a centre fails to take action required of it in the notified timeframes, it may be put on notice by the PII representative that it will be referred to the state or territory PII committee (or equivalent) or if there is no such committee, to the Management Committee/Board of the state or territory CLC association for consideration as to their view about whether the centre should be excluded from the Scheme¹⁰. It is appropriate that these matters go in the first instance to the state bodies because they are most familiar with the particular service and its context, and hence in the best position to ensure that relevant matters are identified and taken into account.

¹⁰ Note that any issue concerning an important question of interpretation of the Guide or the Insurance Policy, and/or the nationally consistent application or implementation of the Guide, ideally will have been resolved by the National PII Network and/or the NACLCL Board before it is applied to a particular centre. See 3.6.6.

- 3.6.19 It is important to recognise that state and territory PII representatives are appointed by state and territory associations and as a result have some accountability to those state and territory associations. They are, however, members of the National PII Network, and it is that body and NACLCL which formally administer the Scheme. The state and territory PII representatives are charged with the state-based administration of the Scheme and implementing the Guide's Mandatory Standards consistent with the National PII Scheme (and, of course, in compliance with any applicable local law). For more detail on the role of the National PII Network and the state and territory PII representatives, see **3.5.6-8** and **3.5.11**.
- 3.6.20 When a matter is not resolved at the state or territory level, the centre, the centre's Responsible Person or a member of the National PII Network can take it to the national level, in the first instance to the National PII Network. It is preferable that matters are brought to the National PII Network by the relevant state or territory PII representative, whether it is at the request of the centre, its Responsible Person or the representative, however if for some reason the centre or Responsible Person wishes to do so itself, it may submit a request for consideration to the National PII Network by email to the Chair of the Network, with a copy to the NACLCL staff member on the Network (for example, the Insurances Coordinator). In any event, the PII representative and the centre, including the Responsible Person, will have the opportunity to submit material.
- 3.6.21 Once the National PII Network discusses and forms a view about the case, the Network will communicate that view to the centre. Usually this will resolve the matter.
- 3.6.22 If, however, the centre, the centre's Responsible Person or a member of the PII Network disagrees with the decision, and wishes to take the matter further, they may request a review by the NACLCL Board. The NACLCL Board gives great weight to the advice of the National PII Network, which it recognises as an expert advisory body. It will also give weight to the fact that, unlike the cross-checker/ PII representative, Board members have not had the benefit of seeing the centre's operations themselves. The Board will also be concerned with ensuring that the Scheme and the Mandatory Standards are implemented in a nationally consistent way, as much as is practically possible and appropriate, and consistent with the principles of the revised Guide and the National PII Scheme, including its organisational development, sound professional standards, risk minimisation and access to justice goals. The Board will take into account the considerations outlined at **3.6.3-5**.
- 3.6.23 The NACLCL Board is the final decision-maker and its decision will be communicated to the National PII Network and to the centre and its Responsible Person.
- 3.6.24 It should be noted that if practicably possible, relevant factual material will be put to the National PII Network and/or NACLCL Board without the centre being identified. Wherever possible, discussions about issues at particular centres including actions to be taken are discussed in the abstract, that is, the centre's identity is not disclosed. This is in keeping with the constructive organisational development focus of the Scheme, which recognises that frank discussion at the local level is assisted by preserving confidentiality wherever possible. It is not always possible, however, for a centre's identity to be kept confidential, especially where the centre's particular location, services or other circumstances are relevant to the issues for determination.

- 3.6.25 Serious and ongoing non-compliance with the Guide's Mandatory Standards may also affect a centre's accreditation status and ultimately its membership of the relevant state or territory association, however these are separate decisions and processes: see 1.5.

3.7 Mergers & amalgamations

- 3.7.1 At the time of publication, there has been an increased trend towards centres merging or amalgamating¹¹ with each other/other organisations. In addition to the many legal, governance, operational and practical issues arising, centres proceeding with such a course will have a number of legal practice management issues to consider and resolve.¹² Such a centre will need to fully consider all requirements and would be wise to seek advice on various aspects.¹³
- 3.7.2 This Guide only considers the key legal practice requirements that will need to be fulfilled. Some of the processes involved in merging or amalgamating can take time and not be as straightforward as they might initially seem, so centres should plan ahead and identify and resolve all the issues early in the process.

Insurance

- 3.7.3 The new centre/entity will need to ensure it has PII cover, and this may need to be confirmed before notifying the legal regulator of the merger/acquisition.
- 3.7.4 Where one or all of the merging centres are insured under the National PII Scheme, the centres should notify NALCLC of the prospective merger/ amalgamation as soon as possible. Where a completely new entity is being formed, the new centre will need to apply and be accepted, at least in principle, to join the CLC Association, and then apply to join the National PII Scheme as a new member. They will therefore first need to:
- ensure their membership status with the relevant state or territory CLC Association is confirmed (confirmation of full membership must be provided to NALCLC)
 - complete a new Proposal form and PII Scheme application form in respect of the new centre/entity, and provide them to NALCLC.

Even if a brand new entity is not being formed (i.e. another centre or centres is/ are being subsumed by an existing centre), these steps should still be undertaken from a practical perspective to ensure that all stakeholders are fully aware of

¹¹ For example, Justice Connect's *Not-for-profit Law Information Hub* provides an overview of the differences between mergers and amalgamations, identifying that amalgamations are available to 'incorporated associations based in the same state or territory', and the process of amalgamating is more simple and less expensive than that of merging. It is also identified that amalgamating is not an option in all jurisdictions. See: Justice Connect, *Amalgamations and Mergers*, Not-for-profit Law Information Hub <<http://www.nfplaw.org.au/amalgamationmergers>> (accessed 31 January 2017).

¹² Justice Connect's *Not-for-profit Law Information Hub* has a number of resources that may assist CLCs in considering and preparing for a merger or amalgamation, including some state- or territory-specific information sheets. See in particular: Justice Connect, *Amalgamations and Mergers*, Not-for-profit Law Information Hub <<http://www.nfplaw.org.au/amalgamationmergers>> (accessed 31 January 2017); Justice Connect, *Working With Other Organisations* (updated June 2015) available at: <http://www.nfplaw.org.au/sites/default/files/media/Working_with_other_organisations_2.pdf> (accessed 31 January 2017); and Justice Connect, *Checklist: Working With Other Organisations* (updated June 2015) available at: <http://www.nfplaw.org.au/sites/default/files/media/Checklist_-_Working_with_other_organisations.pdf> (accessed 31 January 2017).

¹³ Justice Connect's Not-for-profit Law program may be able to assist CLCs with advice for matters involving amalgamations, mergers or working with other organisations, through their telephone advice service or a referral for pro bono assistance. See: Justice Connect, *Legal Help* <<http://www.justiceconnect.org.au/nfpenquiry>> (accessed 31 January 2017).

the changes taking place (or at least an updated Proposal form will need to be provided reflecting the changes to the existing insured entities).

- 3.7.5 The prospective Responsible Person of the new centre/entity will need to meet with their state or territory PII Representative to discuss the arrangements that are being put in place to ensure compliance with the Guide, for example in relation to conflict checking and data merges. It may be necessary to run conflict checks before the merger to ensure that any potential or actual conflicts are identified and those clients contacted and referred elsewhere before the client information and records, and the legal practices, are combined.
- 3.7.6 The state or territory PII Representative must be satisfied that the new entity/centre will be compliant with the Guide before it can be insured under the National PII Scheme. The PII Representative must expressly confirm this to NACLCL before NACLCL will provide its information to the broker for inclusion in the PII Scheme and any other NACLCL coordinated insurances. Depending on the circumstances and the timing in relation to the cross-check cycle, the PII Representative may deem it necessary and a requirement for inclusion in the PII Scheme that a follow-up cross-check be conducted on the new centre/entity in a short time after merger, for example, at three, four or six months.
- 3.7.7 Following completion of the above steps, NACLCL will pass on the relevant details and form to the insurance broker to seek confirmation from the insurer of the centre's inclusion in the Scheme/s and, depending on the timing of commencement of the new entity, new premiums may be payable by the centre.
- 3.7.8 The centre will also have to update any insurances held by it that are not arranged by NACLCL, with the relevant insurance broker/s, and the processes may differ to those with the NACLCL schemes.

Run-off PII cover

- 3.7.9 For any entity/ies that are being closed as an effect of the merger or amalgamation, run-off PII cover will need to be in place. See **3.8.8-10** and **4.6.10**.

Changing the legal entity and notice to legal profession regulatory bodies

- 3.7.10 Some of the steps involved in changing the legal entity and notifying the state legal profession regulator will include:
- Registering the new practice and its principal's details
 - Closing off old trust accounts and notifying with appropriate forms – this should be done before the other legal practice/s are closed (see also **3.8.12**)
 - Opening trust accounts for the new entity and lodging the appropriate forms. Database mergers and conflicts of interest

Database mergers and conflicts of interest

- 3.7.11 Merging or amalgamating centres will need to liaise with their data system provider/host and other IT providers regarding the merger of databases (including cleansing the data and checking for and obtaining lists of actual or potential conflicts prior to amalgamation).
- 3.7.12 Once a list of conflicts has been obtained, the centres may have to notify some current clients that they are unable to continue to act for them, and provide suitable Referrals. Those clients that will continue to be serviced by the new centre/entity should be advised of the merger/amalgamation and the new name of the legal practice and any changed contact information.

3.7.13

Centres may need to set in place a nuanced way to consider the potential for and likelihood of conflicts to be able to optimise vulnerable community members' access to the service. The below table is based on one that was prepared for three Victorian centres which all used CLSIS as their data system, and which merged to form one centre, and is an example of an approach that may be useful. The table identifies the types of questions that the Responsible Person will need to consider. It is important to note that there may not always be a straightforward yes/no answer to these questions, and the Responsible Person will need to determine, on a case-by-case basis, whether the centre can proceed with the matter.

Criteria	Considerations for intake workers	How could we manage the situation better – determined by Responsible Person
They are noted on CLSIS as Other Party	<p>Is the name common?</p> <p>How long ago was the legal assistance?</p> <p>What area of law was the previous legal assistance?</p> <p>Is the person that acted for the client still at the service?</p> <p>What sort of assistance is the centre likely to offer in that area? Eg, would the client only be eligible for a night service appointment</p>	<p>Can further information confirming identity be obtained?</p> <p>If it is after 7 years, it is likely the file or advice has been destroyed, but will also need to check on hard drive that there are no client documents saved</p> <p>Is it an area that files are required to be kept? Eg, POA, Wills, any matter for children including: VOCAT</p> <p>Is it an area of law material to the new matter? This may be broad eg, MVA, old client, new client family violence, or may be issues of economic abuse</p> <p>Presumption of assumed knowledge amongst lawyers, rebuttal may be that the lawyer no longer at the service</p> <p>Would the revealing of that information reasonably be assumed to impact on the previous client?</p> <p>Even if providing limited assistance, consideration must still be given to the above questions</p>
They are noted on CLSIS as Related Party	<p>Does the matter that they are seeking advice about have the old client as Other Party?</p> <p>Yes</p> <p>No</p>	<p>Go through the above considerations.</p> <p>Might the information from the old client be reasonably seen if revealed, as detrimental to that client?</p>
Are there larger public policy issues in acting or continuing to act?	<p>For example, prioritising victims of family violence – need to ensure that when we do intake that we are not providing priority to respondents, for example ensure that they are advised they can receive advice from the duty lawyers at court.</p>	

3.8 Centre closures

3.8.1 This section aims to provide some guidance on some key legal practice management issues that will need to be considered when a centre is ceasing to operate, however it does not address all of the issues that will need to be addressed, and centres must obtain their own advice about what is required to close a centre.

Dealing with open and closed files

3.8.2 Centres that are ceasing to operate will need to ensure that they appropriately handle both open and closed files, observing the key requirement that client confidentiality be maintained even after the clients' legal matters have concluded.

Open files

3.8.3 A centre ceasing to operate will need to advise all current clients of the centre closure, and should offer to refer them to another suitable service. A client's consent/instructions should be obtained *before* a Referral is made, including consent for their files and documents to be provided to the other legal practice (after the other legal practice has performed a conflict of interest check and has confirmed they can accept the client and matter). Centres should check any relevant provisions and requirements in their jurisdiction's legal profession rules¹⁴.

3.8.4 The centre will also need to check any requirements to change official records and notify bodies accordingly, for example with the court where a solicitor from the centre is the Solicitor on the Record, and with other parties' solicitors if the centre is the place for service. Consent will need to be obtained to transfer any client money held in trust to another legal practice and principal. Where files are being transferred to another service, the centre may need to consider and agree with the other service on any indemnity issues (for example, will the new service take full responsibility for files, and when, or will the closing centre be responsible for work until transfer date).

Closed files and storage

3.8.5 When ceasing to operate, centres should review all closed files to determine which files can be destroyed¹⁵ and which must be retained and archived, as well as to identify any original documents that need to be returned to clients. (In theory all original documents would have been returned to the client when the file was closed, but this is not always possible with legal assistance clients.) The centre will need to arrange suitable secure storage of files (whether electronic, hard copy, or a mix) in a manner that does not breach client confidentiality and complies with all requirements for the retention of closed files: see **8.14**.

3.8.6 When a centre closes, it is important that client files and records remain accessible should a claim be made against the PII policy in respect of the file and should the client need access to the file for some reason. Decisions made about where and how to store the client files and records should take these issues into account.

3.8.7 Where practicable, the centre should advise the former clients of the centre's closure and offer for copies of those parts of the clients' files that they are able to request access to under legal and profession requirements in their state or territory and/or the privacy principles to be provided to them. The centre may need to seek the clients' consent in order to transfer their files to another entity

¹⁴ For example, NSW & Vic: r. 6, *Legal Profession Uniform Legal Practice (Solicitors) Rules 2015*.

¹⁵ See **8.14.7-10**.

for storage/archiving (unless this had already been covered in their client retainer). For example, the centre may be able to arrange, with the client's consent, for the storage of files to be with their state or territory CLC association and/or NALCLC.

PII run-off cover

3.8.8 Some, if not all, of the applicable legal profession rules require that centres have run-off insurance cover for their professional liabilities. For example, the Uniform General Rules require¹⁶:

78(6) Professional indemnity insurance must provide indemnity for run-off liabilities for a minimum of 7 years from:

(a) the date (during the period of insurance) that the law practice ceases to practise, or

(b) the date of expiry of the period of insurance,

if the law practice is not covered from the relevant date by a further policy that complies with these minimum standards, including the requirement for run-off cover under this subrule.

Note. Professional indemnity insurance may be provided for by a scheme such as a run-off scheme.

3.8.9 For centres covered under the National PII Scheme, run-off cover is included free of charge as long as the Scheme is in operation: see **4.6.10**. A centre that is closing must give notice of the closure and the effective date in writing to NALCLC, who will convey these details to the insurance broker and ensure that the run-off cover is in place for the centre. Currently, the cost of the run-off cover is included in the annual premiums paid to the broker, so no further premiums will be payable by the centre for the run-off cover.

3.8.10 Centres that are not covered by the National PII Scheme will need to ensure that they have appropriate run-off cover available that at the very least matches their jurisdiction's requirements (if not the full seven years or more).

Notice to legal profession regulatory bodies

3.8.11 Centres should also check any requirements they may have to notify their local legal profession regulatory body of the centre's closure. For example, the Uniform General Rules require notice to be provided to the state regulatory body within 14 days of the cessation of the legal practice¹⁷. Lawyers may also need to notify the local regulatory body regarding changes to their particulars and practising certificate requirements. Centres and lawyers will need to be aware of the requirements in their state or territory.

3.8.12 The legal profession rules may also require notice to be given to the local regulatory body that the centre will cease to hold trust money (because it is ceasing to exist as a law practice).¹⁸ Centres should check the relevant requirements in their state or territory.

Other issues

3.8.13 The legal practice may also have an office account or other financial arrangements that will need to be wrapped up, and other insurances, such as Association Liability Insurance, that will need to be cancelled and run-off cover arranged.

¹⁶ NSW & Vic: r. 78(6) *Legal Profession Uniform General Rules 2015*.

¹⁷ *Legal Profession Uniform General Rules 2015* (NSW & Vic) r 29.

¹⁸ *Legal Profession Uniform General Rules 2015* (NSW & Vic) r 51.

CHAPTER 4

Professional Indemnity Insurance and the National PII Policy

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4.1 Introduction

4.1.1 The National Professional Indemnity Insurance Policy (National PII Policy) provides insurance cover to the centre for a specified range of types of civil liability to any third party. The liability can be incurred by the centre and any person who is or was a principal, partner, director, employee, treasurer, secretary, administrative assistant, consultant, contractor, agent, secondee, volunteer, student, or Board or Management/Executive Committee member, in the conduct of the centre's 'Professional Services', as defined in the Policy.

4.1.2 This insurance cover is provided under a master PII Policy negotiated at a national level by NACLC for the benefit of all full member centres who wish to participate. Each participating centre contributes to the payment of one national premium and the terms and conditions of the Policy are the same for all centres (save that individual centres may pay an additional premium for higher cover).

4.2 Risk management and the National PII Scheme

4.2.1 Professional indemnity insurance is a risk management strategy. The Guide is a risk management tool and a valuable source of information that provides all staff, volunteers and Management Committees with information about PII and related risk management.

4.2.2 To be included in the National PII Scheme, each centre needs to be a full member of a state or territory association of CLCs and demonstrate satisfactory compliance with the Mandatory Standards in the Guide. In order to successfully implement these requirements, a commitment is required from each centre's Management Committee, the principal solicitor or other Responsible Person, all other employees, both legal and non-legal, and all centre volunteers.

The National PII Policy

4.2.3 Until 1988, each CLC negotiated PII individually with a broker and an underwriter. Due to anomalies between centres in policies, coverage and premiums, the 1987 National CLC Conference decided to develop a national CLC indemnity scheme and the national Policy began in 1988. Since 2002 it has been with CGU, and from 2017 the Policy is issued by Pacific Indemnity Underwriting Solutions on behalf of CGU. The Policy generally covers about 160 operating centres.

4.2.4 Most centres currently choose to participate in the National PII Scheme and have cover under the National PII Policy. Importantly, the Scheme has been successful – claims have been few and premiums have stayed relatively low. Other benefits have included:

- a cementing of a cooperative and collaborative approach by centres to risk management and organisational development
- a mechanism for the early identification of areas to address to reduce risk and provide training and support in response
- improvements in service data recording and conflict checking
- demonstrated success in sector-led self regulation by a peer review initiative aimed at quality assurance and organisational development support.

4.2.5 A copy of the current National PII Policy Wording is at **Appendix A**¹⁹. The Schedule that forms part of the Policy for the 2016-17 policy period is at **Appendix B**.

¹⁹ The Policy Wording and Policy Schedule included with the Guide at publication are those valid for the 2017-18 policy year.

The Policy Schedule is updated each year, and the Policy Wording may also change from time to time – the current versions are always made available to participating centres, including via the NACLCL website. See **4.6** below.

The application process

- 4.2.6 A centre that is a full member of a state or territory CLC association may apply to be insured under the National PII Scheme using NACLCL's application form and the PII 'Proposal' form on the NACLCL website (see NACLCL Members' page). The PII section of the Proposal form will need to be completed by the centre's principal solicitor. Once complete, both forms should be sent to NACLCL.

The relevant state or territory PII representative then visits the centre and uses the *Cross-check Questionnaire* (see **Appendix D**) to assess the centre's compliance, or for a new centre, proposed arrangements that will enable it to comply, with the Mandatory Standards in the Guide. The PII representative then advises the centre and NACLCL of the result of this assessment and of their recommendation as to the centre's inclusion or non-inclusion in the Scheme. Where a decision is made to include the centre, NACLCL then advises the broker and insurer (and sends in the Proposal form) and notifies the centre of the premium payable.

- 4.2.7 The renewal process commences in about February/March each year. See **4.6.21-24**.

4.3 The insurer

Pacific Indemnity on behalf of CGU

- 4.3.1 Pacific Indemnity Underwriting Solutions Pty Ltd (AFSL 480863) currently underwrites the National PII Policy on behalf of CGU Insurance Limited (AFSL 238291). Details of Pacific Indemnity can be found on their website – see www.pacificindemnity.com.au.

The broker

- 4.3.2 The insurance broker is currently McDougall Kelly Martinis Insurance Partners, and the current contact details are available on the Members' Page of the NACLCL website. Whenever possible, contact with the insurer should be via the broker.
- 4.3.3 A centre should talk to its PII representative before contacting the broker or insurer in relation to a new notification. If they cannot be contacted and the matter is urgent, contact a PII representative from another state or territory. If the centre cannot get hold of a PII representative and it judges the matter to be urgent, the centre may notify the broker but must inform the PII representative as soon as possible thereafter. See **4.7.10-13**. Contact details for PII representatives can be obtained from the NACLCL website.

4.4 Things to know about the Policy

- 4.4.1 The National PII Policy covers the centre where it is a legal entity or in some cases that part of the legal entity which operates as a CLC, and any person who is or was a principal, partner, director, employee, treasurer, secretary, administrative assistant, consultant, contractor, agent, secondee, volunteer, student, or Board or Management/Executive Committee member for a specified range of types of civil liability to any third party, incurred in the conduct of the centre's Professional Services, as defined in the Policy. See **4.6** below. The Policy also covers the past acts and omissions of any (former) centre (and its former employees, volunteers etc) that was previously part of the Scheme but has ceased to exist or operate or has been disposed of or merged with or acquired by another entity, provided

the centre is listed on the register (maintained by NACLC) attached to the Policy Schedule: see **4.6.10-11** below.

- 4.4.2 All people involved with a centre included in this PII Scheme should be familiar with the types of claims covered by the Policy. These are set out in the Policy with any amendments incorporated into the relevant year's Schedule. See **4.6.12-16** below. The Policy, as amended by the Schedule, specifically excludes some types of claims and it is important for centre staff and management to be familiar with these provisions. See **4.6.25-28** below.
- 4.4.3 Being a member of the National PII Scheme entitles all participating centres – funded or un-funded, volunteer or paid staff – the same coverage and support, regardless of their size or resources.
- 4.4.4 The current National PII Policy provides cover of up to \$5 million for any one claim, with an annual aggregate of \$10 million for each centre.
- 4.4.5 There is an 'Excess' or 'Deductible' of \$10,000 (costs inclusive) applicable to each claim, which means the centre is liable for the first \$10,000 towards any claim's payment or costs. NACLC maintains an Excess Fund (see **4.4.13-19** below) to assist centres that need it to meet the cost of an excess payment. Any centre wishing to apply for a contribution for paying the Excess, should contact their PII representative about the procedure.
- 4.4.6 The policy is 'renewed' (or, more accurately, a new policy is taken out) annually before each year's insurance cover ends on 30 June. Each policy in each successive year is a separate policy, beginning on its respective inception date. This is so even though a centre may have continuous cover with the one insurer, and is renewing year after year. To be covered by the Policy, an operating centre must submit a completed Proposal (renewal) form every year, using the required form, and the insurer must have accepted that Proposal in order for it to be operative. This is not necessary in respect of centres that no longer exist or operate or that have merged with or been acquired by another entity: see **4.6.10-11** below. Current procedures garner all necessary information to allow the policy renewal to occur as seamlessly as possible, and centres have an obligation to cooperate fully in the renewal process. See **4.6.21-24**.

Claims-made policy

- 4.4.7 The Policy is a claims-made policy which means that the Policy that applies is the policy in force at the time when a claim is **made**, rather than the policy which is in force at the time that the event giving rise to the claim **occurred**. On this basis, the Policy responds to a claim made during the policy period. It is important to understand these matters as they are relevant to coverage (including of claims arising from 'Known Circumstances') and the importance of prompt notification (to the broker/insurer) of claims and potential claims, as described below and in more detail at **4.7**.
- 4.4.8 To be covered by the policy, it is critical for each centre to disclose any actual claims, and any fact/s or circumstance/s that might give rise to a claim, as soon as possible and particularly **before the renewal date** (i.e. 30 June). However if a centre inadvertently misses this date, they may still be able to notify or claim and should talk to their PII representative immediately after they realise the issue. See **4.7**.

Policy administration

- 4.4.9 NACLC is responsible for the administration of the Policy and policy negotiation. Certificates of currency are sent to all participating centres each year, along with

information about the Policy (including where to obtain policy documents). It is very important that each centre retains their certificate of currency in a safe place. If necessary, copies of current or old certificates can be obtained from NACLCL. The PII Policy documents are available on the Members' Page of the NACLCL website. If you have any questions about the Policy you should contact your PII representative. For copies of previous policy documents, please contact the NACLCL office.

Premium calculation

- 4.4.10 An annual PII premium in respect of all participating centres is negotiated with the insurer (via the broker) by NACLCL. This premium has remained very competitive because of the low claims record in centres, the nature of their work, the buying power of one national arrangement, and recognition of the quality assurance process provided by the annual cross-checks and the National Accreditation Scheme.
- 4.4.11 The national premium is broken down state-by-state on the basis of total state and territory centre income levels. The centre-by-centre premium is then based on each centre's income as a percentage of the state/territory total premium.
- 4.4.12 Premiums collected from each participating centre, or other designated organisation by the broker. The administration fee charged to centres covers some of the costs NACLCL incurs in managing and administering the Scheme, including maintaining the Excess Fund.

Excess

- 4.4.13 Since 2002, the National PII Policy has included an Excess/Deductible of \$10,000²⁰, which is costs inclusive. This means that the centre is required to pay the first \$10,000 towards claim payments and/or costs, and the insurer will be liable for the costs and claim payments above that \$10,000, and up to the 'Policy Limit'. Sometimes the insurer might pay for everything up front and ask the centre to reimburse it for the Excess later.
- 4.4.14 In 2002, NACLCL established an **Excess Fund** to assist centres to meet most of the cost of the Excess, should a claim be made against a centre. The Commonwealth made the original contribution of \$30,000 to the fund in July 2002 and the fund continues to be maintained by NACLCL. It is topped up as necessary from administration costs contributions collected by NACLCL from the centres at the same time as it collects the premium payments.
- 4.4.15 Previously, NACLCL also maintained a Legal Investigation Costs Fund, which operated in a similar way to the Excess Fund. In 2016 the two processes and funds were merged and the Legal Investigation Costs Fund was closed.
- 4.4.16 If a claim is made against a centre and that centre is required to pay the Excess (in relation to either a claim payment or to costs incurred), the centre may apply to the Excess Fund to assist in paying the Excess. Payment is not guaranteed.
- 4.4.17 Centres wishing to apply to the PII Excess Fund should contact their state or territory PII representative, and provide the following information in support of the application:
- Claim details and/or notification form (as supplied to the insurer), and any additional relevant correspondence with the broker/insurer;

²⁰ The Excess for enquiries is \$1,000.

- All invoices issued by the insurer and/or their lawyers, and/or any other settlement documents or other documents to evidence the total paid claim amount as well as the amount ultimately paid by the centre (i.e. that the centre has indeed paid the Excess). Where the invoice is for legal costs, the centre's principal solicitor must carefully check the **itemised** account (and if necessary request one) and verify that all items are reasonable and appropriately charged, and include their advice to this effect in the application;
- Outline the impact on the centre if it was unable to access the PII Excess Fund, which might consider the centre's audited annual accounts, as well as information about any alternative sources of funding they have which could be used to pay all or part of the Excess;
- The centre's claims history – if there are several claims of a similar nature, or if the claim has arisen out of a cross-check issue, the centre should explain what actions it has taken to remedy the causes of such claims;
- Any special circumstances that would justify the waiver or partial waiver of the minimum centre contribution of \$2,500.

4.4.18 Applications are initially considered by the PII Representative and the National PII Network (or a designated subcommittee of the Network), taking into account the information provided by the centre. The National PII Network then makes a recommendation to NACLC about the application. NACLC makes the final decision and (if approved) arranges the payment.

4.4.19 A centre that is approved for financial assistance from the Excess Fund is required to pay the first \$2,500 of the Excess.

4.4.20 Centres should check their funding agreements to see if there are any restrictions or requirements in relation to their paying the costs of claims or notifications.

4.5 Top-up insurance

4.5.1 Top-up insurance is cover for amounts greater than that provided by the Policy (see 4.6.17) and is an option that is open to all centres as individual entities. A higher level of cover may be a requirement of a centre's funding, or may be indicative of the types of matters that the centre's workers handle in their day-to-day operations. When deciding whether to take out top-up insurance a centre should consider the following:

- **amount of cover needed:** having regard to the individual circumstances of the particular centre including its operational size and the nature of the activities undertaken and Services provided.
- **retroactivity:** centres that purchase top-up insurance should ensure the policy covers all past activities and advice. This type of cover will most often appear as retroactive cover and the policy should say words to the effect that, 'retroactive cover is unlimited' or 'the retroactive date is without limitation of date'. If a policy is purchased without retroactive cover there may be gaps in coverage.
- **disclosure:** the Policy provides cover for claims otherwise covered by the Policy arising from a 'Known Circumstance' in certain situations. Some top-up professional indemnity policies may exclude known claims and/or claim circumstances. This should be checked carefully. It is essential that all claims and/or circumstances that may lead to a claim are disclosed in any proposal or application for top-up insurance. A failure to strictly comply with these proposal obligations may result in cover being avoided.

- **consistency of terms:** it is important that the terms of coverage of the top-up policy are the same or follow as closely as possible and do not conflict with the wording of the primary Policy. Any differences may create gaps in cover, which could have consequences if a claim occurs.
- **each and every claim limit versus aggregate limit:** some top-up policies will cover centres on an each and every claim basis, meaning the centre will be covered for multiple claims as long as the maximum single claim is no more than a specified amount. Above a certain amount, most top-up policies revert to an aggregate limit, meaning that a centre is covered up to the aggregate amount of the value of all claims during the period of insurance.

4.6 Some terms of the current Policy

4.6.1 The PII policy is made up of a Policy Wording and a Policy Schedule. The Policy Wording is a standard document from the insurer or broker (in this case, the insurer), which sets out their standard terms of insurance. The Policy Schedule supplements the Policy Wording, to incorporate any specific terms agreed between the insurer and the insured for that policy year. A new Policy Schedule is issued each year, however the Policy Wording may remain the same for several years. References in this section to ‘the Policy’ refer collectively to the Policy Wording and the Policy Schedule.

4.6.2 The current Policy Wording is included at **Appendix A** to this Guide. A copy of the Policy Schedule for 2017-18 is included at **Appendix B** to this Guide, with information relating to individual centres redacted.²¹

4.6.3 It is imperative that the Responsible Person, centre management, and employed and volunteer workers are familiar with the terms of the Policy Wording and the Policy Schedule. Remember also that parts of the Policy, usually only the Policy Schedule, change from year to year.

Who is covered?

4.6.4 Generally, the term ‘You’ applies to any person (which includes a legal entity) that is covered by the Policy, and the term ‘Named Insured’ refers to the person or entity who/which pays money to the insurer and enters into the contract for insurance cover with the insurer. In the National PII Policy, NACLC is the contracting party; ‘Named Insured’, refers to NACLC and all the centres listed in the register attached to the Schedule to the Policy each year (as amended from time to time), and also ‘Principals’ of those centres; and the term ‘You’ may refer to the centres as well as the individuals from those centres that are insured by the Policy (see **4.6.5-4.6.9**). A relatively small number of centres are not incorporated and they are a program of another, incorporated, organisation. In these cases, the ‘Named Insured’ is the umbrella organisation, although it is only insured ‘in its capacity as’ the relevant centre.

4.6.5 The Policy Wording defines the meaning of the ‘You’ (ie the Insured)’ and ‘Named Insured’, however, in the current Policy these sections have been further explained by endorsements in the Policy Schedule, which specifies all the classes of entities and people covered by the Policy.

²¹ The Policy Wording and Policy Schedule included with the Guide at publication are those for the 2017-18 policy year (valid to 30 June 2018). The Policy Schedule is updated each year, and is made available to all participating centres. The Policy Wording may be updated or changed from time to time, and the current version will always be available to centres via the NACLC website.

4.6.6 **Definition of 'Named Insured'** in the Policy Wording provides:

Named Insured

Each of the following, individually and jointly:

- a) each person, firm or incorporated body identified in the **Schedule** as a **Named Insured**;
and
- (a) any entity which is engaged in the provision of **Professional Services** and which is created and controlled, while this Policy is in force, by anyone identified in the **Schedule** as a **Named Insured**; and
- (c) anyone who becomes a **Principal** of the **Named Insured** while this Policy is in force (but only in respect of work undertaken for or on behalf of the Named Insured firm or incorporated body).
- (d) Any person, firm or incorporated body who is entitled to Cover under the terms of this **Policy** (as a beneficiary).

4.6.7 **Definition of the 'You'**: Endorsement 5.2 in the Policy Schedule provides:

5.2 The definition of "You" is deleted and replaced with the following:

"You means each of the following, individually and jointly:

- a) each incorporated body or trading entity identified in the Schedule as an Insured Centre and any prior corporate entities ; and
- b) any person who is, was or shall be a Principal, partner, director, Employee, treasurer, secretary, administrative assistant, consultant, contractor, agent, secondee, volunteer or student in the an Insured Centre; and any other natural person involved in the governance of any Insured Centres, including any board, management committee, advisory committee or executive committee member, to the extent that such person acts or acted in the course of the provision of the Professional Services Covered by this Policy, but not in respect of Claims or losses arising out of or related to fraud or dishonesty and only in respect of work undertaken for and on behalf of an Insured Centre; and
- c) any entity which is engaged in the provision of Professional Services and which is created and controlled, while this Policy is in force, by an Insured Centre; and
- d) Any person, firm or incorporated body who is entitled to Cover under the terms of this Policy (as a beneficiary); and
- e) each incorporated body or trading entity listed in the attached list of Insured Centres that previously carried on the Professional Services Covered by this Policy (and only in respect of those services), but who or which has subsequently ceased to exist or operate or has been disposed of or merged with or acquired by another entity; and
- f) Each incorporated body or trading entity listed in the attached list of Run-off Insured Centres but only for Claims for Civil Liability arising from the provision of Professional Services whilst they were an Insured Centre.

4.6.8 The 'You' includes consultants, contractors etc, as specified in (b) above, to the extent they are/were providing legal advice and/or related services at or in connection with a centre listed in the register. Clearly this would cover any contractor, consultant etc who is a natural person. It is not clear whether it would

include contractors etc that are incorporated entities. Given this, any centres engaging contractors, consultants etc that are incorporated entities to provide professional services for the centre, may consider it wise to ensure that those entities have their own PII cover.

- 4.6.9 The Policy contains a definition of 'Employee', and specifically includes 'a volunteer worker or student' in that definition.²² Accordingly, volunteers including students are covered by the Policy to the same extent as a paid employee.

Effect of cessation or change of centre: run-off cover for the centre and its employees, volunteers etc

- 4.6.10 The Policy covers claims made and notified against a centre, and/or against any person who was an employee, volunteer etc at the centre, where the centre was previously part of the National PII Scheme but the legal entity has ceased to exist or operate or has been disposed of or merged with or acquired by another entity (sometimes called 'a Run-Off event'), or has otherwise ceased to perform the Professional Services covered by the Policy, provided the centre is listed on the register attached to the Policy Schedule. Where a centre is intending to cease operations, or to merge with or be acquired by another organisation, or for any other reason to change its legal identity, the Responsible Person should notify their PII representative and NACLIC. If and when the Run-Off event occurs, the insurer should be notified, via the broker, as should NACLIC so that the relevant details can be recorded on the register.

Centres that leave the Scheme and insure with another insurer

- 4.6.11 Run-off cover does not apply to centres that continue to operate but have chosen to leave the Scheme and obtain PII from another insurer. Therefore it is imperative that if a centre is leaving the Scheme it ensures that its new (replacement) PII policy provides full retroactive cover so that the new policy will cover claims made in respect of services provided before the centre entered into that new policy. In particular, the replacement policy should *not* contain a retroactive date or a past acts exclusion. Where a centre that has been part of the Scheme intends to leave the Scheme and take out replacement insurance, the Responsible Person should notify their PII representative and also NACLIC.

What is covered?

- 4.6.12 Coverage is discussed in many places in the Policy and all sections should be identified and read carefully. Some of the main relevant sections are:

- Insuring Clauses (page 2)
- Extensions (pages 2-4)
- What Is Not Covered (pages 5-7)
- Claims Conditions (pages 8-9)
- General Provisions (pages 11-12)
- Definitions (pages 13-15)

Note also the amendments made to certain policy terms in the Policy Schedule.

²² Note that in previous versions of the Policy Wording used prior to 2016, volunteers were covered by the PII Policy, by way of an endorsement in the Policy Schedule. This is no longer necessary due to the specific inclusion of them within the definition of 'Employee' within the Policy Wording.

- 4.6.13 Insuring Clauses state:
- 3.1 The Cover We Provide**
- We will pay to or on Your behalf all awards of damages and awards of claimants costs against You resulting from any Claim for Civil Liability arising from the provision of Professional Services by or on behalf of the Named Insured.
- We do this only for Claims which are:
- (i) made against You during the Period of Insurance; and which
 - (ii) We are told about in writing as soon as reasonably possible during the Period of Insurance; and which
 - (iii) Arise out of an act error or omission after the Retroactive Date, if any, specified in the Schedule.
- 4.6.14 Insuring Clause Clarifications (page 2) outlines the types of claims covered (although it is not an exhaustive list). Claims can include:
- breach of professional duty
 - breach of privacy or confidentiality
 - breach of fiduciary duty
 - defamation
 - loss of or damage to documents
 - breaches of misleading and deceptive provisions of various legislation
 - infringement of intellectual property.
- Insuring Clause also provides cover for the legal costs and expenses of investigating, defending or settling a claim ('Claim Investigation costs'), up to the Policy Limit.
- 4.6.15 The current Policy Schedule defines the 'Professional Services' as:
- Legal and/or related services provided at or in connection with a Community Legal Centre, whether to a client or clients or in the public interest generally, including but not limited to:
- Legal and related information, referral, assistance, advice, casework, advocacy, representation, and court support; outreach services; domestic violence advocacy; immigration assistance by registered migration agents; tenancy advice and assistance; mediation and dispute resolution; community legal education; community education; law and policy reform; legal system and public interest advocacy; social work assistance; Financial counselling; media releases and interviews including social media; providing or publishing legal and related publications and materials including self-help kits.
- The definition of Professional Services can be amended by agreement.
- 4.6.16 It is important that if any centre is unsure as to whether it is covered for any work it is undertaking or which is additional to or different from the types of services listed in the definition of 'Professional Services' or otherwise disclosed in their Proposal form, they contact the broker to discuss whether they are covered for that activity in advance of undertaking that work. When contacting the broker, please also always inform the PII representative of the enquiry and the response as soon as possible.

Amount of cover

- 4.6.17 The amount of cover, that is, the total sum insured for each centre, is set out in the Policy Schedule and is, subject to any centre's individual variation, set at \$5 million for any one claim, and an annual aggregate of \$10 million for each centre.²³
- 4.6.18 Endorsement 1.2 of the Policy Schedule lists the centres that have paid a higher premium and taken out a higher level of insurance of \$10 million per claim under this Policy, with an aggregate of \$20 million. There are currently seven centres that take out the higher cover. In all other respects the Policy is the same for these centres.

Period of cover

- 4.6.19 The period of cover is set out in the Policy Schedule under 'Period of Insurance', and currently runs to 4pm on 30 June each year.
- 4.6.20 The Policy is renewed annually and coverage is for the financial year.

Annual PII Proposal (renewal)

- 4.6.21 It is very important that all annual Proposal forms are received promptly by NACLIC, and that all relevant information, especially new or altered information, is communicated to NACLIC to pass onto the broker and insurer, including during the period between when the Proposal form is submitted and 30 June each year. Centres must cooperate fully in the annual renewal process. Full disclosure must be made in response to each question on the Proposal form; otherwise the requirements of the *Insurance Contracts Act 1984* (Cth) with respect to the duty of disclosure may affect the cover. (The duty of disclosure under this Act is summarised in the Proposal form.)
- 4.6.22 Centres should ensure that their annual Proposal form contains information on all the Services that their centre provides including at any branch offices and any specialist hosted services, programs or projects under their auspices (see **7.10**). The expanded definition of Professional Services should cover most activities and services carried out by centres. However, if any of a centre's activities or service types might not fit within that definition, the centre should describe them in the space provided on the Proposal form. Centres should do this every year, even if such Services/activities have been disclosed in Proposal forms submitted in previous years.
- 4.6.23 Where an unincorporated centre is part of another organisation that is the legal entity, those details must be noted on the Proposal form in the relevant spaces provided. The Proposal form must be signed by an authorised officer of the umbrella organisation as well as by the centre's principal solicitor.

What isn't covered?

- 4.6.24 The Policy has specified limits, exclusions and exceptions. See:
- Policy Wording page 7: Limits & GST
 - Policy Wording pages 5-7: What Is Not Covered
- 4.6.25 There are several types of claims specified in the 'What is not Covered' section as being **not** covered (some of which are amended by endorsements in the Policy Schedule). They are:
- known Claims and Claims arising from Known Facts which may give rise to a Claim or loss: (page 5) (see **4.7** below)

²³ PII Policy Schedule, 'Limit of Liability' and Endorsement 1.1.

- foreign jurisdictions: (page 5)
- assumed duty or obligation: (page 5) (for example, if a centre gave a contractual indemnity, or a release to a person/entity from liability to the centre)
- [note that the Related Parties exclusion in (page 5&6) has been removed by Endorsement 2.1 in the Policy Schedule: see **4.6.29-30** below]
- refund of professional fees and trading debts: (page 6)
- profit: (page 6)
- insolvency: (page 6)
- goods and workmanship: (page 6) as amended by Endorsement 2.2 in the Policy Schedule
- employers' liability, directors' and officers' liability, occupiers' liability, motor, marine etc: (page 6) as amended by Endorsement 2.3 in the Policy Schedule
- punitive and exemplary damages: (page 6)
- intentional damage: (page 6)
- deregistration: (page 6)
- asbestos: (page 7)
- radioactivity and nuclear hazards: (page 7)
- war and uprisings: (page 7)
- Terrorism (as defined in the Policy): (page 7)
- pollution: (page 7).

4.6.26 In addition, the Policy Schedule, in Endorsement 2.4, specifically excludes cover for any claim:

Mortgage Funds

Directly or indirectly related to, based upon, attributable to or in consequence of any mortgage fund, investment scheme or any like form of contributory investment scheme promoted, managed, endorsed or otherwise countenanced by the Insured.

Native Title Claims

Directly or indirectly related to, based upon, attributable to or in consequence of any native title claims.

4.6.27 Most importantly, limits, exclusions and exceptions to the Policy may change from year to year and it is essential that centre staff and management ensure that they are familiar with the current Policy Wording and Schedule.

4.6.28 In 2014-15, NACLC negotiated with the insurer to remove the 'Related Parties' exclusion that previously existed in the Policy. Endorsement 2.1 of the Policy Schedule effects that removal. This removal effectively clarifies that cover is provided in respect of claims that are brought against one insured by another insured under the Policy, arising out of Professional Services provided by the first insured to the second. Endorsement 4.1 confirms this cover by way of a new sub-section (c), which also further clarifies that, in such circumstances, 'the Insured bringing such Claim is deemed to be a third party for the purposes of the Policy'.

4.6.29 Accordingly, where a claim arises in circumstances where Legal Advice or other Services were provided to other insured centre/s or to employees/volunteers of the first centre, it will still fall within the professional indemnity cover provided by the Policy, subject to the terms and conditions of the Policy.

4.6.30 It is important to note that this Guide applies to centres for the provision of all professional services, irrespective of the identity of the client. Accordingly, the same protocols that are followed for providing professional services to external clients must also be followed when providing Legal Advice or other Services to employees/volunteers of that centre or to other centres insured under this Scheme or their employees/volunteers. Failure to follow those same protocols may impact on the cover afforded by the insurer in the event of a claim.

4.7 Notifications and claims

Duty to notify²⁴

This is a Mandatory Standard.

Notification of claims or losses

4.7.1 Under the National PII Policy, a centre must notify the insurer in writing as **soon as possible**, and while the Policy is in force, about a claim or loss. This is a fundamental contractual obligation: Policy pages 2 (Insuring Clause) & 8 (We must be told about Claims) (amended by Endorsement 3.1 of the Policy Schedule).

Endorsement 3.1 of the Policy Schedule, which replaces the Clause on page 8, says:

You must tell Us in writing about a Claim as soon as possible during the Period of Insurance. However, this insurance will not be prejudiced by any inadvertent delay, error or omission in notifying Us of any Claims under the Policy provided that such notification is received by Us within 28 days of the expiry date [of the Policy].

4.7.2 'Claim' is defined on page 13 of the Policy as:

Claim

The receipt by You of:

- (a) any originating process (in a legal proceeding or arbitration), cross claim or counter claim or third party or similar notice claiming compensation against You; or
- (b) any written or verbal demand from a third party claiming compensation against You.

4.7.3 The requirement to notify 'during the Period of Insurance' means that the notification of a claim or loss must be made no later than 30 June each year at which time the current insurance policy expires and before the new financial year's policy comes into effect (although note that this has been extended to 28 days late in Endorsement 3.1). However it is the phrase 'as soon as possible' that is paramount and the phrase is interpreted strictly by insurers.

Notification of potential claims: facts or circumstances that might give rise to a claim

4.7.4 To be covered by the Policy the centre must also notify the broker/insurer in writing of any **fact/s or circumstance/s that might give rise to a claim**, and must

²⁴ For a detailed discussion of obligations to notify under PII policies, see the High Court decision *FAI General Insurance Company Limited v Australian Hospital Care Proprietary Limited* [2001] HCA 38.

do so **as soon as is reasonably practicable after becoming aware** of those facts and circumstances. This is for the following reasons:

(a) Section 40(3) of the *Insurance Contracts Act 1984* (Cth) (ICA) provides that: 'Where the insured gave notice in writing to the insurer of facts that might give rise to a claim against the insured as soon as was reasonably practicable after the insured became aware of those facts but before the insurance cover provided by the contract expired', then the insurer will still be liable under that policy for a claim, even if the claim is made after that policy expired. Importantly, where there is any delay in the notification to the insurer of the facts and circumstances, the insurer's liability to indemnify the insured against the claim is reduced to the extent that it has been prejudiced by the late notification.²⁵

(b) PII policies generally exclude cover for claims that arise from 'Known Circumstances'. The Policy defines a 'Known Circumstance' as:

Any fact, situation or circumstance which:

- (a) an Insured was aware of at any time before the Period of Insurance or before this Policy was amended/endorsed; or
- (b) a reasonable person in the Insured's professional position would have thought, at any time before the Period of Insurance or before this Policy was amended/endorsed,

might result in someone making an allegation against an Insured in respect of a liability, loss or costs, that might be Covered by this Policy or the amendment/endorsement to this Policy.

4.7.5 The combined effect of these matters can be seen in the following example:

A centre becomes aware of the circumstances of a potential claim (for example, having given incorrect Legal Advice) but does not notify them to the broker/insurer before the policy expires (or within 28 days of expiry). A claim arises from those circumstances in the following year at a time when the centre has a different PII insurer. Subject to any provisions to the contrary, the claim will not be covered under either the previous, or current, policy. Under the previous policy the claim will have been made after expiry of the policy. As the circumstances were not notified while the policy was still on foot, the claim does not attract the protection of s 40 ICA. Under the new policy, the claim will have arisen from 'Known circumstances', which are generally excluded by PII policies.

4.7.6 Having said this, the Policy with Pacific Indemnity (and all National PII Scheme policies with CGU since 2002) contains a 'Continuous cover' clause (page 3) which is an important exception to the exclusion of cover for claims arising from 'Known Circumstances'. In broad terms, if a centre has been insured with Pacific Indemnity/CGU and renews the cover with Pacific Indemnity, claims arising from Known Circumstances will be covered as long as Pacific Indemnity/CGU was the PII insurer for the centre when the potential claim was first known and remained the insurer for the centre continuously up to and including the time when the claim arising from those Known Circumstances was made against the centre. If there is any gap in the cover, or the centre changes insurer, the continuous cover benefits cease. Note that there are conditions to the cover and these are set out on page 3 of the Policy Wording.

²⁵ Refer to section 54 of the *Insurance Contracts Act 1984* (Cth) and relevant case law.

PROFESSIONAL INDEMNITY INSURANCE
AND THE NATIONAL PII POLICY

- 4.7.7 Note too that where is a delay in notification to Pacific Indemnity, the amount of cover under this Continuous cover provision can be reduced by the amount of any prejudice suffered by Pacific Indemnity/CGU in consequence of the delay.
- So, when should you notify?*
- 4.7.8 To be covered by the Policy, centres should give notice in writing to the broker/insurer of *any claim and/or of any facts or circumstances that might give rise to a claim* against the centre (or anyone else insured by the Policy) as soon as reasonably practicable after receiving a claim or becoming aware of those facts or circumstances that may give rise to a claim and before the expiry of the Period of Insurance. If this is done, the PII Policy will, subject to its terms and conditions, provide cover even if that claim is made after the expiry of the Period of Insurance. The Continuous cover clause means that a centre may still be covered for a claim even if notification of a fact or circumstance that gave rise to the claim was not made before the end of the insurance period (provided Pacific Indemnity is still the insurer when the claim is made and there has been continuous cover with Pacific Indemnity). So if a centre inadvertently misses this date, they may still be able to notify or claim and should talk to their PII representative without delay.
- 4.7.9 Delayed notification can at the very least prejudice the extent of cover available, and may mean cover is denied. If in doubt, notify. It is better and safer to notify than not.
- 4.7.10 The notification form appears at **Appendix C**. If a centre believes it has a potential claim, *before making any notification to the broker/insurer* the centre should get all details of what has happened and the Responsible Person must discuss the matter with their state or territory PII representative without delay. The PII representative can assist the centre to complete the form and will maintain a confidential file on the matter. If the representative cannot be contacted and the matter is urgent, the Responsible Person of the centre should discuss it with a PII representative from another state or territory. If the matter is so urgent that this is not possible, the PII representative should be informed at the same time or as soon as possible after notifying the broker/insurer.
- 4.7.11 Discussion with the PII representative can be very helpful when deciding whether to notify. PII representatives have a wealth of experience about centre matters and other situations that may have given rise to a claim or possible claim or grounds for notification. Ultimately, however, the decision whether or not to notify rests with the centre.
- 4.7.12 The broker too has useful experience of what the insurer may think about particular matters and it can be helpful to get their perspective. Wherever possible a centre should contact their PII representative first, however a centre may contact the broker directly first if necessary. Where this has been done, the centre should inform the PII representative by email or phone of the question asked and the response given. Any information or comment provided by the broker (or the insurer) should be fully recorded in a contemporaneous file note.
- 4.7.13 Whenever possible, a notification should be made to the broker, who will forward the notification to the insurer. However a notification can be sent directly to the insurer, for example because of urgency, in which case a copy should be sent to the broker and the PII representative.
- 4.7.14 The Responsible Person should consider reviewing the legal practice and its related Services prior to submitting the insurance Proposal form each year. It is critical that the information on the Proposal form is accurate at the time it is signed and submitted **and** that any other relevant information is notified to the

insurer/broker before the end of that year's cover and the beginning of the new policy. This is particularly critical for a claim or circumstance that may have come to the centre's attention between submission of the Proposal form and 30 June. As noted above, notification of such a claim or circumstance must be made as soon as possible. Further, if the insurer is not notified of any claim or circumstances by 30 June, it may refuse to pay the claim entirely, subject to the application of the Continuous cover clause.

4.7.15 A copy of any notification must be given to the PII representative. The notification will generally be treated as confidential to the PII representative and the identity of the centre will not be disclosed except on a need-to-know basis within the administration of the Scheme: see **3.5.17-18**. The PII representative must also be advised of the outcome of any notification/claim that is made.

4.7.16 Once a notification is received by the insurer, page 8 of the Policy refers to the actions the insurer can take to protect their position:

We can protect our position

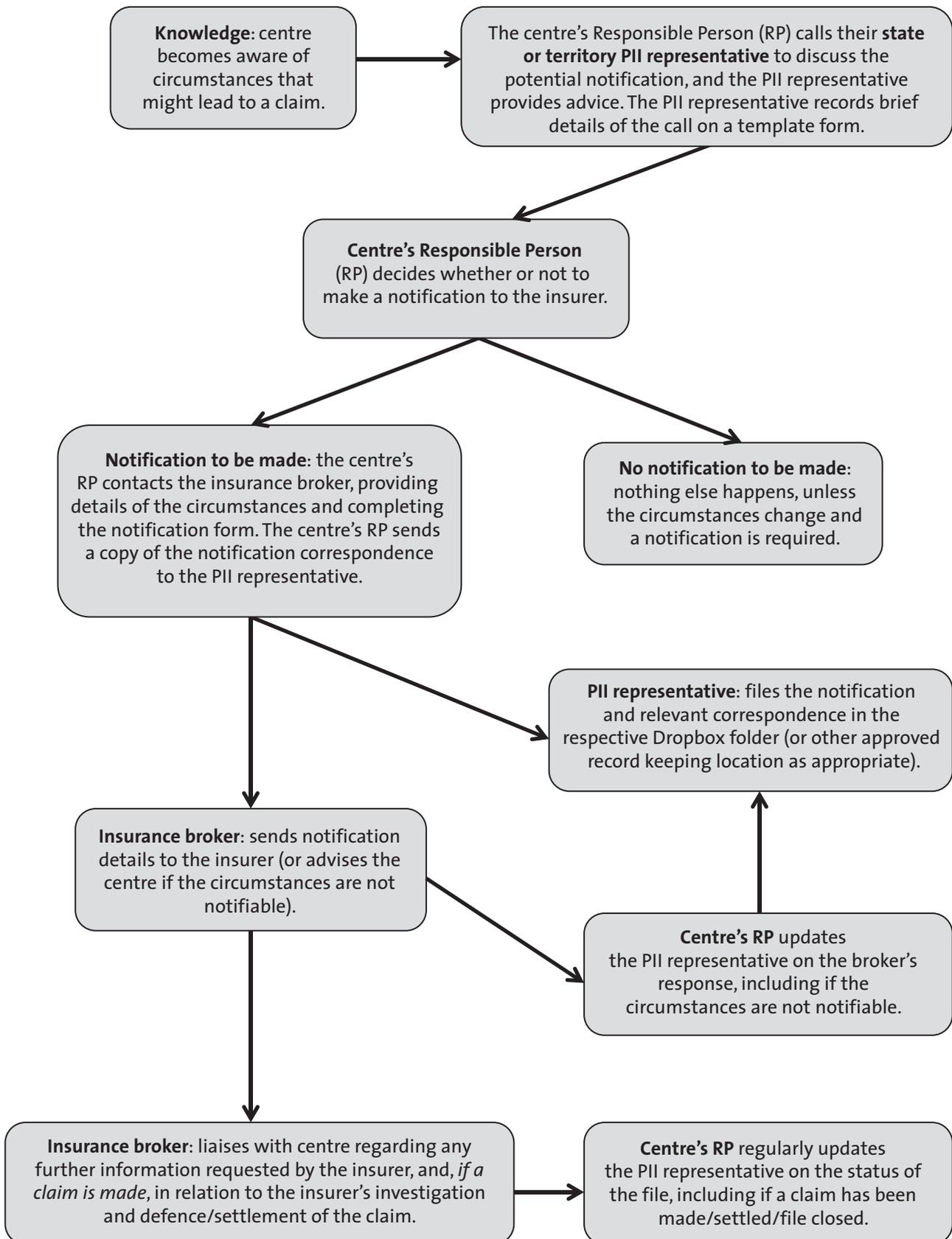
When We receive a notification of a Claim or Covered Claim, then We can take whatever action We consider appropriate to protect Our position.

This does not, however:

- (a) indicate that any Insured is entitled to be Covered under this Policy; or
- (b) jeopardise Our rights under this Policy or at law.

4.7.17 The following flowchart illustrates the notifications process for the National PII Scheme.

Notifications Process



Duty not to admit liability

This is a Mandatory Standard.

4.7.18 The insured centre must not make any admissions of liability. Refer page 8 of the Policy:

You must not admit liability for or settle any claim (or covered claim)

You must not:

- (a) admit liability for, or settle any Claim (or Covered Claim); or
- (b) incur any costs or expenses for a Claim (or Covered Claim) without first obtaining Our consent in writing. If Our prior consent is not obtained, Your right to Cover under this Policy may be affected.

4.7.19 Of course this does not prevent a centre taking any remedial or mitigating action in relation to a potential claim itself but any such action should only be done after consultation with the PII representative and the broker/insurer. The centre may be under an obligation to correct or clarify advice and/or to refer the client for independent legal advice. Given the difficulties of doing this without admitting liability, the centre should first talk to their PII representative and the broker/insurer. Once a centre is aware of a claim or circumstance that could give rise to a claim, they should be extremely cautious about any communications with the client including communications rectifying errors (see **7.2.9-10**). An admission of liability can occur or be inferred from other behaviour, for example, by an apology. If the insurer forms that view that this has occurred, it may affect cover. On the other hand, if something such as this has occurred, it too must be notified to the insurer as soon as possible.

4.7.20 Note Page 11 'Loss Prevention', whereby You are required as a condition of cover, to:

take all reasonable steps to prevent any act, error, omission or circumstance which may cause or contribute to any Claim or Covered Claim which may be Covered under this Policy.

Working with the insurer

4.7.21 There are a number of Policy clauses that go to the need to work with the insurer and their agents on any matter notified. The Claims Co-operation provision on page 8 of the Policy requires the insured centre to cooperate 'diligently' and by doing and allowing to be done 'everything reasonably practicable' to avoid or lessen liability or loss, including by immediately giving 'all the help and information' that the insurer reasonably requires to investigate and defend a claim or loss, and work out its liability.

Reserve

4.7.22 Once a notification is made to the insurer, it will set a reserve. The reserve is the amount of funds or assets necessary for an organisation to have at any given time to enable it, with interest and premiums paid to meet all claims on the insurance then in force. The minimum reserve applied to any claim is usually \$15,000. As the time limit for bringing a claim passes or the insurer finds the risk has passed, the relevant part of the reserve will lapse. The reserve reflects the insurer's assessment of its potential exposure in respect of each and every claim.

Subrogation

4.7.23 Subrogation is defined as:

The substitution of one person for another in respect of a lawful claim, demand, or right, so that the person substituted succeeds to or acquires the rights, remedies, or securities of the other in relation to the claim. The person who is subrogated to another stands in that person's shoes...

Insurance. 1. A doctrine by which an insurer is entitled to have the rights of the insured substituted to him or her so as to be entitled to the rights and remedies the insured possesses against third parties in relation to a claim...²⁶

This is reflected by the provision on page 8 of the Policy:

We can manage the claim (or covered claim) on Your behalf

We can:

- (a) take over and defend or settle any Claim (or Covered Claim) in the Your name; and
- (b) claim in Your name, any right You may have for contribution or indemnity.

4.7.24 As a matter of law, subrogation means that if a centre seeks to rely on the insurance Policy (and limit its liability) by notifying, then the centre's rights become the insurer's rights.

4.7.25 As a matter of practice, it means that from the moment the insurer is notified, every decision in relation to how the matter is handled, is the insurer's. This includes, among many other things, which lawyers are to be instructed.

4.7.26 The above referred to sections effectively mean that, for full cover, it is the insurer's decision whether a claim will be defended or settled, and on what terms. The insured centre does have a right, under section titled "Your right to contest" (page 8), not to consent to a settlement that the insurer recommends, and to contest or continue the legal proceedings, but if this is done, the cover provided will be limited to:

- (a) the amount the insurer would have settled for;
- (b) LESS the Excess; and
- (c) LESS the Claim Investigation costs calculated to the date the centre chose not to consent to settlement.

The Senior Counsel section on page 8 of the policy wording provides that neither the insurer nor the insured centre can require the other to contest a matter unless an agreed senior counsel has advised that the claim proceeding should be contested.

Claim Investigation Costs

4.7.27 'Claim Investigation Costs' are defined on page 13 of the Policy Wording to be the legal costs and expenses of investigating, defending or settling any Claim (or anything that might result in a Claim. The Insuring Clauses of the Policy explains what claim investigation costs will be paid by the insurer, and on what conditions.

²⁶ LexisNexis, *Encyclopaedic Australian Legal Dictionary* (as at 31 January 2017) 'Subrogation'.

- 4.7.28 The Excess on the National PII Policy is 'inclusive of costs and expenses'.²⁷ This means that the centre will also be required to contribute up to the amount of the Excess towards Claim Investigation costs [see "the Excess" provisions on page 9 of the Policy]. The total Excess required to be paid by the centre in respect of claim payments and Claim Investigation costs should not exceed \$10,000 for any one claim.
- 4.7.29 Centres may apply to the PII Excess Fund to assist in paying for the Excess payable to the insurer, regardless of whether that Excess is in relation to a claim payment, Claim Investigation costs, or both. Payment is within the discretion of NACLCL who will take advice from the National PII Network. See **4.4.13-19** for more details on the PII Excess Fund including the procedure to be followed.
- 4.7.30 Additionally, the centre should keep in close contact with the PII representative throughout the legal investigation phase and seek their advice if they are unsure about any request made by the insurer or its lawyers. The centre needs to understand that the lawyers are acting for the insurer and not for the centre.

Finalisation of claims

- 4.7.31 When a claim has been finalised it is effectively taken off the books and the reserve for that circumstance or claim disappears from the reserve total. That is, the insurer no longer holds that amount of money 'in reserve' against that claim.
- 4.7.32 Some claims are finalised when the likelihood of a law claim disappears, for example, where the potential plaintiff is out of time to sue the centre. Others end when the circumstances that led to notification are resolved. It is therefore important that any centres with notifications with a reserve set against them keep the PII representative up to date with the circumstances and progress of the claim. Once a matter is finalised, the centre and PII representative, and if needed the PII Network, might need to make representations to the insurer about removal of reserves against the Policy, as these can affect the premium set the following year.

4.8 Complaints about insurance

Any complaint about dealings with the insurer should be directed through the Responsible Person in the centre to the PII representative and then on to the state or territory PII committee and/or National PII Network. As NACLCL is the contracting party, it is imperative that NACLCL is informed of any issue with the Policy, its interpretation or application.

4.9 Relationship with legal profession regulatory bodies

- 4.9.1 The relationship between insurers and legal profession regulatory bodies (for example, law societies) differs from state to state. One common element is that each year the regulatory body needs to be satisfied that lawyers to be issued practising certificates have PII for the forthcoming year **and** that the insurance is adequate.
- 4.9.2 In the event that the centre receives a query from a regulatory body about insurance arrangements, the PII representative should be contacted to assist with formulating a response.

²⁷ See PII Policy Schedule, 'Excess'.

4.10 Double insurance

4.10.1 If a centre has more than one insurance policy providing professional indemnity cover it should consider whether there is double (or dual) insurance. If so, the centre should consider the relevant provisions of the two policies, as it is possible that one or more of the insurers may seek to avoid liability in the event of double insurance resulting in a dispute between insurers and/or the insured. This can occur whether or not an insured intended to have more than one insurer cover a particular area.

4.10.2 Many insurance policies purport to limit or exclude cover in instances where 'other' policies may or do provide cover.

Note that the National PII Policy (page 11) requires immediate notification:

Other insurance which may cover the risk

You must immediately advise Us in writing of any insurance already affected or which may subsequently be affected covering, in total or in part and whether absolutely or contingently, the risk, or any part of it, Covered by this Policy.

Note also the 'Continuous Cover' provision on page 3 of the Policy, which provides the following in relation to continuous cover of prior Known Circumstances:

... If the Insured was entitled to have given notice of the Known Circumstance under any other policy of insurance (with any other insurer), then this Continuous Cover extension does not apply to provide Cover under this Policy ...

4.10.3 Where a policy has a provision that purports to limit or exclude liability because of 'other insurance', s 45 of the *Insurance Contracts Act 1984* (Cth) is relevant and provides:

45 'Other insurance' provisions

(1) Where a provision included in a contract of general insurance has the effect of limiting or excluding the liability of the insurer under the contract by reason that the insured has entered into some other contract of insurance, not being a contract required to be effected by or under a law, including a law of a State or Territory, the provision is void.

(2) Subsection (1) does not apply in relation to a contract that provides insurance cover in respect of some or all of so much of a loss as is not covered by a contract of insurance that is specified in the first-mentioned contract.

4.10.4 This area of law is complex and in the event that the centre has more than one insurance policy and may be 'double insured' it should seek the advice of specialist lawyers.

CHAPTER 5

Legal Profession Regulation

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5.1 Introduction

The laws regulating the legal profession affect the risk management of a centre's legal practice in many ways. Compliance with these laws is of course a mandatory requirement for centres.

5.2 Mandatory risk management

Legal profession regulation laws are an essential part of the risk management environment because they:

- incorporate the general requirements for engaging in legal practice
- regulate the conduct and parameters of legal practice
- provide complaints mechanisms and disciplinary procedures
- provide for external review and intervention
- establish regulatory bodies such as legal services commissions.

5.3 Relationship to insurance

The laws regulating the legal profession set out requirements in relation to professional indemnity insurance for those who engage in legal practice: see 4.9.

5.4 State and territory regulatory schemes

5.4.1 Each state and territory has laws for the regulation of the legal profession²⁹. The Council of Australian Governments (COAG) decided to establish uniformity and simplification in the regulation of the legal profession, by way of harmonised legislation. The Legal Profession Uniform Law Scheme is overseen by the Legal Services Council (LSC) and Commissioner for Uniform Legal Services Regulation³⁰. At the time of going to print, Victoria and NSW are the only two jurisdictions participating in the scheme, and their own legislation adopts the Uniform Law: see 1.7. Queensland and the Northern Territory had previously agreed to participate in a national scheme and to the terms of draft legislation, however are yet to agree to adopt the final Uniform Law. Lawyers should keep themselves apprised of developments in regard to any potential adoption of the Uniform Law and Rules in their jurisdictions, or changes to their own jurisdiction's law.

5.4.2 Legal profession laws create a range of issues that need to be discussed in the Guide.

5.5 Mandatory Standards

Practising certificates

5.5.1 To practise as a lawyer a person must be admitted to practise and have a current practising certificate. Lawyers should be familiar with the legal practice legislation of the relevant state or territory (or relevant state and territories if they practise across borders), and ensure that all requirements are met. They must ensure that they are on the relevant rolls of court.

5.5.2 The issue of practising certificates is regulated under the various legal profession laws that differ in their requirements including as to types of certificates and/or

²⁹ ACT: *Legal Profession Act 2006*; NSW: *Legal Profession Uniform Law (NSW)*; NT: *Legal Profession Act*; Qld: *Legal Profession Act 2007*; SA: *Legal Practitioners Act 1981*; Tas: *Legal Profession Act 2007*; Vic: *Legal Profession Uniform Law*; WA: *Legal Profession Act 2008*.

³⁰ More information is available on the Legal Services Council's website, at <<http://www.legalservicescouncil.org.au/>>.

rights to practise and in the conditions that can and will be imposed in various circumstances.³¹ Generally the levels or types of certificates include principal and employee certificates. The *principal certificate* is issued to the principal solicitor/s. A lawyer will be eligible for an *unrestricted practising certificate* once they have undergone the required supervision time and, where relevant, complied with other legal practice management education requirements. In most jurisdictions there is a level of practising certificate denoted as *restricted*. A restricted practitioner is subject to a number of restrictions including reasonable supervision (see below) and ensuring that any competency or skills based requirements are met.

5.5.3 Conditions in practising certificates usually relate to issues such as:

- whether the certificate is restricted or unrestricted
- type of employer organisation
- level of supervision required
- whether the practice is limited to a particular activity
- compliance with mandatory continuing legal education requirements.

Supervision

5.5.4 Legal profession laws generally allow for ‘supervised’ and ‘unsupervised’ practice. Where a lawyer is subject to a condition of supervised practice they must have reasonable supervision.³² For example, in Queensland ‘supervised legal practice’ is defined in the following way:³³

supervised legal practice means legal practice by a person who is an Australian legal practitioner--

(a) as an employee of a law practice if--

- (i) at least 1 partner, legal practitioner director or other employee of the law practice is an Australian legal practitioner who holds an unrestricted practising certificate; and
- (ii) the person engages in legal practice under the supervision of an Australian legal practitioner mentioned in subparagraph (i); or

(b) as a partner in a law firm if--

- (i) at least 1 other partner is an Australian legal practitioner who holds an unrestricted practising certificate; and
- (ii) the person engages in legal practice under the supervision of an Australian legal practitioner mentioned in subparagraph (i); or

(c) in a capacity approved under administration rules.

5.5.5 The provision of adequate and appropriate supervision is not only a matter of complying with relevant professional regulation requirements. It is also a risk management issue because proper supervision ensures quality work and

³¹ ACT: *Legal Profession Act 2006* s 35; NSW & Vic: *Legal Profession Uniform Law* ss 43-44, 47; NT: *Legal Profession Act* s 46; Qld: *Legal Profession Act 2007* s 45; SA: *Legal Practitioners Act 1981* s 16; Tas: *Legal Profession Act 2007* ss 41-42; WA: *Legal Profession Act 2008* s 37.

³² ACT: *Legal Profession Regulation 2007* reg 13; NSW & Vic: *Legal Profession Uniform General Rules 2015* r 14; NT: *Legal Profession Regulations* reg 12; Qld: *Legal Profession Regulation 2007* reg 8; Tas: *Legal Profession Regulations 2008* reg 8; WA: *Legal Profession Regulations 2009* reg 7. Note: there appears to be no South Australian equivalent.

³³ Qld: *Legal Profession Act 2007* sch 2 (definition of ‘supervised legal practice’).

competency in legal practice and other service delivery. It can also be relevant to the wellbeing and job satisfaction of staff, and to retention of staff – these can themselves be areas of potential risk to a centre and another reason for ensuring reasonable supervision.

5.5.6 What is reasonable supervision depends on a number of factors including:

- the qualifications, experience and competence of the supervisee
- the range and type of work being undertaken by the supervisee
- the size and nature of the practice/service
- the types of supervision and support arrangements the principal puts in place.

Costs agreements and recovery of costs

5.5.7 Legal profession laws generally regulate the area of costs and costs agreements³⁴ and in some state or territory jurisdictions, specific costs legislation exists. There is of course a wealth of common law on costs as well. Centres need to ensure that they enter arrangements that comply with all relevant law.

5.5.8 Recovery of legal costs is an area that regularly gives rise to complicated questions for centres. There appears to be nothing preventing a centre claiming legal costs as long as the centre has:

- a principal certificate that allows for costs recovery under the law
- a lawful basis for seeking costs under any relevant legal profession or other applicable law.

5.5.9 Some funding agreements and grants of legal aid require centres to claim costs where possible. If a centre is acting for a client on the record in a costs jurisdiction it needs to ensure that it complies with any such contractual obligations and protects the right the client may have to recover costs with whatever action is permitted and required in that jurisdiction.

5.5.10 The centre should be aware of any funding or service agreement obligations in respect of claiming, reporting and expenditure of legal costs.

Trust money and controlled money

5.5.11 Some centres have trust accounts, some don't. Centres that accept money from or on behalf of clients – as controlled monies or on trust – must ensure that there are adequate and legally compliant procedures for dealing with and accounting for those monies. Centres must refer to any relevant law including their legal professional rules or regulations for details of the requirements. For those that do operate trust accounts, legal profession laws provide for the regulation of trust money and controlled money³⁵. In each case trust or controlled money must be dealt with in accordance with the relevant laws in each jurisdiction.

³⁴ See for example ACT: *Legal Profession Act 2006* ss 279, 282; NSW & Vic: *Legal Profession Uniform Law* ss 172, 179-180; NT: *Legal Profession Act* ss 314, 317; Qld: *Legal Profession Act 2007* ss 319, 322; SA: *Legal Practitioners Act 1981* s 41 and sch 3; Tas: *Legal Profession Act 2007* ss 303, 306; WA: *Legal Profession Act 2008* ss 271, 282.

³⁵ ACT: *Legal Profession Act 2006* ss 221-233; NSW & Vic: *Legal Profession Uniform Law* ss 127-154; NT: *Legal Profession Act* ss 245-261; Qld: *Legal Profession Act 2007* ss 247-262; SA: *Legal Practitioners Act 1981* s 25 and sch 2; Tas: *Legal Profession Act 2007* ss 230-259; WA: *Legal Profession Act 2008* ss 204-229.

Transit money

- 5.5.12 Centres that receive client money as money in transit must ensure they comply with the legislative requirements dealing with such transit money³⁶. For example, in New South Wales and Victoria the *Legal Profession Uniform Law* provides:

140 Transit money

(1) A law practice that has received transit money must pay or deliver the money as required by the instructions relating to the money within the period (if any) specified in the instructions, or else as soon as practicable after it is received.

Civil penalty: 50 penalty units.

(2) A law practice must, in respect of money received by the law practice, record and keep brief particulars sufficient to identify the relevant transaction and any purpose for which the money was received.

Civil penalty: 50 penalty units.

(3) A law practice must keep the particulars mentioned in subsection (2) for 7 years.

Civil penalty: 50 penalty units.

- 5.5.13 Even if not exactly the same as the legislative provision above, the legal profession regulations in other jurisdictions require law practices that receive transit money to 'record and keep brief particulars sufficient to identify the relevant transaction and any purpose for which the money was received'. Accordingly it is recommended that centres receiving transit money have a Transit Money Register recording details of the name, date, receipt and payment/endorsement/delivery and purpose of each transaction.

- 5.5.14 It is essential to understand the difference between transit money and arrangements and trust money and trust account arrangements.

Registered Migration Agents

- 5.5.15 A person, whether a lawyer or not, must register as a migration agent before providing immigration assistance³⁷ or representations. These terms are defined in the *Migration Act 1958* (Cth). There are a number of legislative requirements for Registered Migration Agents³⁸. In some cases lawyers provide immigration legal assistance³⁹, a term also defined in the Migration Act. Where immigration Advice, assistance, legal assistance or representations are part of the centre's work, the Responsible Person must ensure that the formal requirements of this legislation and associated regulations are met. See also **6.5.1**.

³⁶ ACT: *Legal Profession Act 2006* s 225; NSW & Vic: *Legal Profession Uniform Law* s 140; NT: *Legal Profession Act* s 249; Qld: *Legal Profession Act 2007* s 253; SA: *Legal Practitioners Act 1981* sch 2(17); Tas: *Legal Profession Act 2007* s 247; WA: *Legal Profession Act 2008* s 220.

³⁷ 'Immigration Assistance' is defined at section 276 of the *Migration Act 1958* (Cth). It defines what is and isn't immigration assistance that requires registration.

³⁸ *Migration Act 1958* (Cth) (particularly part 3 of the Act), *Migration Agents Regulations 1998* (Cth), *Migration Agents Registration Application Charge Act 1997* (Cth), *Migration Agents Registration Application Charge Regulations 1998* (Cth).

³⁹ *Migration Act 1958* (Cth) s 277.

CHAPTER 6

Professional Obligations Including Confidentiality and Avoiding Conflicts of Interest

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6.1 Introduction

Centre staff and volunteers may be subject to a number of ethical and legal conduct standards, deriving from a range of sources including legislation, common law and/or the worker's membership of a profession or professional association. Other standards may be optional or voluntary. Centre managers must recognise these professional obligations and support staff and volunteers in complying with them. See also **3.5.38-40**.

6.2 Lawyers

6.2.1 The traditional duties of the lawyer are generally seen to include:

- duty to the court
- duty to the client
- duty to the other party or parties
- duty to the administration of justice.

6.2.2 The ethical duties of lawyers can be described as 'professional responsibilities and legal ethics'. They are often contained in legal profession rules,⁴⁰ however common law can still be relevant.

6.2.3 These duties have also been incorporated into the Australian Solicitors' Conduct Rules (ASCR), which, at the time of going to print, have been adopted in New South Wales and Victoria per the Legal Profession Uniform Law, and have also separately been adopted in Queensland and South Australia (although there may be some differences). The ASCR may also be adopted in other states and territories and all lawyers should make sure that they keep up to date with developments in their own jurisdictions. See **1.7**.

6.3 Financial counsellors

6.3.1 Financial counsellors are required to comply with professional association codes, a system of accreditation by state or territory associations (in most jurisdictions) and to meet the exemption (from licensing) requirements under the ASIC Class Order for the *Financial Services Reform Act 2001* (Cth) and the exemption requirements under the *National Consumer Credit Protection Act 2009* (Cth). Any person practising as a financial counsellor at a centre, whether as an employed worker or volunteer, must comply with all such measures and requirements that apply in their jurisdiction.

6.3.2 The Australian Securities and Investments Commission (ASIC) has granted conditional relief from licensing requirements under the Corporations Act to financial counselling agencies that may provide financial product advice as part of a financial counselling service.

6.4 Social workers

6.4.1 A centre worker who is a qualified social worker and is a member of the Australian Association of Social Workers (the AASW) is required to follow the codes set out by the AASW. Social workers who are not members of the AASW are not

⁴⁰ In the ACT: *Legal Profession (Solicitors) Conduct Rules 2015*; in NSW and Vic: *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*; in the Northern Territory: *Rules of Professional Conduct and Practice*; in Queensland: *Australian Solicitors Conduct Rules 2012*; in South Australia: *Australian Solicitors' Conduct Rules (SA version)*; in Tasmania: *The Rules of Practice 1994*; in Western Australia: *Legal Profession Conduct Rules 2010*.

subject to the AASW's authority. Members of the AASW retain professional indemnity insurance by virtue of their membership. For information about how this insurance works alongside the National PII Policy, see the section on Double insurance at **4.10**.

6.4.2 Codes of ethics apply to workers who are the subject of the particular code; they do not apply to organisations. It is important to note, however, that they are relevant to the whole organisation in terms of proper employee support, quality client service, risk minimisation, risk management, good governance and quality assurance. An organisation and/or its management that has made no attempt to ensure that a code was complied with, whether mandatory or not, may leave itself open to litigation and potential liability over a breach of the code.

6.4.3 For example, an organisation that employed social workers to offer counselling but disregarded the sound guidance provided by the AASW code of ethics, whether or not its social workers were **obliged** to comply with the code of ethics, would be ignoring good risk management practice. Such an organisation is more likely to find itself at risk of allegations of negligence, breach of contract and breach of other duties, and/or that it operates in an unprofessional and unethical manner.

6.4.4 Other similarly qualified workers must also comply with the relevant industry codes where they hold membership of professional associations. Note that the Australian Psychological Society sets out very detailed codes of ethics that deal with general and specific issues.

6.5 Codes of conduct

6.5.1 Like codes of ethics, codes of conduct are widespread and apply to many professions and community workers. Codes of conduct can be all-encompassing or specific and particular. The Migration Agents Registration Authority has a general code of conduct that applies to all Registered Migration Agents in Australia.⁴¹ That code of conduct covers a range of subjects including:

- standards of professional conduct
- obligations to clients
- relations between Registered Migration Agents
- fees and charges
- record keeping and management
- financial duties
- duties of Registered Migration Agents to employees
- complaints
- termination of services
- client awareness of the code.

6.5.2 The Australian Counselling Association has a code of conduct that covers:

- responsibility
- anti-discriminatory practice
- confidentiality

⁴¹ Australian Government, Department of Immigration and Border Protection, Code of Conduct for Registered Migration Agents, 1 July 2012.

- contracts
- boundaries
- competence.⁴²

6.5.3 Adherence to codes of conduct can be enforced where a centre worker is a member of an association that has the authority to enforce a particular code of conduct or where a centre worker works in an area that has a mandatory code of conduct. Adherence cannot be enforced where a centre worker is not a member of a profession or an association that has the authority to enforce the particular code of conduct.

6.6 Confidentiality

This is a Mandatory Standard.

6.6.1 Confidentiality implies '[a] relationship between two or more persons in which the information communicated between them is to be kept in confidence'.⁴³ A duty of confidentiality can arise from a number of sources including but not limited to:

- a contractual duty through a service agreement, employment contract or client agreement
- an ethical duty informed by a code of ethics or code of conduct
- a statutory duty governed by professional regulation or a particular legislative scheme
- a fiduciary duty arising from the solicitor/client relationship
- under equity's exclusive jurisdiction.

6.6.2 The duty of confidentiality applies to all clients of the centre, including any clients of a specialist, auspiced or hosted project, program or service of the centre (see 7.10) and it applies whether information is obtained by a lawyer or non-lawyer.

6.6.3 Where circumstances arise that cause a centre worker or volunteer to believe that they are under an overriding duty, such as a legal requirement that certain matters be notified, they should discuss it with the centre's Responsible Person.

Contractual duty

6.6.4 Centres have a contractual duty to keep their clients' records and information confidential, except where permitted or authorised by law, or because of overriding legal duties or where the client has given their informed consent to particular disclosure. This is aside from the professional duties owed by lawyers and social workers or counsellors.

Ethical duty

6.6.5 Ethical duties of confidentiality may arise from one of the ethical and conduct frameworks such as codes of conduct, codes of ethics, guidelines or by virtue of membership of a particular profession or professional association. A number of factors will determine:

- whether the confidentiality is enforceable or unenforceable
- against whom the confidentiality will be enforced

⁴² Australian Counselling Association, Code of Ethics and Practice, Version 8, July 2012.

⁴³ LexisNexis, *Encyclopaedic Australian Legal Dictionary* (as at 31 January 2017) 'Confidential relationship'.

- the scope and limits of the confidentiality
- the consequences for breach of confidentiality.

6.6.6 For lawyers, the duty of confidentiality means that lawyers may not disclose to a third party any client information that has come to them in their professional capacity and in the legitimate course of their professional employment, unless permitted or authorised by law or with the client's consent. As part of the legal and related practice, all staff and volunteers within the centre should regard themselves as bound by this duty. *The Responsible Person and centre management should ensure that all centre workers and volunteers are aware of this duty, and that it is made clear to them at the time of induction.*

Statutory duty

6.6.7 The duty of confidentiality is reflected in Legal Profession Rules.⁴⁴

Confidentiality and cloud computing

6.6.8 Cloud computing (for example, computing services operated over and accessed via the internet)⁴⁵ is becoming increasingly common. Many legal practices including centres already use cloud-based and other internet products, such as various email, social media and document storage platforms, and, now a number of centres will be using CLASS, a cloud-based data system to record and store their client and service data, and for reporting to government funders and other stakeholders.

6.6.9 Centres using cloud services should be aware of the potential risks that come with such use in relation to client confidentiality, client legal privilege, privacy, loss of data, security breaches, and outages (causing an inability to access data) – just as they should be for any data system they use.⁴⁶ Centres using or considering using cloud computing will need to consider the possible risks and ensure that appropriate security and risk minimisation and management mechanisms are in place.

6.6.10 Whether using the cloud, or retaining third party IT service providers to maintain and support their own local data systems, centres must take action to protect confidential information. As a generalisation, disclosure to an IT provider is permitted when the disclosure or possible disclosure is made for the purpose

⁴⁴ ACT: *Legal Profession (Solicitors) Conduct Rules 2015* r 9; NSW and Vic: *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* r 9; NT: *Rules of Professional Conduct and Practice* r 2; Qld: *Australian Solicitors Conduct Rules 2012* r 9; SA: *Australian Solicitors' Conduct Rules (SA version)* r 9; Tas: *Rules of Practice 1994* r 11(1); WA: *Legal Profession Conduct Rules 2010* r 9.

⁴⁵ The Australian Government has widely adopted the US Government's National Institute of Standards and Technology (NIST) definition, which states:

Cloud computing is an ICT [Information and communications technology] *sourcing and delivery* model for enabling convenient, on demand network access to a shared pool of configurable computing resources (e.g. networks, servers, storage, applications and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction.

See: Australian Government, The Department of Finance and Deregulation, *Cloud Computing Strategic Direction Paper: Opportunities and applicability for use by the Australian Government, Version 1.1* (released April 2013) at 9, available at: <http://www.finance.gov.au/files/2013/04/final-_cloud_computing_strategy_version_1.1.pdf> (accessed 31 January 2017). For a further discussion of what constitutes 'cloud computing', see also: Law Society of Western Australia, *Ethical Practice and Guidelines* (25 August 2015), at 53-55.

⁴⁶ On some potential risks for using cloud services in particular, see, eg: Australian Government, Attorney- General's Department, *Information Security Management Guidelines: Risk management of outsourced ICT arrangements (including Cloud) Version 1.1* (amended April 2015) at 11-12, available at: <<https://www.protectivesecurity.gov.au/informationsecurity/Documents/AustralianGovernmentInformationSecurityManagementGuidelines.pdf>> (accessed 31 January 2017).

of the centre providing legal services to the client and it is done subject to a confidentiality agreement between the provider and the centre. However, Responsible Persons should consult their own jurisdiction's rules and ensure compliance. Responsible Persons and centres should also consider the actions their centre should take to protect confidentiality in this context, including for example signing a confidentiality agreement with the provider and obtaining informed consent from clients.⁴⁷

6.6.11 As for any other information storing or document management system, centres should ensure that their cloud computing systems allow for tailored access to client information *within* the centre (for example, through individual allocated permissions, separate logins, passwords, confidentiality agreements, etc), so that only authorised employees and volunteers have access to confidential client information and on a need to know basis.

6.6.12 There are additional, serious considerations where a centre uses cloud computing or any other internet-based service or application and the infrastructure is located or permits the data to be 'sent' outside of Australia, for example it may be caught by the Patriots Act or be particularly vulnerable to attack in certain overseas jurisdictions.⁴⁸ Note, all data in CLASS will be stored in Australia.

6.7 Conflicts of interest

6.7.1 The conflict of interest procedures involve **Mandatory Standards** including that:

- centres must avoid conflicts of interest;
- centres must have a conflict of interest policy (see 6.7.6); and
- centres or services/programs/projects that provide Legal Advice and any other Discrete Assistance or Ongoing Assistance Service where there is a solicitor/client relationship or that are provided within the legal practice, must conduct a full conflict of interest check **before** giving that Legal Advice (whether the advice is given in person, on the telephone, or by other means) or providing the other Discrete Assistance Service (other than Information or Referral) or Ongoing Assistance Service. There are some very limited situations where a *full* conflict check is not required. These are set out at 6.7.58-69.

What is a conflict of interest?

6.7.2 A conflict of interest in relation to a legal practice involves a situation where a lawyer has or may have competing professional or personal interests. It is properly described as a conflict of duties as it refers to the duty of confidence and loyalty, a fiduciary duty. Competing interests can make it difficult for a lawyer to fulfil their duties impartially, and the lawyer has an obligation to avoid situations where this may occur (a potential conflict) or do occur (an actual conflict). A conflict of interest can exist even if no unethical or improper behaviour results from it. It can include:

⁴⁷ See, eg, Law Council of Australia, *Cyber Precedent: strengthening the legal profession's defence against online threats* <<http://lawcouncil.asn.au/lawcouncil/cyber-precedent-home>> (accessed 31 January 2017); and Law Society of Western Australia, *Ethical and Practice Guidelines* (25 August 2015) at 57. See also: non-binding Practice Notes from the Office of the Legal Services Commission (NSW) on cloud computing and outsourcing, available at: <http://www.olsc.nsw.gov.au/Pages/olsc_education/olsc_education_notes.aspx> (accessed 31 January 2017); and Justin Edwards, 'Cloud computing services: Professional obligations and ethics' (Apr 2016) 43(3) *Brief* 32, at 34.

⁴⁸ See, eg, Law Society of Western Australia, *Ethical and Practice Guidelines* (25 August 2015) at 56. See also: Australian Government, Attorney-General's Department, *Information Security Management Guidelines: Risk management of outsourced ICT arrangements (including Cloud) Version 1.1* (amended April 2015) at 11-12, available at: <<https://www.protectivesecurity.gov.au/informationsecurity/Documents/AustralianGovernmentInformationSecurityManagementGuidelines.pdf>> (accessed 31 January 2017).

- acting against a former client – a successive conflict
- acting for more than one party in a current dispute – a concurrent conflict.

One must guard against the issue arising in all manner of circumstances including a person presenting:

- whose 'Other Party' is an ex-client
- whose Other Party is a current client
- who was an Other Party to an ex-client
- who is an Other Party to a current client.

6.7.3 In each case the relevant past and current files must be carefully scrutinised to determine whether the centre will compromise any client's position by the person presenting becoming a client.

Lawyer-client duties

6.7.4 A lawyer owes duties to their client to:

- act honestly and fairly in the client's best interests
- maintain confidentiality of the client's confidential information
- avoid conflicts of interest.

6.7.5 A lawyer also owes a duty to the court to ensure the proper administration of justice. In rare cases, this duty might prevent a lawyer from acting for a client where to do so would undermine the requirement to ensure that 'justice is done and seen to be done'. This could include a situation where circumstances may reasonably give rise to a perception of a **potential** conflict of interest even where there is no **actual** conflict of interest. The reason for this is that the public's faith in the administration of justice is of primary importance.

Avoiding conflicts: centre policy and training

6.7.6 A centre must have a policy dealing with conflicts of interest and conflict checking for the protection of their clients, potential clients and the centre. See the discussion below and see **Appendix G** for a sample conflict of interest policy. The policy must cover any branch office and any specialist, auspiced or hosted project, program or service of the centre (see **7.10**). Even centres and services that only ever provide Information and Referral – Services of a general nature that the solicitor/client relationship does not arise - must have a conflict of interest policy to ensure that their workers are aware of these issues and the risk management parameters in which they need to operate.

6.7.7 All staff (employed and volunteer) and management must be trained to identify potential conflicts of interest, and be aware of their centre's conflict of interest policy and procedures. The subject must be covered during the orientation of new staff (employed and volunteer) and Management Committee members and must be reinforced regularly. See also **8.7.9-10**.

A centre cannot act for both parties to a dispute

6.7.8 The duty to act in a client's best interests prohibits a centre from acting for any other party with interests adverse to those of a current client. In simple terms, this means that a centre cannot act for opposing parties in a matter like an intervention order application, debt or motor vehicle accident.

Can a centre ever act against a former client?

6.7.9 A centre must also refuse to act against a former client where the centre has relevant confidential information about that client from the former matter, which may be used against them. In this case, the duty of confidentiality to the former client (to protect their confidential information) conflicts with the duty to act in the best interests of the new client (which could involve using or having to make a decision as to whether to use, the former client's confidential information). So a centre is not automatically prevented from acting against a former client. It is prevented from doing so when it has confidential information about the former client that could be relevant to the new client's matter.

6.7.10 One starting point to identify conflicts of interest involving former clients is to ask the following questions:

- does the centre have any confidential information about the former client?
- is it relevant or possibly relevant to the new matter?

If you answer 'yes' to each of these questions, your centre has a conflict and cannot act in the new *matter against the former client*.

6.7.11 Another relevant question to consider might be: could the former client reasonably perceive that any confidential information held by the centre could be used to their detriment? If so, this may point to a potential conflict and the Responsible Person will have to decide whether or not it is a matter that the centre can act in.

What is confidential information in this context?

6.7.12 Confidential information gained in the course of acting for a client in an earlier matter can sometimes go beyond the strict confidential information disclosed in the course of the matter, to include what can be described as 'getting to know you' factors, such as the client's honesty, their strengths and weaknesses, their tactics or their attitude to litigation. It has been suggested by one academic commentator that 'the factors should be confined to "impressions" obtained by a lawyer of the client's approach to litigation, or, in the case of non-contentious matters, commercial negotiation' and that '[s]uch impressions will only meet the necessary level of particularity of confidential information if it can be established that the lawyer and the client have had a long course of dealing which has enabled the lawyer to form lasting, accurate and useful impressions'.⁴⁹

When in doubt – former clients

6.7.13 If in doubt as to whether or not the centre holds confidential information concerning a former client, or if confidential information is held but it is not clear whether it is relevant to the new matter or action, the centre and its legal practitioners should not act against the former client. This is particularly the case in family law matters where courts have taken a stricter view of conflict of interest.

Service types and conflict checks

Overview

6.7.14 In CLSIS, because there were fewer service types it was easier to identify the types of service where the solicitor/client relationship operated, and where it did not. The most common situation where centres encountered this distinction in

⁴⁹ Sandro Goubran, 'Conflicts of Duty: The Perennial Lawyers' Tale – A Comparative Study of the Law in England and Australia', (2006) 30(1) *Melbourne University Law Review* 88 at 104.

practice was in relation to the provision of legal information, where the service-provider provides a person with general information, not related to their particular fact situation (in contrast to a Legal Advice).

- 6.7.15 The previous edition of the Guide made clear that a centre could provide an Information Service without being obliged to conflict check first (and hence was not required to collect and record the person's name, but could), but for any type of service where the solicitor/client relationship would be in operation – such as for providing Legal Advice – the centre must conflict check before providing the service.
- 6.7.16 In CLASS, for many of the Services it will be easily apparent where the solicitor/client relationship – and the obligation to conflict check before providing the service – operates.
- 6.7.17 However, given the change to previous CLSIS service types and definitions in CLASS, the Responsible Person and centres will need to carefully consider the position in relation to each occasion of some types of services and ensure that they are familiar with the relevant parts of the DSM that deal with data items relevant to conflict checking.
- Further information*
- 6.7.18 CLSIS required a centre to record the client's name and 'Other Party' information when the centre provided Advice to a client or provided Ongoing Assistance, called 'casework' in CLSIS – that is, whenever the centre was 'acting for' the person and had a 'solicitor/client relationship' with them. This relationship and its attendant obligations could occur even if the Advice or other Services were non-legal. CLASS, operates similarly in terms of how to conflict check.
- 6.7.19 This Guide recognised however that there were certain types of Services for Individuals that centres provided that were by nature more general, and did not require detailed understanding of the person's situation and problem, nor the application of legal knowledge or opinion to the particular facts of that person or their problem. It was recognised that the provision of an Information or Referral Service were in this category, and that a Service Provider could provide such a Service without a retainer and outside the solicitor/client relationship and its duties. For that reason, centres were not required to record the name of the person seeking assistance or the 'Other Party' (although some centres did, or did in some instances), and there was no obligation to conflict check. CLSIS allowed for the recording of some data such as number of Services for Information and Referrals, without client name, address or other demographic data. CLASS will also allow for this.
- 6.7.20 The previous edition of this Guide acknowledged that:⁵⁰
- There can be a blurred line between information and advice (including legal and non-legal advice). Generally speaking, 'information' refers to providing factual information that is of general application. It may include giving a person a relevant brochure, fact sheet or other like material. It may involve obtaining some information from the person about their particular circumstances in order to ensure that the information and/or referrals provided are the most appropriate. Obtaining some particular facts about an individual and giving more targeted or specific information and/or referral based on that information may still be regarded as information and referral...

⁵⁰ NACLC, *Risk Management and CLC Practice Guide* 2012, paras 6.7.14-16.

Sometimes the provision of information and/or referral involves little time and minimal client interaction, for example, someone calls a centre and asks for a service that the CLC does not provide and a referral is given, with little discussion about the person's circumstances. Other times though, the provision of information can be a substantially more involved process. A person may come into the service very upset and a worker spends a significant amount of time with that person, listening to them, offering support, discussing their situation to enable the worker to make a warm referral, and perhaps even sending correspondence or emails. This person may never get to the point where they receive advice or casework assistance but, by dint of the information they have 'shared', they may have become, *or may themselves feel they have become*, a client of the centre. In either of these situations, as a matter of law, some level of retainer may have been implied, giving rise to a duty owed to that person by the centre. The amount of time spent with a person is not necessarily determinative of whether such a duty arises.

It is important that centre staff and volunteers are trained to recognise that:

- in some cases during the course of providing information and/or referral to a person, that person may disclose confidential information to the CLC of a kind or to a degree that would preclude the centre from giving advice to or acting for another person in the same or a related matter or from advising or acting against the person in a future matter (hence these workers need to be trained about the criteria for this type of confidential information)
- if a centre has received confidential information of this kind, or if the interaction has clearly gone beyond mere information and referral, simply administratively describing the activity as 'information' or referral does not avoid the centre's obligation to avoid acting in conflict
- where it appears to a worker providing information and/or referral to a person on behalf of a centre, or on behalf of a service auspiced or hosted by a centre, that the interaction may be moving beyond information and referral, the worker should bring a halt to the interaction. A conflict check must be conducted before providing advice
- if a person discloses confidential information of a kind or to a degree that would or should preclude the centre from advising or acting for another person in the same or a related matter or from advising or acting against the person in a future matter, even if it was intended to provide them only with information/referral, it is **mandatory** that the client/person and other party details are entered into CLSIS or whatever other database is used so that any conflict will appear on the database if another party to the matter seeks assistance or a person seeks the centre's assistance in a dispute against the person. On CLSIS this can only be done by recording it as an advice. It can be recorded as a non-legal advice.

6.7.21 The issues identified and the action to be taken set out in the above extract from the previous edition of the Guide, are still applicable. In CLASS, it is possible for a Service Provider to record an Information or Referral being provided and also record the name of the person and Additional Party/ies if the centre deems this appropriate.

6.7.22 However, given CLASS is based on the DSM and its classification and definitions of Services, which as outlined throughout this Guide, differ from CLSIS, Principal Lawyers and centres will need to carefully consider the position in relation to each occasion of some types of services.

Consultation with other lawyers or agencies

6.7.23 Another situation where it is critical to remain vigilantly aware of this issue is where a centre lawyer consults another lawyer or agency, for example a specialist CLC about the matter, or some aspect of the matter. It is a common and important practice of centre workers, and lawyers generally, to consult other experts about legal or other specialist issues, and clients benefit a great deal from this combined experience and expertise being brought to their problems. Often these discussions are held in such a way that the client is not and cannot be identified, and there is no disclosure of individual information that would breach client privilege or give rise to an inference (or actuality) of the second lawyer being regarded as acting for the client. In these situations, the exchange can be regarded as analogous to the second lawyer providing 'Information' and there is no necessity to conduct a full conflict check.

6.7.24 On occasions though, the information provided or the information communicated in response will be sufficient to mean that the situation must be regarded as the second lawyer providing Legal Advice and that there is a risk of a conflict of interest, and thus a full conflict of interest check must be done before the second lawyer proceeds to provide Legal Advice.

6.7.25 There are arrangements that may to some degree avoid the risk of a conflict occurring when the second lawyer is advising another centre or agency, for example, in some instances the centre or agency consulting the expert may be the 'client', and/or there may be an agency relationship. Even so, reasonable steps will still have to be taken to ensure that a conflict won't occur. If the second lawyer provides Legal Advice to other centres or agencies, or to the public directly, it is hard to see how the possibility of a conflict occurring can be avoided unless they obtain the details of the person attending the first centre/agency, and (where applicable) any other parties, and undertake a conflict check.

6.7.26 If the second lawyer (that is the one consulted by the centre lawyer or agency who is in direct communication with the client) does not undertake a full conflict check, they may inadvertently advise a person where they have, or could in the future, also advise another party to that matter, or could, if the person were to subsequently come to their centre and provide them with all the facts, provide different Legal Advice. These possibilities can only be avoided by the lawyer not advising unless and until they have obtained all the requisite information and conducted a full conflict check.

6.7.27 CLSIS was and CLASS is a very valuable tool for thorough conflict checking and sound risk management, and the potential of systems with these types of legal practice management functions to assist centres in good practice management should be utilised as much as possible. See **Chapter 8** for details regarding the use of CLASS and other data systems in conflict checking.

Knowledge of one lawyer is the same as knowledge of the entire practice

6.7.28 The general rule is that the same knowledge of confidential client information is implied of all lawyers in a legal practice even only if one lawyer in the practice has that knowledge. This is not a universal rule and it can be rebutted in limited circumstances. The prudent approach for small legal practices like centres, is to

proceed on the basis that all lawyers are implied to have the same knowledge of client information. The exception to this is for volunteer and seconded lawyers (see below).

Volunteer lawyers, confidential information and imputed knowledge

6.7.29 Legal assistance service providers, particularly community legal centres, rely heavily on the work of volunteer lawyers, most of whom are employed in other legal practices. Particular risks around conflict of interest arise in these circumstances and centres need to take steps to avoid such conflicts. The perception of conflict can also arise here and centres ideally should take steps to protect public confidence in their centre and in the sector generally, by seeking to avoid any potentially adverse perception.

Example

Domenico works for the Sunshine office of a multi-office family law firm, Pride & Associates. He also volunteers at the Sunshine CLC one night a fortnight. A woman seeks Legal Advice from the Sunshine CLC staff lawyers on a family law matter. The Melbourne office of Pride & Associates has provided Legal Advice on the same matter to the woman's ex-partner. Neither Domenico nor the CLC's staff lawyers are personally aware that the ex-partner has received advice from another lawyer at Pride & Associates. In this situation a suggested approach is:

- Domenico would have signed a confidentiality agreement when he started volunteering at Sunshine CLC
- Prior to the advice session Domenico could be sent a list of names of clients who had booked appointments at Sunshine CLC to conduct a conflict check
- If the potential conflict is identified Sunshine CLC could ensure another volunteer sees the woman.

Each case will have to be considered on its facts.

6.7.30 In some jurisdictions, for example, Victoria, it is permitted, as a risk minimisation strategy, to establish an 'information barrier'⁵¹ to rebut the presumption that a volunteer lawyer has the same implied knowledge of client confidential information as all other lawyers in the centre. In this construct, the information barrier limits the volunteer lawyer's access to information concerning the clients to whom the particular lawyer is providing advice, and excludes access to information concerning the centre's other clients.

6.7.31 To be effective, an information barrier would have to effectively screen the volunteer lawyers away from all other confidential client information so that there is no real and sensible possibility of the misuse of the confidential information. Practical steps to establish this barrier must include:

⁵¹ See the *Information Barrier Guidelines* (2015) produced by the Law Society of New South Wales, available at: <<https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/1088899.pdf>> (accessed 31 January 2017); as well as the previous 2006 version produced in consultation with the Law Institute of Victoria and adopted by the Queensland Law Society, available at: <<https://www.liv.asn.au/PDF/Practising/Ethics/2006GuidelInfoBarrier.aspx>> (accessed 31 January 2017); <http://www.qls.com.au/Knowledge_centre/Ethics/Resources/Conflicts_concerning_former_clients/Information_Barrier_Guidelines_LIV_LNSW_adopted_by_QLS_Council> (accessed 31 January 2017); and summarised here: <<http://www.liv.asn.au/PDF/Practising/Ethics/2010InformationBarrierGuidelines>> (accessed 31 January 2017).

- a written policy and volunteer agreements that provide that volunteer lawyers will not access the centre's client database or the centre's client files other than those the volunteer is working on
- practical measures to ensure that this does not occur even inadvertently.

- 6.7.32 If a client seeks advice from a volunteer lawyer at a centre, and the volunteer lawyer is aware that their other practice has received relevant confidential information from and possibly provided advice to the other party to the matter, the lawyer must not personally provide Advice through the centre's practice. The centre must also not provide Advice through a different lawyer unless it has an effective information barrier quarantining any knowledge of the matter to that volunteer lawyer.
- 6.7.33 Importantly, the information barrier type of arrangement may not be acceptable in some jurisdictions and any centre contemplating adopting it should first check the relevant law in their state or territory.
- 6.7.34 A recommended option to manage the risk of conflicts is, wherever possible, to provide volunteer lawyers with an advance list of clients they will be seeing at the centre. This allows the lawyers to conduct conflict checks at their own firm to minimise the risk of potential conflicts. The volunteer agreement should provide that the lawyer is required to keep the client list confidential and only use it for the purposes of screening to avoid conflicts. This option will not be feasible for those centres that operate 'drop in' clinics where the names of the clients are not known in advance.
- 6.7.35 It may also be helpful for the centre to make sure that clients attending the centre know about the use of volunteer lawyers from other legal practices and that the lawyers are under a duty not to disclose any confidential information, in either workplace, that they have gained in the other. This may help avoid client concerns.
- 6.7.36 One practical step is to ask and provide to the volunteer lawyers the name of the other party and the other party's lawyers – if known – in advance of the volunteer seeing a client. This way the volunteer is able to see if there is a firm conflict right away. This is an example of a reasonable step to avoid actual and perceived conflicts in volunteer sessions.
- 6.7.37 It should be noted that the rule of imputed knowledge will have obvious and immediate consequences where lawyers employed by centres or Legal Aid Commissions volunteer in another service. In some circumstances it may be practically impossible to have any effective information barrier to deal with this.

Management Committee members

- 6.7.38 It is possible for a person with a legal problem to attend a centre where a centre Management Committee member may have a real or potential conflict of interest if the matter is taken on. It is recommended that centres have procedures in place that enable conflict of interest checks to be run against the names of their Management Committee members (and, should they consider it necessary, for staff and volunteers). This can be particularly important for centres in regional, rural and remote areas.

Changing jobs, locums and conflicts of interest

- 6.7.39 Centres regularly use short-term or locum lawyers and lawyers in the legal assistance sector often change employment to work at another centre or legal assistance organisation. In a similar way to the use of volunteer lawyers, this also creates conflict risks.

- 6.7.40 The general rule is that a lawyer may have a conflict in any matter where, in the course of a former legal practice, they have personally acquired confidential information which could be used adversely to the interests of the former client if they were to act for a new client.

Example

Liya works for Eltham CLC. She used to work for Hawthorn CLC where one of her clients in a family law matter was Val. Val's partner Graeme approaches Eltham CLC to seek assistance. Liya is given the file. She quickly realises that the other party to the matter is Val, her former client from Hawthorn CLC.

In this example, Liya is likely to have a conflict of interest. Eltham CLC would also have a conflict of interest, unless it could somehow establish an information barrier to quarantine Liya's knowledge and have a different lawyer work on the matter – which is probably unlikely and impractical. The better approach is for Eltham CLC not to act for Graeme.

If in doubt, don't act or advise. Refer the client elsewhere.

- 6.7.41 Lawyers on short-term/locum arrangements are subject to the same rules of maintaining client confidentiality and avoiding conflict as other lawyers. The risk of conflict for them and their employing/engaging centres is heightened because of the transitory nature of their engagement, and the possible multiple workplaces they attend.
- 6.7.42 It is a good idea for locums to disclose to each employer the legal practices where they have worked in the past, and the areas of work they have undertaken at each, so that at least a preliminary form of conflict check can be made. It is also sensible for centres to remind and emphasise to locums their duties around client confidentiality and avoiding conflicts.

Secondments and conflict of interest

- 6.7.43 Some legal aid commissions (Legal Aid) and private firms provide lawyers on secondment to work in CLCs under pro bono or other programs. This gives rise to potential conflicts of interest as the seconded lawyers may be deemed to have the same knowledge of confidential client information as all other lawyers in their employer practice (for example, the legal aid commission or private firm) or in the CLC. The risk of conflict is probably higher when a legal aid commission has seconded staff to a CLC, as many CLCs are often involved in matters, particularly family violence matters, where Legal Aid is acting for the other party.
- 6.7.44 The risk of conflict may arise with lawyers seconded from private firms, for example where the firm acts for a bank or telecommunications or insurance company and the CLC has clients with legal issues involving those companies. Ways to minimise the risk of conflict in this situation include:
- ensuring that Legal Aid or the firm has an information barrier in place that prevents the seconded lawyer from accessing client information held by Legal Aid/the firm during the course of the secondment at the CLC, or
 - establishing an information barrier within the CLC that limits the seconded lawyer's access to information concerning the clients they personally are assisting (as opposed to other clients of the CLC) – this option is probably less practical from a CLC point of view, but some centres manage it, and
 - considering any ways to address the conflict following the return of the secondee to Legal Aid or the firm.

It is important to minimise the risk of perceived conflict by ensuring that the seconded lawyer does not work on matters in which Legal Aid or the firm is acting or has acted for the other party.

- 6.7.45 It is important to think about the possible risk issues that may arise well in advance and make plans to deal with them. For example, when a CLC is considering taking a secondee lawyer, they should ensure that their arrangement with the law firm or Legal Aid stipulates any requirements about information barriers being in place during the secondment, and also any requirements for the period after the seconded lawyer has returned to their employer. If the law firm or Legal Aid works in an area that the CLC also practises in, it may be possible that the CLC and the other party can agree that the lawyer will not work in that area of practice for a certain number of months after their return.

Screening for conflict of interest

- 6.7.46 A centre must conduct a full conflict of interest check **before** providing any Discrete or Ongoing Assistance Service where there is a solicitor/client relationship. There are some very limited situations where a **full** conflict check is not mandatory: see below.
- 6.7.47 Given the change in service types and definitions in CLASS from CLSIS, the Responsible Person will need to carefully consider the position in relation to each occasion of some types of services and be familiar with the relevant part of the DSM that deal with data items relevant to conflict checking.
- 6.7.48 The Responsible Person has the ultimate responsibility for ensuring that conflict checking is properly performed and managed and for determining whether or not there is or may be a conflict of interest in particular circumstances and accordingly, whether the Legal Advice or other Discrete or Ongoing Assistance Service is to be provided to any person.
- 6.7.49 Conflict checks must cover the whole of a centre's service operations including within each and across all branch offices and all specialist, auspiced or hosted projects, programs or services (see **7.10**) **if those services ever provide Services to Individuals (other than Information or Referral)**. Conflict checking is not mandatory where a centre or its service/project/program is providing **only** Information and/or Referral Services, but doing so can provide extra risk minimisation.
- 6.7.50 Centres should take action to ensure that Service Providers understand the types of services where there is a solicitor/client relationship and when to suspend an interaction/interview if it seems that the conversation is moving beyond Information or Referral. See below.

What are the requirements of a full conflict check?

- 6.7.51 In order to be able to do conflict checks a centre must have a database or databases of 'Client' and 'Other-Party' information. CLSIS served this purpose, and CLASS was developed to provide the same functionality.
- 6.7.52 A 'full conflict check' requires the client's name/s and the name/s of the Other Party or Parties to be checked in the centre's client database/s. The Service Provider must first ensure that they obtain and enter the correct spelling of the full name of the client, and any variations or other names that the person may use or has used. See also **6.7.89**.
- 6.7.53 The Service Provider should think about and identify all 'Other Parties' that may, given the nature of the issue, be (or come to be) in conflict, for example, family members or co-tenants. For example, in a tenancy matter, a centre should

ascertain whether there is a co-tenant and, if so, whether in the particular dispute there is a real risk of a conflict arising. If the centre worker has, after reasonable enquiry and consideration, formed a view that there is a real risk, they must record and check the names of the co-tenants in the database/s to establish whether there is a conflict and to protect against one occurring in the future.

- 6.7.54 When obtaining client or party details, it is very important to obtain the full names of the parties, including any spelling or name variations and all names used currently or previously. Care should also be taken in regard to obtaining, entering and conflict checking the name/s of other parties that are companies, and the people involved, for example, directors.
- 6.7.55 The only situations where a full conflict check is not required for Services other than Information and Referral (or any other general Service to a person not a client of the centre), are set out below.
- What do I do if the person attending does not know the Other Party's name?*
- 6.7.56 If the person seeking Legal Advice or other Assistance does not know the name of the Other Party, the centre can still provide the person with Information and/ or Referral. If the person is seeking or requires Legal Advice or some other form of Discrete Assistance or Ongoing Service for an Individual, but does not know the name of the Other Party or Parties, the Service Provider should, wherever this is possible, ask the person to find out the name (and of course may assist them in doing so), and explain that the centre cannot provide the required Service until this information is obtained and a conflict check is done of that name. In this scenario, the Service Provider has judged that there is some real prospect that the person can ascertain the name; and that the circumstances do not fall within one of the very limited situations where Legal Advice or other Discrete or Ongoing Assistance may be given without a full conflict check (see below).
- 6.7.57 Once the name is supplied, the centre can carry out a conflict check of the name, and absent a conflict showing, may provide the Service. If the name of the Other Party cannot be ascertained, see the discussion below.

The only situations where a full conflict check is not mandatory

- 6.7.58 The only situations where a full conflict check is not mandatory are set out below. NACLC and the National PII Network are continuing to look at this area and will be monitoring the operation of the requirement and the need for reform of legal profession laws to better reflect the needs and circumstances of centres and their clients. NACLC has made submissions in this regard previously in relation to community legal centres' operations and operating contexts. If there are particular issues that arise for a centre, the centre is encouraged to raise them with their PII representative to inform that consideration.

SITUATION 1 – Certain 'other' parties that the centre never assists

(a) Where another party is an institution that the centre never assists

- 6.7.59 Some centres work in areas where their clients have matters against particular institutions, or types of institution, that the centre *never* advises, assists or represents. Examples of such institutions include: government departments and agencies (for example, Centrelink; Police Forces; Prisons/Corrective Services authorities; Immigration), banks and other financial institutions. In these cases, where the centre ascertains that the Other Party is such an institution, the centre is not required to conflict check the name of *that* party in the database/s, however it is still necessary to check the caller/client's name and the names of any other parties in the database/s.

(b) Where another party is of a distinct type or kind that a stand-alone specialist centre never assists: Advice only

- 6.7.60 There are some stand-alone (self-contained and independently operating) centres that specialise in a particular area of law or client group and have a policy of never assisting a certain type of party to disputes in their area, for example, landlords in tenancy disputes. If so, it may be acceptable risk-minimisation and sufficient 'reasonable efforts' to simply identify that the only Other Party falls within that category (for example, landlord) and not conflict check the name of that party.
- 6.7.61 At present, the only such centres and parties recognised by this Guide as falling within this category are stand-alone specialist tenancy services and landlords respectively. A stand-alone tenancy service that does not ever act for landlords can provide Advice to a tenant (but not represent the person or act on an ongoing basis) without conflict checking the name of the landlord, however it must still conflict check the name of the caller/client and, where the CLC worker assesses that there is a potential for a conflict, the name/s of any co-tenants.
- 6.7.62 This exception does not apply to generalist centres providing tenancy Advice or to specialist tenancy services that are not stand-alone but are, in a legal sense, part of a generalist centre.

SITUATION 2 – Advising/assisting people in prison, detention centres or secure health facilities in certain circumstances

- 6.7.63 Where Legal Advice and/or another form of Discrete Assistance is being provided at a prison, detention centre or secure health facility, it will not be possible to carry out a conflict check prior to giving advice if the names of inmates/detainees are only given to the centre immediately prior to the appointment and the Service Provider cannot communicate externally. In this situation, taking into account the particular circumstances of the service delivery and the importance to the person of receiving immediate Advice and/or other Assistance, the centre worker may provide Advice/Assistance, but should only do so after considering the likelihood of a conflict of interest being present and making a risk assessment and, if relevant, limiting the Advice/Assistance provided accordingly.
- 6.7.64 It is also appropriate before providing the Advice/Assistance, to inform the person of the importance and relevance of conflict checking, what is being done in this case and the possible effect of a conflict subsequently being discovered. The centre worker should carry out a conflict check as soon as practicable after the Advice/Assistance has been provided, for example, upon return to the centre or when remote access to the centre's data system or access to a telephone is possible. The centre cannot provide Ongoing Services to the person unless and until a full conflict check has been carried out.

SITUATION 3 – Providing outreach services where external communication is not possible

- 6.7.65 Similarly, where centre workers are providing outreach services, such as a Duty Lawyer Service at the Local Court, the centre must have systems in place to ensure the Service Provider can screen for conflicts of interest before giving Legal Advice and/or providing other Assistance (for example, by remote access to the centre's client data system or telephone conflict checks). If it is not possible to do so in particular, exceptional, circumstances, for example where mobile phone or internet service is unavailable at the time, then the procedure outlined at Situation 2 above should be followed.

SITUATION 4 – Exception to the requirement to check the name of an Other Party to the dispute in certain exceptional circumstances when the person contacting the centre is unable or unwilling to supply that name/s: Advice only

- 6.7.66 Where a person seeking assistance from a centre is unable or unwilling to supply the name of the Other Party/Parties, the safest course is never to provide advice. Most centres adopt this course. However, some services do not find this practicable or desirable given their particular client group and service delivery context, and their assessment of the very low risk.
- 6.7.67 A centre's conflict of interest policy may provide that where a person is unable or unwilling to supply the name of the Other Party to the dispute, the centre may nevertheless provide Legal Advice or another form of Discrete Assistance (but not represent the person or act or provide Assistance on an ongoing basis) provided the following conditions are met:
- 1) a conflict check is done against the person's own name and the name/s (if known) of any Related Parties;
 - 2) the following circumstances apply:
 - a) the person (and/or the centre) has made all reasonable efforts in the circumstances to find out the name of the Other Party but has been unsuccessful; and/or
 - b) the person refuses to provide the name of the Other Party; and/or
 - c) the matter is urgent and the person may suffer serious detriment as a consequence of delay;
 - 3) alternative appropriate assistance is not available;
 - 4) the person is asked to identify the status of the Other Party (for example, a co-tenant, a partner) (because this is a relevant risk management consideration);
 - 5) the Responsible Person or a Nominated Person considers the potential for a conflict of interest in the circumstances of the particular matter; and
 - 6) the person is told that because the centre cannot do a conflict check, the centre cannot guarantee that they have not assisted another party to the dispute. The person must consent to being provided with advice/ assistance in these circumstances. (Note that this consent should be in writing or a file note made of verbal consent).
- 6.7.68 Services wishing to invoke this limited exception must recognise the risk that failing to perform a conflict check of the name of the Other Party may mean: there is an increased risk of an actual conflict occurring and they may need to stop providing assistance to all conflicted parties seeking assistance (in circumstances that could have been avoided by conducting a full conflict check (if that were possible)).
- Can the Service Provider provide Representation Services or other Ongoing Assistance Services when a full conflict check has not been done?*
- 6.7.69 A centre cannot provide Ongoing Assistance to a person without conducting a full conflict check, that is, a conflict check across the names of all parties to the dispute, except that it is not necessary for a centre to do a database check of the name of an Other Party if that party is an institution that the centre never assists (see Situation 1(a) above). In Situations 1(b), 2, 3 and 4 above, one-off

Advice (1(b)-4) and/or other Discrete Assistance (2-3) can be given in certain very limited circumstances where a full conflict check has not been done. Even in those exceptional situations the centre cannot provide Ongoing Assistance unless and until all the necessary information has been obtained and a full conflict check has been undertaken.

Where an obligation to conflict check has unexpectedly arisen

- 6.7.70 If a Service Provider feels that the line between Information/Referral and Advice or Legal Task has, for whatever reason, been crossed or that client confidential information that could give rise to a potential conflict has been provided to the centre, then the Service Provider must at that point obtain and enter the names of the person and the Other Party (or as much of that information as they can obtain) and undertake a full conflict check. See also **6.7.14-27**.

What you must do if you have conducted a conflict check

- 6.7.71 The centre should record on **every** client file and Advice record that a conflict check has been done. In Situation 4 set out above (**6.7.66**), where a conflict check was not done of the name of the Other Party before providing the Advice, that fact and the reason/s for it should be noted.

- 6.7.72 Some centres that have hard copy 'Advice Sheets' or Service records stamp or write or tick 'conflict check done' on the Advice sheet/record to confirm that the check has been done. It is a good idea for centres to ensure that there is a relevant field in their database to indicate that allows them to record that a conflict check has been done or is not applicable.

What you must do if the centre cannot act for someone because of a conflict

- 6.7.73 If a conflict of interest is discovered, the centre should inform the person that the centre is unable to provide a service to them and refer them to another appropriate service, such as another centre or Legal Aid. In some cases, like family violence Duty Lawyer Services, CLCs may have protocols with Legal Aid in cases of conflict. When informing the person that the centre cannot assist them, centres should be mindful of their duty of client confidentiality.

Conflict of interest in multi-program agencies

- 6.7.74 Some centres are 'programs' within larger community agencies or other bodies. The centre may not be incorporated in its own right, but rather is one service or program operating within and under a larger incorporated body. Ideally the centre would be or would move to be incorporated, and where possible, be physically separated from the other programs to avoid the conflicts issues that may otherwise arise. This is to ensure that the legal practice is clearly separate and is seen to be separate for the centre's purpose of assisting clients.

- 6.7.75 There are a range of existing models currently in place, some where there seems to be no issue and some with many satisfactory arrangements but where some improvements could and/or should be made. Where all the issues have not been addressed, the arrangements can give rise to potential and actual conflicts of interest and risk breaching client confidentiality or client legal privilege, or put the legal practice and its principal in breach of statutory or other legal duties.

Example

Abbott's Creek CLC is not a stand alone CLC. It is a program within the broader community agency Western Regional Care Inc. A client comes to the CLC seeking advice about obtaining an intervention order against her violent spouse. The spouse is attending a Men's Behavioural Change Program run by the broader Western Regional Care Inc agency and has admitted his violent behaviour in the course of this program.

6.7.76 Centres that operate in this type of arrangement must have procedures to avoid and manage conflicts of interest. Minimum procedures that must be put in place to avoid and minimise the risk of conflicts arising or breaches of confidentiality and/or duty are:

- establishing an 'information barrier' to ensure that there is no real possibility of communication of confidential information outside the centre. It must prevent confidential information held by the centre from being accessed by staff of other programs or common intake and assessment workers, and in particular it should prevent non-centre agency staff from accessing confidential client information held by the centre. This applies to the database, electronic and hard copy files and would extend to prevent the managers of other programs or of the overarching entity from accessing the centre's client files, records and client information except the body's management under controlled circumstances and only when necessary (such as for handling complaints, operational necessity or for employment accountability purposes) to support the centre providing legal Services to clients.
- the information barrier must comply with the requirements of the legal profession laws operating in the centre's state or territory, and the lawyers' ethical duties. For a detailed treatment of the law on information barriers and recommended guidelines to guard against a breach of the duty of confidentiality owed to former clients, see the *Information Barrier Guidelines* produced by the Law Society of New South Wales and Law Institute of Victoria and adopted by the Queensland Law Society.⁵²
- a draft information barrier policy must be provided to the relevant state or territory PII representative for consideration by the National PII Network. The PII Network will make a recommendation to the relevant state or territory CLC association, which is ultimately responsible for approving the policy for their member centre.⁵³ Records of approved information barrier policies will be centrally held and made accessible to the PII Network and NALCL.
- an approved written policy which is available to clients supporting this information barrier
- inclusion of key aspects of the policy in staff employment contracts
- regular training on the policy

⁵² Available at: <<https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/1088899.pdf>> (accessed 31 January 2017); <<https://www.liv.asn.au/PDF/Practising/Ethics/2006GuidelInfoBarrier.aspx>> (accessed 31 January 2017); <http://www.qls.com.au/Knowledge_centre/Ethics/Resources/Conflicts_concerning_former_clients/Information_Barrier_Guidelines_LIV_LNSW_adopted_by_QLS_Council> (accessed 31 January 2017); summarised here: <<http://www.liv.asn.au/PDF/Practising/Ethics/2010InformationBarrierGuidelines>> (accessed 31 January 2017).

⁵³ Further detail on the procedure for implementing an information barrier policy is set out in **Appendix E: PII Representatives: Framework, Role and Responsibilities.**

- regular review of the effectiveness of the policy by a nominated staff member (usually the Responsible Person)
- transferring staff between programs only when this can be managed without breaching the information barrier policy.

An example Information Barrier policy appears at **Appendix K**.

6.7.77 It is important that all staff and managers understand that these obligations relate to all client confidential information, and that they understand the breadth of what may constitute client confidential information. The mere name of a client attending for Advice could be confidential.

6.7.78 For this reason, centre agencies should also consider physical separation of the centre from other programs. Physical separation prevents, for example, staff from different programs overhearing client telephone conversations with centre staff, and also supports the maintenance of the information barrier (for example, other staff will not hear client confidential information, view client information in diaries or on papers on centre staff member's desks, or computers etc). It also helps to avoid issues like clients who are or may be opposing parties seeing the Other Party at the same organisation or having to wait for appointments in the same waiting room.

6.7.79 'Identity' separation, such as the centre having a distinct letterhead and name, assists with avoiding the perception of conflict of interest between the centre and other host agency programs and can help to confirm in the mind of the person seeking assistance exactly what services are being provided (and not being provided) and by whom. It is acknowledged and accepted that centres that are part of larger agencies may have some branding that is consistent across programs hosted by the agency. However, while there may be common branding elements between some programs (for example, broad styles or themes), in order to avoid perceived conflicts of interest the centre must have a distinctive name and its own distinctive letterhead and branding on other communications that clearly differentiates the centre from the other programs.

Example continued:

Abbott's Creek CLC and Western Regional Care Inc have considered the legal obligations associated with running a CLC. They are considering how to meet their obligations while meeting preferred operational requirements.

Option A: They establish the CLC in separate premises from all other programs. All centre operations are fully contained within the CLC.

Option B: The CLC is co-located with other programs but steps are taken to maximise separation from other programs. The CLC has sound information barriers, a separate entrance, waiting area, administration services, facsimile machine and firewalled computer system.

Option C: The CLC is co-located with other programs but various operation functions are integrated, including: single entrance, common administrative functions, access to multiple client databases by administrators, a common telephone number and a common facsimile machine.

Option D: The CLC is co-located, all operation functions are integrated and there is a notional barrier between staff employed by the CLC and other program staff. The client intake procedure is handled independently by the host organisation to achieve operational consistency across programs. The centralised intake worker, who has access to all databases in the agency (including the CLC's database) receives confidential information, conducts conflicts checks and provides a triage function into the respective programs.

Of these options, A and B are the most likely to be compliant with legal obligations concerning conflicts of interest and confidentiality. Option C risks breaching a range of obligations. Option D actively breaches a range of obligations.

Conflict of interest in referring matters to volunteer lawyers

6.7.80 Many volunteers at centres are local private solicitors whose firms may be referred clients by the centre. This gives rise to the potential for conflicts of interest as the volunteer solicitor may have an interest in referring the client, or encouraging the client to be referred, to their practice, and is likely to be perceived to have that interest, including in situations where this may, or may appear, not to be in the best interests of the client.

6.7.81 Centres could manage this potential for conflicts by implementing a policy that the Centre will not refer any paying matters to any solicitors who volunteer at the centre. In practice however, this may unnecessarily disadvantage lawyers who choose to volunteer at the centre, and indeed could disadvantage clients by precluding them from being referred to relevantly experienced, local solicitors and solicitors who may undertake the work on terms advantageous to the client, for example for a discounted fee or on a no win-no fee basis.

6.7.82 An alternative suggested approach to manage the potential for conflict in this situation is for the centre to have policies that:

- prohibit volunteer solicitors from directly referring any clients to themselves
- ensure that Referral information is always provided or endorsed by an independent staff member, not a volunteer lawyer
- always provide clients with at least two suitable referral options (which may include volunteer solicitors) unless it is not possible to do so.

Similar considerations can be applied to briefing barristers who volunteer at the centre.

Conflict of interest – staff lawyers who run private practices

6.7.83 Some centre lawyers may also conduct their own private practices outside the centre, although this is rare. This raises significant potential conflicts should Referrals be made by the centre to the staff lawyer's private practice.

6.7.84 Some legal practices prohibit staff from engaging in legal work outside the practice. This approach eliminates the potential for conflict of interest but it may also unnecessarily disadvantage some centres and their staff, where, for example, the lawyer works part-time at the centre and uses the private practice to supplement their income or maintain or develop other legal practice expertise and skills. The issue is further complicated where the staff lawyer conducts the external cases pro bono or for reduced fees or in situations where no other lawyer would take the matter on.

6.7.85 The least risky and recommended position is that each centre has a policy that prohibits any Referrals whatsoever being made from the centre to the staff lawyer's external practice, however this may not always be practicable or fair, for example where no other lawyer will take on the matter or where the lawyer has the requisite expertise and capacity to take on the case at the private practice, where the centre did not.

6.7.86 An acceptable approach would be to prohibit Referrals other than in exceptional circumstances, which may include that the lawyer is taking the matter on pro bono, for reduced fee or because there is no other suitable lawyer available. Under this modified approach, the policy should state that the lawyer must not make a self-referral. Any Referral information should be provided by a different staff member and where possible, should include at least two referral options. Disclosure of the lawyer's interest must be made to the client. This involves ensuring that the client is aware that the lawyer who is being provided as a referral option is also an employee of the centre.

6.7.87 Other suggestions to include in the policy for managing the potential for conflict in this situation are to:

- require staff to obtain approval before engaging in any paid or unpaid work outside the centre
- state that approval will not be given if the external work may negatively impact on the centre's operations and/or on the staff person's health – for example, where they propose to conduct a private practice in addition to working full-time or nearly full-time at the centre, or where the external work may jeopardise key stakeholder relationships or funding for the centre, is contrary to the values of the centre, or has the potential to harm the centre including by bringing it into disrepute
- have the lawyer sign an agreement that they will immediately declare any potential or actual conflict of interest arising, and will follow an agreed documented procedure as to what is to be done then – including giving the centre client priority, that is, continuing to act for them, if possible
- state that any private legal work must not be conducted using the centre's resources or during the employee's work hours.

Advising centre staff and volunteers; or advising other centres

6.7.88 Sometimes centres will be asked to provide Legal Advice or other Discrete Assistance Services to a centre employee or volunteer. Other times, centres may be approached by another centre for Advice on a matter, for example when a lawyer from a generalist centre seeks Advice from a specialist centre without referring the client. In both of these situations, it is important for the centre providing the Advice and/or other Service/s to remember that the person or entity they are advising then becomes a client. Accordingly, the centre must always follow the Mandatory Standards of the Guide, including in relation to intake procedures, conflicts of interest, obtaining full details, keeping adequate records, etc. Failure to follow the same protocols as for any other client may impact on the centre's insurance cover in the event of a claim: see **4.6.29-31**.

Confidentiality, conflict of interest and acting for groups and associations

- 6.7.89 CLCs may be approached to provide Legal Advice and Representation Services to community based incorporated associations, non-government organisations and similar groups that might or might not be a legal personality. Clients in these circumstances range from well-organised and structured legal entities to loose coalitions and 'campaigns' around a particular issue. In many cases it will be a simple matter of relying on the ostensible authority of an office holder of an incorporated association to provide instructions and receive communications. In other circumstances meeting obligations with respect to confidentiality and avoidance of conflicts will require careful attention to identifying the entity, which is the client as well as the individual authorised to provide instructions and receive communications on behalf of that entity.
- 6.7.90 In cases where a coalition of groups or individuals seeks the assistance of a CLC, it may be appropriate to require them to nominate a group or individual as the client of the CLC. Alternatively, if a CLC acts for multiple clients with a common objective, careful attention will need to be paid to ensuring that no possibility of a conflict of interest is anticipated or foreseeable and that procedures are in place to deal with any that do arise, such as advising and ceasing to act for all parties.

Further information and getting advice

- 6.7.91 Law societies and law institutes often have useful information on conflict of interest, information barriers and ethics on their websites.⁵⁴ Some also provide advice to members about conflict of interest issues via telephone ethics advice services.

⁵⁴ ACT: <<http://www.actlawsociety.asn.au/>>; NSW: <<http://www.lawsociety.com.au/>>; NT: <<http://lawsocietynt.asn.au/>>; QLD: <<http://www.qls.com.au/>>; SA: <<http://www.lawsocietysa.asn.au/>>; TAS: <<http://lst.org.au/>>; VIC: <<http://www.liv.asn.au/>>; WA: <<http://www.lawsocietywa.asn.au/>>.

CHAPTER 7

Practice Supervision and Management

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7.1 Introduction

Supervision of the legal practice and its legal, non-legal and related Services is a critical area of risk management in centres and is the focus of this part of the Guide.

7.2 Supervision

This is a Mandatory Standard.

- 7.2.1 The Responsible Person retains overall responsibility for a centre's legal and related service delivery practice, including in any branch office and any specialist, auspiced or hosted project, program or service of the centre: see **3.5.21-28**, and **7.10**. The Responsible Person must ensure that reasonable and appropriate supervision is provided not just to all lawyers but to all workers – employed and volunteer - providing Services to clients of the centre.
- 7.2.2 It must be understood that this Guide requires the Responsible Person or their delegate, a 'Nominated Person', to check and supervise essentially all Services for Individuals (except general, non-specific, assistance such as Information or Referral) that the centre provides - not just Legal Advice and Representation Services. Further, the Guide requires that the Responsible Person or Nominated Person must also check many Services for the Community such as Community Legal Education (CLE), Community Education (CE) and Law and Legal Services Reform or policy reform materials and other publications or media work - basically any activity of the centre where what is said or done (or not) may give rise to legal risk.
- 7.2.3 The provision of adequate and appropriate supervision is not only a matter of complying with relevant professional regulation requirements. It is also a risk management issue because proper supervision ensures quality work and competency in legal practice and other service delivery. Good quality supervision can also improve the wellbeing, morale, professional development and retention of staff – this is risk management in a broader sense.
- 7.2.4 The Responsible Person must determine the level of supervision required for each employed worker and volunteer in the centre, having regard to the following:
- qualifications and experience of the employed worker or volunteer
 - knowledge, skills and experience of the employed worker or volunteer
 - complexity and/or nature of the legal or other work being undertaken by that person
 - any other relevant matter.
- 7.2.5 The Responsible Person must ensure that reasonable supervision is provided by, wherever practicable, directly supervising the worker or volunteer but on occasions where it is necessary and appropriate, delegating supervisory responsibility over the legal practice or a discrete area of the legal practice to a Nominated Person with sufficient expertise and experience in the requisite area/s of law or other type/s of work. See **3.5.21-28** and **3.5.29-33** in relation to the roles, qualifications and other requirements for the appointment of Responsible and Nominated Persons.
- 7.2.6 If the Responsible Person or other supervisor is on leave or otherwise absent for any significant period, or resigns from the centre and there is no immediate replacement, the centre must make arrangements for another suitably qualified and experienced supervisor: see **3.5.25-26**. Centres must ensure that they comply

with the legal profession legislation in their state or territory at all times in relation to practice supervision and management, as with other areas. The state or territory PII representative must be advised of any change to the position of the Responsible Person and/or Nominated Person.

Checking Discrete Assistance (other than Information and Referral) and Ongoing Assistance Services

7.2.7 The Responsible Person or a Nominated Person must check all Legal Advice and other Discrete Assistance (other than Information or Referrals), Duty Lawyer and Ongoing Assistance Services, performed by **volunteer lawyers and volunteer non-lawyers** for clients, including in any branch office and any specialist, auspiced or hosted service, program or project (see 7.10). They must also check Discrete and Ongoing Non-Legal Support Services provided by staff who are within the centre's Legal Practice (that is, operating on the other side of an information barrier). Where a volunteer is a Nominated Person, their Legal Advice and other Discrete Assistance (other than Information or Referrals) and Ongoing Assistance work must be checked by a Responsible Person who is a lawyer with an unrestricted practising certificate or principal certificate (however described) or other employed lawyer who has an unrestricted practising certificate. If this is not possible, the centre will need to negotiate with their state or territory PII representative and CLC association to obtain approval for an alternative arrangement. Checking must be done in a timely manner to minimise the risk of a client relying on incorrect or incomplete advice or missing a limitation date. See also 7.2.11 below.

7.2.8 Ideally the Responsible Person or a Nominated Person should check all the Legal Advice and other Discrete Assistance (other than Information or Referrals), Duty Lawyer and Ongoing Assistance Services, performed by **employed lawyers and employed non-lawyers** for clients. However in practice the need for or amount of checking varies according to circumstances such as the experience and expertise of the supervisee and the nature and complexity of the work done. The feasibility of checking all such work will vary according to the size and resources of the centre. The Responsible Person therefore retains some discretion in the checking of employee advice and casework. However, at a minimum the Responsible Person or a Nominated Person must check:

- (at least) a significant proportion of Discrete and Ongoing Assistance performed by **employed non-lawyers**, including in any branch office and any specialist, auspiced or hosted service, program or project. This includes the Discrete and Ongoing Assistance of a Nominated Person who is not a lawyer. For the purposes of checking this work, 'employed non-lawyer' includes any non-lawyer working on secondment to the centre.
- (at least) a sample of Discrete and Ongoing Assistance performed by **employed lawyers**, including in any branch office and any specialist, auspiced or hosted service, program or project, on a regular, frequent and random basis. This includes the Discrete and Ongoing Assistance of the Nominated Person/s themselves and also that of the Responsible Person unless the Responsible Person is the principal or senior solicitor at the centre and has an unrestricted practising certificate. For the purposes of this work, 'employed lawyer' includes any lawyer working on secondment to the centre.

Checking work is a quality assurance procedure performed in a collegiate and constructive way, and is not a reflection on the expertise or experience of the original advisor.

- 7.2.9 If it becomes apparent that incorrect or incomplete Advice has been given to a client, the following steps must be taken as soon as possible:
- the Service Provider responsible for providing the inaccurate or incomplete Advice must be alerted to this fact
 - the client must be advised of the correct Advice by telephone and/or in writing
 - the new Advice must be recorded.

- 7.2.10 In these circumstances if the Responsible Person forms the view that the client may possibly have a claim against the centre the Responsible Person should speak to their PII representative and notify the broker/insurer. The Responsible Person should obtain the advice of their PII representative and the broker/insurer before they advise the client that there may be an issue, they should consider obtaining independent legal advice for the centre and after consultation with the broker/insurer, contact and carefully inform the client of the need to refer them and refer them appropriately. Note that there must be no admission of liability or any action or communication that may be construed as an admission of liability (for example, an apology) by the centre, unless and as permitted by the insurer: see **4.7.18-20**.

Access to the Responsible Person

- 7.2.11 Any staff member or volunteer providing Services to Individuals (other than Information or Referral) must have timely access to the Responsible Person (or the appropriate Nominated Person). In the event that the Responsible Person (or Nominated Person) is not immediately available and the person is not sure about the Legal Advice or other Service to be provided or course of action to be taken, then:
- the client must be informed that the Advice/course of action must be checked, and
 - the Responsible Person or Nominated Person must check the Advice/course of action within 24 hours or as soon as is reasonably possible, and if necessary the worker should recontact the client once this has been done.

Supervision of Ongoing Services

- 7.2.12 For Ongoing Services, the day-to-day management or supervision of each file must be the responsibility of an employed worker.
- 7.2.13 It is recommended as good practice that the Responsible Person or a Nominated Person convene 'case' conferences with workers at regular intervals, for example weekly or monthly, as they see fit. The case conference is a supervision tool to:
- determine what matters the centre will undertake on an ongoing basis
 - monitor caseloads
 - discuss difficult cases
 - detect any problems, consider options and implement actions to address them
 - monitor and ensure compliance with limitation dates, and
 - ensure that the quality of the service is maintained, and the wellbeing of staff is protected.

Remote supervision

- 7.2.14 In some cases supervision can be carried out remotely by teleconferencing, videoconferencing or other methods.
- 7.2.15 The Country Lawyers Project in Western Australia was an example of where remote supervision methods were put in place by arrangements between the Legal Practice Board, CLCs and WA Legal Aid. Because of the length of time that restricted practitioners must be supervised, the Country Lawyers Program and the Western Australian Legal Practice Board considered some flexible supervision models including:
- the introduction of ‘mobile supervising solicitors’ who regularly spent time in the regions with junior lawyers
 - use of state of the art electronic communications to provide remote supervision
 - a structured and collaborative inter-agency approach to supervision, bearing in mind professional conflict issues in a regional context, and
 - pro bono mentors from a number of large commercial law firms.
- 7.2.16 What will constitute reasonable supervision depends on the wording of the requirements in the relevant legal profession laws and how these issues are dealt with by the state and territory law society and any other regulatory body in question. In practice, it should also take into account factors such as:
- the experience, expertise, skills and competence of the supervisee
 - the range and type of work being undertaken by the supervisee, and the ways in which it is delivered (for example, in prisons or detention centres, in remote communities, by Duty Lawyer Service)
 - the size and nature of the practice/service (for example, from a branch office with few staff, trauma-informed service delivery, culturally safe for Aboriginal and Torres Strait Islander people, on circuit, fly-in, fly-out).
- 7.2.17 It is important that lawyers do not assume that being willing to be consulted is adequate supervision. The case law on the relevant rule in the Legal Profession Uniform General Rules makes clear that the requirement to provide ‘reasonable supervision’ requires positive engagement by the supervising lawyer – having an ‘open door’ policy is not sufficient. Ultimately, the Responsible Person is responsible for ensuring that adequate and reasonable supervision is provided to every lawyer. In centres, this obligation extends to the supervision of all Service Providers.

Supervising branch offices

- 7.2.18 Centres that operate branch offices will need to ensure that:
- they comply with any legal profession laws relevant to the operations of branch offices⁵⁵
 - staff in branch offices are suitably qualified and experienced
 - staff in branch offices receive adequate and reasonable supervision

⁵⁵ ACT: *Legal Profession Act 2006* ss 208-209; NSW & Vic: *Legal Profession Uniform Law* ss 116-118; NT: *Legal Profession Act* s 227; SA: *Legal Practitioners Act 1981* ss 23E-23I; Tas: *Legal Profession Act 2007* ss 218-219. There appear to be no specific provisions in Qld or WA.

- staff in branch offices are trained in and comply with any risk management processes and policies including this Guide.

7.2.19 A centre may wish to develop a dedicated risk management policy for the operation of the branch office and its workers and provision of Services.

7.3 Workloads

This is a Mandatory Standard.

7.3.1 The Management Committee and the Responsible Person must ensure that they are mindful of the limits and resource constraints of their centre and its workers and do not take on more work than staff and volunteers, where relevant, can reasonably and safely handle.

7.3.2 Ongoing Assistance must be kept within reasonable limits taking into account staffing levels, available resources and allowing for changes in the centre's operational context, including unexpected priority demands or staff changes.

7.3.3 Workloads should be continually monitored and reviewed to ensure they are kept at a manageable level for workers and that adequate supervision can be provided.

7.4 File reviews

This is a Mandatory Standard.

7.4.1 The centre must have a comprehensive file review system, whether electronic or in another form such as a hard copy diary. The system must be in the form of diary/ies, calendar/s or software reminder system. The centre must record on each hard copy or electronic file and in the system itself:

- the next action date and the next review date for the file
- the limitation date for the cause of action for each file (other than a one-off Legal Advice or other Discrete Assistance)
- appropriate forewarnings of that date
- any other due or critical dates, for example, court dates, and forewarnings for those dates.

7.4.2 The system must be accessible at all times at the centre by relevant staff (and not only by the person responsible for the file). This is to ensure that correspondence is sent or attended to, court dates and limitation dates are not missed and other necessary action is taken on the matter, regardless of staff or volunteer availability or any other variable or contingency. Lawyers may choose to keep their own individual diary systems but should still ensure that all relevant information is on the central system so it can easily be seen by others in the centre in case the lawyer is absent or the file cannot immediately be located. In some centres it may be more practicable for workers to maintain their own file review diary or system without a central system, however in that case that diary or system must be accessible to the Responsible Person or at least one other lawyer or the Coordinator, and the Responsible Person must ensure that entries are reliably made, for example, by reasonably frequent random checks. If a hard copy diary is used, there must be a system in place ensuring that limitation dates in future years are transferred to the next year's diary.

7.4.3 Whatever system is used, it is essential that:

- each and every file is reviewed at an appropriate interval, see below

- court dates and any other critical dates are recorded on the file and in a separate diary system accessible by more than the Service Provider responsible for that file
- on the review date a check is done to ensure that any necessary action is completed, the check and its results are recorded and signed by the checker in the file (for example, by way of a file note) and the review is also ticked off in the central system and a new review date set and recorded
- checks to ensure that limitation dates are not missed must occur well in advance of the expiry of the limitation date
- there are procedures in place to ensure that an action to be taken on a specified date is not missed due to the absence of a particular person
- there is a formal system in place to ensure that files due for review are still reviewed even in the absence of the lawyer or other Service Provider who would normally undertake that review.

7.4.4 The lawyer or other Service Provider responsible for the particular matter should undertake file reviews regularly. There is no single answer to how often this should be done and it will depend on a range of factors including the type of matter and the stage of the matter. Some centres require Service Providers to conduct file reviews on a monthly basis.

7.4.5 File reviews should also be done regularly, but generally less often, by the Responsible Person or Nominated Person. The frequency of these types of reviews will be affected by the extent of relevant experience and expertise of the lawyer or other Service Provider with the carriage of the matter.

7.4.6 The review system must identify the file, the review date and the name of the staff member responsible for the file, and the name of the person allocated to undertake the next action or review, as this may sometimes be different to the person responsible for the file (for example, it could be action to be undertaken by a volunteer assisting with the Ongoing Service).

7.5 Electronic communications

This is a Mandatory Standard.

7.5.1 Communication by email and electronic means is increasingly common in centres and raises a number of risk management issues – in relation to form and content - that centres need to consider and address, for example, ensuring that the relevant systems are appropriately secure and that there are no breaches of confidentiality or inadvertent disclosure of confidential information. Centre workers should take the same care in drafting an email or a text message as they would for any other written communication and should not say anything in an email or text message that they would not be prepared to see in a letter or an exhibit in court. Centres must have a policy that deals with use of electronic communications at the centre: see **8.5.8-10**.

7.5.2 The Responsible Person or a Nominated Person must ensure that there is an electronic communications policy that staff and volunteers know about it and check that it is being followed. For example, the Responsible Person (or Nominated Person) should check that hard copy files contain printouts of relevant emails and other forms of electronic communication, and any files kept in digital form also contain copies of all relevant emails and other electronic communications. They should also check that emails and any other form of electronic communication sent comply with the centre's policy. See the detailed discussion at **8.5.8-10** and see the sample Email Policy at **Appendix F**.

7.6 Community Legal Education, Community Education and publications

This is a Mandatory Standard.

- 7.6.1 The current National PII Policy (section 3.1) covers insured centres ‘in the provision of the Professional Services’. The definition of Professional Services includes Community Legal Education, Community Education and publications, Law and Legal Service Reform or policy reform Services and materials and media releases and/or interviews – see **4.6.15**.
- 7.6.2 The Responsible Person or a Nominated Person must check any brochures, publications or other Community Legal Education (CLE) or Community Education (CE) materials produced by a centre (including specialist, auspiced and hosted services, programs or projects and branch offices, if any) for accuracy and legal risk prior to their distribution. This procedure should extend to checking any CLE or CE material produced by others that the CLE or CE worker is intending to distribute or ‘publish’. It is the Responsible Person’s decision as to what services are within or outside of the centre’s legal practice.
- 7.6.3 Publications must contain a disclaimer as to the extent to which the information contained in the publication can be relied upon and the need for the reader to obtain legal advice in relation to their particular circumstances.
- 7.6.4 Centres undertaking CLE or CE activities must make it clear that the information provided in those sessions is general Information, **not** Legal Advice, and accordingly must not be relied upon or applied by participants in their own cases. Participants must be advised that each set of circumstances needs to be looked at individually and they must seek individual legal advice if they have a legal problem. For example, ‘The information provided in _ is for information only. It must not be relied on as legal advice. You should seek legal advice about your own particular circumstances’.
- 7.6.5 CLE and CE providers may choose to discuss de-identified case studies. However they should be alert to the risk of creating the perception that they are providing actual advice and to the possibility of receiving confidential information that could lead to a conflict of interest.
- 7.6.6 Workers conducting CLE sessions must not give Legal Advice during those sessions. CLE sessions are not appropriate occasions for obtaining sufficient and comprehensive instructions upon which to provide advice. However it may be possible and appropriate to provide Legal Advice before or after a CLE session provided the lawyer can ensure that they are doing so in an appropriate environment that enables confidential communication, that proper instructions can be obtained, a conflict check carried out and a proper record made of the instructions taken and Legal Advice given.
- 7.6.7 The Responsible Person or a Nominated Person must ensure that the content of CLE and CE sessions is accurate and up to date, and that workers conducting such sessions are aware of the parameters and considerations of the law of defamation.
- See also **7.9**.

7.7 Law and Legal Service Reform or policy reform

This is a Mandatory Standard.

- 7.7.1 The Responsible Person or a Nominated Person must check that any Law or Legal Services Reform or policy reform publication or other written material prepared

by the centre (including specialist, auspiced and hosted services, programs and projects and branch offices, if any) is legally accurate and does not contain any defamatory material, before it is published or distributed. This obligation extends to reform submissions and campaign material.

- 7.7.2 This obligation to check applies also to material prepared by other organisations or individuals if it is to be distributed by the centre.

See also 7.9.

7.8 Media

This is a Mandatory Standard.

- 7.8.1 The Responsible Person or a Nominated Person must check all media releases and statements prior to their 'publication'. Publication in this context does not just refer to literal publishing of hard copy material but also includes any communication of the material. They must ensure that the content of a media release is correct, that any risk of defamation has been considered and that it does not breach any law or legal obligation (for example, a court confidentiality order or contempt).
- 7.8.2 The Responsible or Nominated Person should also make sure that all workers who may speak with the media, whether by way of making a comment, speaking in a public interview or otherwise, are aware of the issues around defamation and other relevant laws. It is recommended that the Responsible Person or Nominated Person speak in advance to any centre worker who will be dealing with the media to make sure they are alert to and understand these issues.
- 7.8.3 Remember that the way in which 'publication' is construed in defamation cases means communication to any third party, so it is particularly important that any material that may be defamatory is carefully considered prior to any sort of publication to another person, including by way of media comment, emails, bulletin board and website postings.

See also 7.9.

7.9 Services for the Community (CLE, CE, Law and Legal Services Reform, Stakeholder Engagement) and Media: files and records

- 7.9.1 It is recommended as **good practice** to open a file and to record on CLASS or the centre's other data system, each Service for the Community, that is:

- Community Legal Education or Community Education Resources or Activities
- Law or Legal Services Reform or policy reform publication, submission or campaign, or
- Stakeholder Engagement.

It is also recommended that the centre open a file and record on their data system each media activity.

- 7.9.2 This file should contain the following information, as relevant:

- project title
- Service type
- project description
- project start and end date (if known)

- project status, hours
- activity date/s
- location
- attendances
- project activity or activities
- worker names
- evaluation details.

7.9.3 It is worth noting that in recent times, the majority of notifications for possible defamation have occurred in relation to Law and Legal Service Reform and campaign work.

7.10 Specialist, auspiced or hosted services, programs and projects

7.10.1 The terms 'auspiced project' or 'auspiced service' or 'hosted services/projects' are used to denote a funded project or program which, to some extent can be seen as having its own separate identity, but is conducted under the auspices – with the support of – of a larger legal entity.

7.10.2 This type of auspiced or hosted service, program or project can be distinguished from cases where the CLC has, as an integral part of its core service delivery, a specialist (and sometimes specialist-funded) project or service, such as the Women's Domestic Violence Court Advocacy Services (WDVCAS) in NSW, Tenancy Advice and Advocacy Services, Welfare Rights and Financial Counselling services.

7.10.3 It is imperative that a centre that conducts such a specialist service lists and/or describes that service in its PII application and annual PII renewal application. Provided that this has occurred, the workers in these specialist projects in CLCs are covered by that centre's National PII Scheme Policy. It follows that the whole centre, including the specialist service, must comply with all the Mandatory Standards of the Guide (see **Chapter 2**), including conflict checking across the whole of the centre. Similarly, an auspiced or hosted service can be covered by a CLC's PII policy under the National PII Scheme provided that it is, in a legal sense, part of and controlled by the CLC in the relevant period and the CLC has 'declared' the service as part of the CLC's Professional Services in their PII application - and the application was accepted by the insurer.

7.10.4 Some auspiced services may have their own separate insurance arrangements and it is important that the centre considers and decides how best to ensure cover for the service and for the centre. Consideration should also be given to any possible 'double' insurance, and whether it might jeopardise coverage for either the CLC or the service (see **4.10**). A centre may wish to obtain legal advice about this. It is open to a centre to choose to have the specialist service insured by another policy, and only have the remainder of the centre's Services covered under the National PII Scheme policy – provided that both insurers know and accept this arrangement.

7.10.5 Where the auspiced service is covered by the National PII Policy, the centre must ensure that the service, along with the rest of the centre, complies with all Mandatory Standards of the Guide (see **Chapter 2**) including conflict checking across all services of its host CLC – and vice versa.

- 7.10.6 Where a specialist project, program or service is covered by the National PII Policy:
- any Legal Advice or other Discrete Assistance or Ongoing Services provided by the project/service must be opened as a record of the centre
 - projects/programs/services must either use the centre letterhead (which may then have a subheading in the name of the project/program/service) or clearly indicate on its letterhead that it is a service of the centre
 - project/program/service workers must sign correspondence over their stated position, for example, tenancy worker
 - where appropriate, project/program/service workers must advise clients that there may be (other) legal issues or ramifications in the matter and refer them to legal practitioners at the centre or to another appropriate centre or lawyer for that advice
 - the project/program/service must be included in the annual cross-check of the centre. Accordingly, records of Legal Advice and other Discrete Assistance and files for Ongoing Services for Individuals or Services for the Community of the auspiced/specialist service are to be included in the cross-check and any workers or volunteers who are Nominated Persons must be interviewed.

7.11 Volunteers

This is a Mandatory Standard.

- 7.11.1 The National PII Policy defines 'Employee' to include (among other things) '...a volunteer worker or student'. Thus the same professional indemnity insurance protection applies to a volunteer as to an employee, when such:
- ... is (or was) at the time of the act, error or omission which gave rise to the **Claim** under **Your** (Named Insured's) direct control and supervision in the provision of **Professional Services**.)
- 7.11.2 The Responsible Person or Nominated Person must supervise the legal and non-legal service delivery (whether for individuals or community) work of volunteers. See in particular **7.3** above. All new volunteers must participate in a training and orientation program. An orientation package must be given to each new volunteer, which includes:
- as a minimum, information about this Guide and its requirements, and how to access it
 - policies and procedures of the centre (at a minimum, the Conflicts of Interest policy), including office procedures, guidelines for Services for Individuals.
- 7.11.3 Each centre is encouraged to provide an ongoing training program for volunteers to keep them up to date with changes at the centre, developments in relevant areas of law, and developments in risk management procedures or policies at the centre.

See also **6.7.6-7** and **7.5**.

7.12 Students and clinical programs

- 7.12.1 Placements of students for work experience, practical legal training (PLT) or clinical legal studies programs are subject to the same risk management practices as any other aspect of CLC practice. As mentioned in **7.11.1**, students are classified as 'Employees under the National PII Policy.
- 7.12.2 Because of the diversity of the programs and clinics utilised by centres, a one-size-fits-all approach cannot be taken. The variable elements that may need to be

taken into account include:

- size of the centre
- number and availability of lawyers or other relevant specialist workers (for example, social workers) suitable and available for providing supervision
- number of students
- student/practitioner ratio
- academic level and standard, and relevant experience or training, of the student
- type of work undertaken
- whether or not and for what purpose, the student interacts with clients.

Some centres will, for example, only take a PLT placement if that person has completed some relevant skills training, for example client interviewing, or cultural awareness.

- 7.12.3 Centres that provide a clinical legal education program or clinic must ensure that the program or clinic is described in adequate detail to the insurer for the insurer to have a full understanding of what is involved – and any potential risks.

7.13 Duty Lawyer/advocate services

- 7.13.1 Some centres are funded to provide a duty lawyer role while others choose to provide a Duty Lawyer/advocate type service to fill a gap in legal assistance provision in their catchment area. This may be in, for example:

- local/magistrates' courts
- state and territory criminal courts
- federal circuits and family courts
- tribunals.

- 7.13.2 Any Duty Lawyer/advocate services conducted by the centre should be clearly described in the original application for PII and in each Policy renewal application.

- 7.13.3 From a risk management perspective the centre should also make sure that it complies with any guidelines, terms or condition of the contracts entered to provide those services. The centre will need to have a system in place to enable conflict of interest screening of clients utilising the Duty Lawyer/advocate service, for example, remote access to the centre's client database or telephone conflicts checks prior to the provision of any Legal Advice, Duty Lawyer Service or Representation Services. See 6.7.

7.14 Contract work for Legal Aid Commissions

Any centre that acts as a supplier of Services for Individuals or Services for the Community (for example, CLE) to a state or territory legal aid commission must ensure that those services are described in the application for insurance and annual renewal form. This includes contracts for:

- work as a preferred supplier of Legal or other Services
- remote suppliers
- independent children's lawyers or separate representatives
- panel practitioners.

CHAPTER 8

Services for Individuals

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8.1 Written guidelines

This is a Mandatory Standard.

- 8.1.1 Centres must have written guidelines about the types of work – Legal Advice and Other Discrete Assistance Services and Representation and other Ongoing Assistance Services – they will, and will not, take on, including specifying any criteria, parameters and/or priority considerations. These may refer to types and numbers of Services and/or clients. In relation to Ongoing Assistance, the guidelines should include the type, amount or level of Assistance that will be provided to clients. Centres may, but are not required to, also include in these guidelines similar considerations and criteria for providing Services for the Community, such as Community Legal Education, Community Education or Law and Legal Services Reform.
- 8.1.2 All workers and Management Committee members must be familiar with these guidelines and procedures must be developed to ensure that all centre Service Providers, paid and volunteer, comply with them.
- 8.1.3 The guidelines must at the very least take account of the following:
- the particular knowledge and expertise of the Responsible Person and centre staff
 - the capacity of the centre to take on work both generally and specifically of the particular type
 - the available human and other resources of the centre
 - other criteria as determined by the centre (for example, target/priority client groups, funding and funding reporting requirements)
 - the risks associated with certain types of work (for example, wills, personal injury and property matters).
- 8.1.4 Centres that receive funding through the NPA are also required to meet and report on certain Performance Indicators and Benchmarks (clauses 17-18) that relate to Commonwealth Client and Service Priorities and Commonwealth Eligibility Principles set out in in Schedule B of the NPA, and, where relevant, the requirements of their state or territory program's Service Agreement.

8.2 Conflict of interest check

This is a Mandatory Standard.

- 8.2.1 A centre must conduct a full conflict of interest check **before** giving Legal Advice (whether the advice is given in person, on the telephone, or in any other form) or other Discrete Assistance (other than Information or Referral) **or** commencing providing any Ongoing Assistance for a person. There are some very limited situations where a **full** conflict check is not required (set out at **6.7.58-69**) but, absent those exceptional circumstances, this is a mandatory requirement.
- 8.2.2 A full conflict of interest check involves checking the client's name (or names) and the name/s of the other party/ies on the centre's database/s. This is discussed in detail at **6.7** and see also **8.3** below.
- 8.2.3 All centres must have a conflict of interest policy, including an explanation of required procedures that must be followed: see **6.7.6**. Only staff and volunteers who have been trained to identify potential *and actual* conflict of interest should be involved at intake.

8.3 Intake records and procedures

This is a Mandatory Standard.

This section does not refer to contact with a person that only involves providing Information and/or Referral.

- 8.3.1 The following information must be recorded for all potential clients upon intake for Advice or other Discrete Assistance or Ongoing Services or Duty Lawyer Services, including for telephone and face-to-face Advice and/or Legal Task and for Advice given and/or Legal Task performed at outreach programs.

Client's name, date of birth and contact details

- 8.3.2 The client's contact details (full name, date of birth, address and/or phone number) must be recorded wherever possible. The client's full name and any previous or other names including spelling variations should always be recorded. A date of birth is a very useful identifier and must be recorded whenever possible.
- 8.3.3 Exceptional circumstances may exist, such as where the client is unable to provide their address and/or phone number for reasons of homelessness, accommodation in a refuge or mental illness. In these cases the client should be asked whether there is some way they can be contacted (for example, to send correspondence, to leave a message), for example, through a family member, obtaining the phone number of the refuge or of an organisation they come into contact with. If so, the client's permission should be obtained to record that information and to contact them in this way.
- 8.3.4 Where a client is unable or refuses to provide contact details, the client must be told that the centre will not be able to correct, update or add to the Advice given upon checking of the Advice. The fact that this information was given to the client must also be recorded on the Advice record, together with a record that the client refused or was unable to provide those details.

Names of Other Parties

- 8.3.5 The full name or names of any Other Party must be recorded wherever it is/they are ascertainable, unless within the very limited situations set out at **6.7.58-69**. Where the name of the Party is unknown because it could not be obtained, that fact (as well as the steps taken to obtain the name) should be recorded. Where the Other Party is a government agency, the police or a business, that fact and any other specific identifying information available must be recorded.
- 8.3.6 Where a client refuses or is unable to provide the name of the Other Party, the centre cannot provide Legal Advice or other Assistance (other than Information and Referral) except in the very limited situations set out at **6.7.58-69**.

Indication that a conflict of interest check has been performed

- 8.3.7 See **6.7** and see **8.2** above. The conflict of interest check and the result should be recorded on the Legal Advice or other client or Service data record. Some centres stamp the core data/advice record indicating that the check has been done, others write or tick 'conflict check done' on the record.
- 8.3.8 Centres can also incorporate a relevant field into their database to indicate that a conflict check has been done or is not applicable: this is recommended.

Date instructions received

- 8.3.9 This date may be different from the date the Legal Advice or other Discrete Assistance Service is given. Note that the date on which the Service is given must also be recorded.

Type of Service

- 8.3.10 The type of Service will vary according to whether the work is Discrete Assistance or Ongoing, Legal or Non-Legal, Services for Individuals or Services for the Community, but in any event specificity, accuracy and consistency are important. In relation to files and records concerning work that is not direct legal or non-legal Service delivery to clients, but Services for the Community, such as CLE, CE, Law and Legal Services Reform, or media work, see **7.9**.

Client identifier, file number and file register

- 8.3.11 There must be a unique client identifier for every client. This should be a number/s or letter/number combination – it should not be a name as there may be more than one person with that name. Where a file is opened, the file must have a unique file number. All Legal Advice and Other Discrete Assistance records and files must be readily retrievable. Centres must have a central file register in some form (this may be their database or the CLASS data system) and a filing system that allows all client files and other records to be located by name and number and their status (open/closed) recorded and easily ascertained. See also **8.8**.
- 8.3.12 It is desirable that all files for CLE, Law and Legal Service Reform or other Services for the Community also have an identifying file number: see **7.9**. CLASS will assign a unique client and Service identifier for each Service provided. Some legal profession laws may also require additional specific information to be recorded in the file register. For example, NSW and Victoria require the file register to record (in respect of each ‘matter’) the client’s address, the date of receipt of instructions, and a short description of the services, which the legal practice has agreed to provide (as well as the client identifier).⁵⁶

8.4 Instructions**This is a Mandatory Standard.**

This section does not refer to contact with a person that only involves providing Information and/or Referral.

- 8.4.1 All legal and non-legal problems must be recorded legibly and in sufficient detail so that the nature of the problem and client’s enquiry is clear. An outline of instructions should include a record of the relevant facts and the client’s instructions as to what issues they want resolved and in what way. The record should also include the nature of the Assistance that the client is seeking or that is required to address the problem, the form of Discrete Assistance or Ongoing Assistance Service that the Service Provider or centre is to provide, and that the client accepts this. Copies of any letters or other relevant documents that are relevant to the problem must be securely fastened to the client Legal Advice or other Discrete Assistance or Ongoing Assistance record or file.
- 8.4.2 It may be prudent, at least in some instances and where practicable, to have the client sign a record confirming the instructions. In the case of Ongoing Assistance, at least with regard to legal Services, it is recommended that a letter of engagement or letter confirming the instructions is sent or provided as soon as possible after instructions are taken.

⁵⁶ *Legal Profession Uniform General Rules 2015*(NSW; Vic) r 93(2).

8.5 Legal Advice and other Discrete Assistance Services

This is a Mandatory Standard.

Professional basis for Advice must be disclosed

- 8.5.1 People who are not legally qualified or who are legally qualified but do not have a current practising certificate must not hold themselves out as a lawyer or otherwise imply or allow by their behaviour others to reasonably infer, that they are a lawyer.
- 8.5.2 This issue can be particularly relevant for workers in some auspiced or specialist projects (for example, WDVCS⁵⁷ or other court support workers), or law students and other volunteers involved in initial interviews or follow up attendances. They should introduce themselves and tell the client immediately or as soon as is practicably possible what their status is with words to the effect of 'I am not a lawyer, I am a law student' or 'I am not a lawyer, I am a tenancy worker'. Similarly, it is just as important for any Service Provider to identify as soon as possible their role and relevant experience and expertise, including whether they are a lawyer or non-lawyer. For example, a social worker, domestic violence counsellor or financial counsellor should make their qualifications and role clear, as well as correcting or avoiding any possible misunderstandings about their experience and role. Any titles used by workers should be clear and unambiguous. Legal profession rules in the different jurisdictions set out the appropriate use of lawyer titles.

Record of Advice given to client

- 8.5.3 A record of all Advice given must be noted on the client's file or Advice record. This must be legible and recorded in sufficient detail so that it is clear to **anyone** who reads it what Advice was given to the client, and who provided that Service and on what date. Any other Assistance provided, for example a Legal Task or Referrals or other Information should also be recorded.

Limitation and other critical date/s

- 8.5.4 When first seeing a client and obtaining instructions, one of the lawyer's first priorities is to ascertain if the type of problem is such that there is or may be a limitation or other critical date/s.
- 8.5.5 A client may approach a centre with one or a number of different problems, or a number of possible causes of action may arise out of the same set of facts (for example, victim's compensation, worker's compensation, personal injury claim). The client must be advised of all relevant limitation dates or if the precise date is not known, the relevant limitation period for each possible cause of action. The worker should record on the Service record/file that the client has been advised of relevant limitation dates, what the limitation date/s and appropriate forewarning dates are, and these dates must also be recorded in the centre's file register/ review system. If the centre is not able to advise in any particular area of law, the client must be told that advice should be obtained in relation to those areas and, as limitation dates may apply, that advice should be sought immediately.
- 8.5.6 These practices should also be followed, adapted as necessary, for any other critical dates, for example court dates.

⁵⁷ Wome's Domestic Violence Court Advocacy Services (in NSW).

Date and signature of person giving Advice

- 8.5.7 The person giving the Advice must record their name, and sign and date the Advice record. Where no paper copy exists the electronic record must clearly record who gave the Advice and the date it was given.

Legal Advice and other assistance given by email or other forms of electronic communication

- 8.5.8 Centres may wish to provide Legal Advice and perhaps Legal Task assistance (for example, assistance with drafting a document) or Discrete Non-Legal Support or Information or Referral by email or other forms of electronic communication so as to increase accessibility, for example to people with a disability. Centres must have a policy and procedures for how Service Providers may provide Services by email (and other electronic communications with clients): see 7.5. Even if a centre decides not to provide Discrete Assistance by email or other forms of electronic communication, it must still have a policy for dealing with people who may make contact via email or other forms of electronic communication, including if and when and how a Service Provider should respond.
- 8.5.9 If a centre provides Legal Advice or other Discrete Assistance by email or another form of electronic communication, the Mandatory Standards in this Guide apply to the provision of that service in the same way as to advice/assistance given in person, by telephone or by hard copy written communication. For example: a conflict of interest check must be done before giving Advice by email or another form of electronic communication and a record made and kept that this was done.
- 8.5.10 A centre's electronic communications policy must, as a minimum:
- require messages to be appended with an appropriate disclaimer concerning confidentiality, privilege and incorrect addressees (some examples appear at Appendix F)
 - outline the centre's procedure for dealing with (new) email inquiries and requests for Information or Advice. (For example, '[Centre] does not provide Legal Advice by email. Please telephone to make an appointment...')
 - if Advice is given by email, ensure that the policy and procedures incorporate the relevant Mandatory Standards of this Guide, for example, conflict of interest checks, recording of client and Service data, file opening, checking of Advice and any other Discrete Assistance provided
 - require that all email or other forms of electronic communication relating to clients receiving Ongoing Services, are printed out and placed in their hard copy file and/or filed and stored on their electronic file
 - ensure that confidential information is protected adequately. Sending of confidential information by email or other forms of electronic communication should be avoided as much as possible because it is not secure – and indeed may be passing outside of Australia. If confidential information must be sent, ideally it should be protected for example by 'read only' format and/or by a password. If confidential information is received by email it should be recorded elsewhere, for example stored in a secure electronic client file or a copy printed out and placed on a hard copy file, and its confidentiality protected in the same way as other hard copy material on the file.

A sample Email Policy appears at **Appendix F**.

Advice to third parties

- 8.5.11 Centres must not provide Advice to a third party (that is, to a person who requests Advice on behalf of another person) except in exceptional circumstances, for example:
- it is a person who clearly acts with the client's consent or with clear delegated authority from an organisation
 - it is a person representing the client in a professional capacity, for example, a solicitor, a social worker, welfare worker and/or financial counsellor
 - the client is physically incapacitated or hospitalised, and
 - the client lacks the capacity to give instructions, or
 - a power of attorney or guardianship is held (and the Service Provider has sighted these documents).
- 8.5.12 The primary reason for this is that it is that the third person is outside the privileged solicitor/client relationship and also it not possible to be certain that the third party is aware of all the relevant facts or giving correct or complete instructions to the Service Provider, nor is it possible to be certain that the Advice given to the third party will be relayed entirely or accurately. In addition, there may be, or there may develop, a conflict of interest between the third party and the client.
- 8.5.13 Before providing Advice to a third party, the Service Provider should ascertain whether it is possible to communicate directly with the actual client. If it is not, there should be some recorded evidence that the Service Provider has used their best endeavours in the circumstances to confirm that the third party is acting for and in the best interests of the client and that there is no reasonable basis for thinking that there is a conflict of interest between the third party and the client.
- 8.5.14 If the centre intends to provide Advice, the actual client's name and the name/s of Other Parties must be obtained so a conflict check can be performed and details entered on the relevant database. It is good practice to also record the name of the third party, at least on the Advice record or file.
- 8.5.15 See the discussion at **6.7.23-26** on some of the risks and considerations to be taken into account where a centre lawyer or other Service Provider is consulted by a lawyer or Service Provider from another centre or organisation who has the direct contact with the client.
- Retention and destruction of Advice records**
- 8.5.16 An Advice record (known in some centres as an advice sheet) is a record of a one-off, Advice and, if relevant, other Discrete Assistance provided at the same time to a client. (Advice may of course also be given at the beginning of or during the course of the provision of an Ongoing Assistance Service, in which case it would be recorded on the file relating to that Service.) Centres must keep every Advice record for at least 7 years from the date the Advice was provided. Generally after this time the record may be destroyed, without notice to the client. However, before doing so centres should consider whether in a particular instance there are circumstances warranting a longer period of retention, including the provisions of relevant legislation concerning limitation periods, such as where the client is or was a child or otherwise under a legal disability at the time the Service was provided.
- 8.5.17 Before destroying any documents or copies of documents attached to a Advice record a centre must consider whether those documents ought to be returned to

the client, for example, they are originals or other documents to which a client is entitled.

- 8.5.18 Where a file is opened in relation to an Ongoing Assistance Service provided to a client, see **8.14** regarding archiving and destruction requirements.

Duty Lawyer Services

- 8.5.19 Services delivered by Duty Lawyers will generally be Discrete Assistance Services. The above requirements therefore also apply to any Advice or other Discrete Assistance that is provided as a Duty Lawyer Service. Duty Lawyer Services may also lead to further and ongoing assistance being provided, in which case the requirements of the Guide will apply as such.

8.6 Ongoing Assistance Services

This is a Mandatory Standard.

The above requirements in relation to Legal Advice and other Discrete Assistance Services apply also to Ongoing Assistance Services, indeed many such Services commence as a request for Legal Advice and then or at some later point, the Service Provider will form the view that the client's problem should be taken on by the centre for Ongoing Service provision.

8.7 Centre's database and its role in centre risk management

- 8.7.1 Many CLCs have relied heavily for several years on CLSIS for managing key areas of legal practice risk management in centres, particularly with regard to conflict checking. CLASS has been developed to provide the same functionality as CLSIS for conflict checking.

Data entry for conflict checking – accuracy and completeness

- 8.7.2 Conflict checking using any database is only as reliable as the quality of the data recording and data entry that centres maintain. Further, to be most effective, centres must implement a number of access and usage protocols and standards required by CLASS or their own database provider.
- 8.7.3 For effective and reliable conflict checking, data entry must be accurate and complete. The client's name is the primary data used in conflict checking, and special care must be taken when entering this data. Any other names that are or have been used by the client and/or alternative spellings should also be recorded with equal care. Accurately recording the name of the Other Party or Parties is also critical.
- 8.7.4 Supplementary data that can be used to identify a client should be collected wherever possible. This includes date of birth, full address details, and phone number – research has shown that a person's mobile telephone number is one of the most reliable identifiers, particularly over time.

Other Parties and related clients

- 8.7.5 A reliable conflict check is possible only if complete details of the Other Party or Parties have been recorded (see *Names of Other Parties* above at **8.3.5**). In all matters – other than those within the very limited exceptions at **6.7.58-69** and the very few types of legal problem that do not involve Other Parties – the names of **all** Other Parties must be recorded in the centre's database. The accuracy of Other Party identifying data is no less important than that of client's. Where Legal Advice or another Discrete Assistance or Ongoing Assistance has been provided

to more than one person – for example advice to a married couple – one client’s details must be entered into the ‘client details’ screen, and the other client should still be recorded as ‘Related client’ or whatever name for other client the database provides.

Duplicate clients

- 8.7.6 Each **client** must be recorded only once in CLASS, or the database the centre uses. If there is more than one record for a client there is a risk that information about the client, including their service history, is spread among multiple client records. This increases the risk of incorrect results from the conflict check. Duplicate client data should be corrected as soon as possible, and workers undertaking data entry should be trained to avoid creating duplicate client entries.

Timeliness of data entry

- 8.7.7 It is mandatory that client details and Service data is recorded in CLASS or the centre’s own database as soon as possible. CLASS is cloud-based and it is expected that some Service Providers will enter the client and Service data at the time of Service provision. Where Service Providers complete hard copy records first, for entry by others later, it is critical that this is done very promptly. Delay in entering data into CLASS or other database substantially increases the risk of incorrect conflict check results.

- 8.7.8 It is recommended that, where the data system permits, centres consider making ‘temporary data entries’ for clients making appointments to ensure that accurate conflict checking occurs during the period between the time when the client is given an appointment and when they attend it. This way, if the Other Party contacts the centre for Legal Advice or other Assistance in that period, the centre will be able to identify that it has a conflict of interest and can make an appropriate Referral for the second party. Once the client has attended for Advice, the data entry is updated to note that the client has attended for Advice and the ‘temporary entry’ is deleted.

Training for conflict checking

- 8.7.9 Workers responsible for undertaking conflict checks must receive adequate training. In addition, all workers entering client and Service data must be properly trained both about use of the data system itself and to be made fully aware of the requirements for data completeness and accuracy, and its critical importance to conflict checking and the role of the data system in identifying and managing conflict risk at the centre.

- 8.7.10 All Service Providers providing Legal Advice or other Discrete Assistance or Ongoing Assistance Services to Individuals must be trained in the conflict checking procedures established and implemented at the centre. See also **6.7.7**.

Data definitions and training

- 8.7.11 Centres funded and reporting under the NPA must comply with the Commonwealth’s DSM and NPA data reporting requirements⁵⁸, including data definitions. The people providing Discrete and Ongoing Assistance services are the primary data collectors for CLASS, and must be fully trained in correct data collection procedures, and possess a thorough understanding of the data definitions.

⁵⁸ DSM Services type definitions are included in the Glossary at the beginning of this Guide, and within the DSM, available at: Attorney-General’s Department, *National Legal Assistance Data Standards* <<https://www.ag.gov.au/LegalSystem/Legalaidprogrammes/Pages/National-Legal-Assistance-Data-Standards.aspx>> (accessed 31 January 2017).

- 8.7.12 Staff must not enter data into CLASS or their centre's own database before undergoing formal training in the relevant data system. Training, including online training, for access and use of CLASS is available for all CLASS users from NACLCL, which also provides a CLASS Helpdesk that is generally free to users.

Scope of data recording in centres' databases

- 8.7.13 There was considerable diversity across centres in the extent to which detailed Service data was recorded in CLSIS, and this will no doubt be the case in CLASS or in centres that use their own databases. Some enter minimum data necessary to fulfil funding accountability and conflict checking requirements, keeping detailed records on hard copy files, while others now maintain detailed digital records or even complete files of client Services.
- 8.7.14 Where there is substantial destruction of paper files due to fire, flood, theft or other major event, the centre's database may be the only remaining source of client data. On the other hand, electronic records can also be vulnerable and centres must verify for themselves that confidential information and other valuable information and records are secure and protected. CLASS has a number of security measures to protect centres from loss of data (such as data being replicated on two separately located servers in Australia). Centres using other databases should ensure that their records are backed up on a server or hard copy as they see fit. Centres may still be wise to keep all hard copy records of their clients and Services.

Data security and unauthorised access

- 8.7.15 Of necessity, CLASS and any centre's own database contain confidential information about clients. It is the responsibility of the centre to protect client confidentiality by ensuring that unauthorised access to client data does not occur. Access and usage protocols and security instructions must be followed meticulously and consistently by all centre staff and any volunteers authorised to access the data system in any part. As a general rule, centres should only give each 'user' the access permissions they require to undertake their duties.
- Any centre that uses a database that is located on their server locally should ensure that their data is backed up weekly.

8.8 Files

- 8.8.1 Centres need to ensure that all Service Providers comply with good legal practice management file keeping standards. In this standard, 'files' refers to both hard copy documents and electronic files or records relating to a client Service.

File number and file record

This is a Mandatory Standard.

- 8.8.2 The Ongoing Assistance Service will already have been given a file number (see **8.3 Intake records and procedures** above). The centre's central file register system must also record that a file has been opened as an Ongoing Assistance file (of whatever type of Service) and when.

Letter of engagement or client/litigation agreement

- 8.8.3 Whenever Ongoing Assistance is undertaken and a file is opened, it is mandatory that the client is advised of the Services that the centre has agreed to provide and that a short description of this is recorded in the file (and, sometimes, in the file register⁵⁹). It is recommended, as good practice, that a 'client/litigation agreement'

⁵⁹ *Legal Profession Uniform General Rules 2015* (NSW; Vic) r 93(2).

or a 'letter of engagement' or written 'retainer' is provided to the client, if appropriate. (See definition in **Glossary** and see the sample letters of engagement at **Appendix J**). This is a **Mandatory Standard** in circumstances where the legal profession laws of the particular state or territory require it. In some cases, for example where work is done quickly to meet a deadline, this may not be practical. In those cases it is desirable to provide the client with written confirmation of the work that was undertaken as soon as is possible afterwards, if that is practicable.

8.8.4 Even if it is not practical to get a client agreement signed, it is good practice to confirm the following in writing to your client:

- what your centre is agreeing to do
- what you are not agreeing to do
- what happens if further Representation or other Ongoing Assistance is required.

Limitation date

This is a Mandatory Standard.

8.8.5 Legal problems to which a limitation date or dates apply must have the date marked prominently on or near the front of the file. If no limitation date is applicable, this must be noted prominently on the file as 'N/A'. Similarly, if the limitation date has expired, this must be prominently indicated as 'expired'. Limitation dates must also be recorded and monitored in the centre's file review system. In situations where the centre is only acting for the client in one of a number of possible actions, it must be noted in the file that the client has been advised of the limitation dates for all possible causes of action, and what they were advised in relation to each. (This is usually on the initial advice sheet or by way of a letter of advice. The limitation date relevant to the cause/s of action for which the centre represents the client is the only limitation date that must be noted on the file in the space for recording limitation date/s.)

Front of file information

This is a Mandatory Standard.

8.8.6 The following information must be recorded prominently on or at the front (for example, inside the front cover) of all Representation or other Ongoing Assistance files:

- full name/s, address and telephone number/s of client
- full name/s of the Other Party or Parties
- indication that a conflict of interest check has been done
- problem type
- file number
- limitation date (see above)
- other critical dates (if any)
- action and review dates
- name of worker responsible for file.

Centres should consider client confidentiality when determining what information will appear on the outside cover of a file.

- 8.8.7 The following information must be recorded in the file when a new Representation or other Ongoing Assistance file is opened:
- outline of the client's problem
 - outline of the Legal Advice or Legal Task or any other Service given (*if any*)
 - date file opened (*this may be recorded on the front of the file*)
 - date instructions first received
 - date Legal Advice given and/or other Service provided (if any).

- 8.8.8 Legal profession laws may prescribe additional requirements. For example, practitioners in NSW and Victoria are required⁶⁰ to record (in the file register, in respect of each 'matter') a short description of the services that the legal practitioner has agreed to provide. The Responsible Person should check whether there are any such additional requirements in their jurisdiction and where there are, ensure that all Service Providers at their centre comply with them.

File notes

This is a Mandatory Standard.

- 8.8.9 File notes must be made of all telephone or face-to-face attendances with the client or any other person spoken to in relation to the client's problem. File notes should also be made of text messages sent or received or any other electronic communication. The file notes must be legible, dated, indicate the circumstances in which the note was made (for example, face-to-face, or telephone), note the name of the person making the file note, be signed or initialled (either by hand or electronically) by the person making the file note (including file notes on electronic files), and secured in the file or, in the case of electronic files, be included in the client's Service file or folder.

Incoming or outgoing calls

This is a Mandatory Standard.

- 8.8.10 Records must be made of all incoming and outgoing calls made or received in relation to each client's case, by the person who takes or makes a call in relation to it. It is good practice (and can be relevant to costs recovery, to record whether each call was made from or received by the Service Provider). Messages taken from callers, as with any other record of communication about the matter, must be secured appropriately in the file or entered into the electronic file.

Correspondence, court documents, evidence and disbursements

This is a Mandatory Standard.

- 8.8.11 Unless there is only an electronic file, copies of all correspondence, including emails, should be kept on the hard copy file. Files should be kept in a sensible and logical order, with court documents and evidence separated from file notes and correspondence. File notes and correspondence should be secured to the file in chronological order, usually and most conveniently in reverse chronological order.
- 8.8.12 Electronic records, including original records or copies of material on the hard copy file, should be stored in an electronic file dedicated to and easily identifiable as

⁶⁰ *Legal Profession Uniform General Rules 2015* (NSW; Vic) r 93(2)(c).

the particular client Service file or folder. It is good practice for that folder to have sub-folders that reflect the hard copy file, for example, 'correspondence' and 'court documents'.

- 8.8.13 Records of disbursements or any other financial information and records should be kept together and separate from other documents on the file.

8.9 Client information security

This is a Mandatory Standard.

- 8.9.1 Centres must protect client confidentiality (see 6.6) and client legal privilege (see 8.15) by ensuring that unauthorised access to client information does not occur. Physical files must be kept in a secure location and in such a way as to prevent unauthorised (including inadvertent) access or the unauthorised imparting of client information (this includes leaving a file in a place where the client's name may be seen by others). Electronic files, records and data concerning clients must be kept on a secure computer network that is protected from unauthorised access from outside the centre.

- 8.9.2 Within the centre, strong passwords should be required to access any computer on the centre's network and strict permissions management should operate. All centre data that is kept locally must be backed up at least weekly. Mobile devices (for example, smart phones, laptops, notebooks) that may contain confidential client information should be strongly password protected and always kept in a highly secure place and manner. Portable data storage devices (for example, USB flash drives) containing client information need to be treated like files containing confidential information and should be securely managed and stored. Remote access should not be used unless it can be done in a secure manner.

8.10 File movements

This is a Mandatory Standard.

- 8.10.1 While it is good risk minimisation practice to limit file movements between the centre and other locations, it is sometimes necessary for files to be taken elsewhere, such as to court, counsel's chambers, prison, mediation, a centre branch office, or to a client interview at an outreach clinic or the client's home, or travelling to any of these locations. Where this occurs, the centre must take all reasonable steps to maintain the security of the file/s, to minimise the risk of a file being damaged or lost and to protect client confidentiality.
- 8.10.2 Each centre must have, maintain and use a central file register in some form (see 8.3.11). It is strongly recommended as good practice that any file movements, that is any movement from its primary place, be recorded. Ideally the register should record the current location of the file, the date and the name of the person who has the file.
- 8.10.3 Other good practice rules to reduce the risk of the file getting lost or damaged, or falling into the hands of a third party, include that:
- the file should never leave the office unless it is necessary
 - the current location of every file, the name of any person who removes the file, date of removal and purpose/destination is recorded in a file movement register or some other written record available at the centre
 - the file should not be left in a car if at all possible but if it is, it must be locked away and out of sight

- if a file is taken outside all effort should be made to conceal the name and identifying details of the client and ideally the file should be conveyed in a briefcase or bag
- the file must not be left unattended in a public or a publicly accessible place.

8.10.4

A client's 'file' includes all client information including emails and electronic records. Similar common-sense good-practice rules should be applied to client information in this form, for example:

- client data should not be taken out of the office on memory sticks or CDs etc unless it is absolutely necessary and is strongly password protected or encrypted
- client data stored on a laptop or mobile phone or other device taken outside the centre should also be strongly password or otherwise security protected.

8.11 Client records

Client records can include a wide range of forms:

- client intake sheets
- diaries, booking sheets
- journals and communication books
- notes, whether handwritten or typed
- correspondence
- emails and their attachments
- copies or originals of documents about the client or their legal and related problem/s including medical records and expert opinions
- records of Service/s provided to the client
- database records
- audio, dictation and video tapes
- digital files
- photographs, scans, images.

8.12 File ownership

8.12.1

Generally, a client's legal file is owned in part by the client (for example, original client documents) and in part by the centre (for example, file notes). Centres need to be familiar with the principles concerning ownership of legal and other files, as well as consider any implications of the relevant privacy laws in relation to clients' entitlements to access information held about them: see **8.19**.

8.12.2

Centre staff and volunteers do not own client files and must not treat them as their property. When the employment or volunteer relationship ends, the files and records remain with the centre.

8.12.3

In some service agreements, funding bodies claim ownership of files, parts of them, or of some information or records. Centres should consider any such clauses carefully before agreeing to any service agreement and ensure that they are only agreeing to terms with which they can and will comply.

8.12.4

The claiming of ownership of, or even a right of access to, client legal files by a funding body is particularly contentious because the centre is obliged to protect

its clients' legal privilege. If a funding body, or any other third party seeks access to the file, the centre is obliged to claim privilege (on their client's behalf) and deny that party access to privileged parts of the file unless and until they have the express consent of the client to release those parts to that person or body.

8.12.5 This privilege may apply to files containing any client information. It refers not just to hard copy but also to electronic communications.

8.12.6 It is very important that each centre understand the legal situation in relation to all the files and client records and information that their centre possesses and consider if, when and how they explain that situation to clients and how to protect client privilege where relevant, as well as ensure that their lawyers meet their duty to protect client confidentiality – the two overlap, but are different.

8.13 Closing files

Preparation for closure

This is a Mandatory Standard.

8.13.1 Before a file is closed, it must be reviewed by a Responsible Person or Nominated Person to ensure that the following requirements have been complied with:

- the client is advised in writing:
 - that the file is about to be closed
 - that the file will be destroyed after seven years (or other date as applicable) (see below)
 - of relevant limitation dates (if any).
- the following administrative process has been completed:
 - any original documents provided by or obtained on behalf of the client have been returned to the client
 - all bills have been paid, trust statements sent and unused trust monies returned and accounted for, any transit money has been passed on to the appropriate person/body
 - the date the file is closed is recorded on, at a minimum, the central file register and the file itself.

Closure

This is a Mandatory Standard.

8.13.2 The file must be closed on the centre's file register.

8.13.3 There must either be a record on the file that the above things have been done (for example by way of a checklist) or an explanation as to why they have not been done.

8.14 Archiving and destruction

This is a Mandatory Standard.

8.14.1 All files must be kept for a minimum of seven years from the date that the file is closed. In relation to particular clients and particular types of legal issues a longer period may be required by law and the Responsible Person must ascertain the requirements (if any) that apply in their jurisdiction to the particular type of legal issue and ensure those requirements are complied with. For example, in respect of a client under a legal disability (such as being under 18 or some people with an intellectual disability or mental illness) it may be necessary in a particular

jurisdiction, or at least prudent, to retain the file beyond the seven-year period. See **8.14.7** *Destroying files* below.

Archiving files physically

8.14.2 After files are closed on CLASS or any other database the file can be physically archived. Archival arrangements differ from centre to centre but should at least meet the following criteria:

- files must be stored in a secure environment away from public and unauthorised access, even inadvertent access
- files should be archived in such a way as to allow necessary access to check potential conflicts of interest and/or take copies of or return client documents where such a request is made. Some centres archive files by the year they were closed and in alphabetic order (client family name) for each year. Other centres archive by CLSIS/CLASS file number or centre file register number
- where the file is not to be destroyed this must be clearly marked on the file – a destruction date should be marked on files as part of the closure and archival process
- how long files are kept will vary depending on jurisdictional requirements in relation to particular types of legal problems and each centre should investigate this issue including the range of laws that apply to archiving and destruction of client files, both legal and non legal
- service agreements and funding arrangements may create additional archival or destruction criteria and these should be considered, as relevant, by each centre.

Archiving files electronically

8.14.3 If a centre intends to electronically archive client data it should seek advice about the application of any state or territory privacy, information or archives laws that affect archiving of electronic records and develop a policy that deals with security and integrity of the data. If a centre intends to archive files electronically (for example, via an online document management system, or scanning physical files to make an electronic record for storage purposes) the client's consent will be required before destroying documents to which the client is entitled (see **8.14.7-10**). A system of electronic storage that satisfies the key requirements of reliability, integrity and accessibility as set out in relevant legislation can be implemented⁶¹. A document that records the electronic storage process and policies should also be prepared.⁶²

8.14.4 Some documents must be stored in their original hard copy form and in a safe and easily accessible location, for example:⁶³

- title deeds and any documents recording dealings with land
- wills
- original executed agreements
- powers of attorneys or other similar authorisations; and
- any other documents or things held by the centre for safekeeping.

⁶¹ For example, in WA: *Electronic Transactions Act 2011* (WA) s 12.

⁶² See: *AS ISO 15489 Australian Standard on Records Management*.

⁶³ For example, in WA: *Legal Profession Conduct Rules 2010* r 28(4).

- 8.14.5 Client files that are in electronic form must be retained for the same period of time as for a physical file. A centre will need the client's consent to destroy documents to which the client is entitled even if they are in electronic form (see **8.14.7**).

CL SIS and CLASS records

- 8.14.6 CL SIS records were required to be kept indefinitely in order for them to be available to be assessed for potential conflicts of interest. CL SIS records could not ever be 'archived' in the sense of being deleted from the CL SIS database as this deleted them from the National Processing Centre (NPC) database. The Attorney-General's Department required access to all NPC records for long term statistical reporting and analysis.

All centres' data that was in CL SIS is being migrated into CLASS. The client data that was in CL SIS will therefore be available in CLASS for ongoing conflict checking. CLASS records must also be retained indefinitely.

Destroying files

- 8.14.7 A file (physical or electronic) usually comprises a range of things including correspondence, file notes and reports (see **8.11**). Some of the records in a file may be the client's documents or documents to which the client is entitled.⁶⁴ Client consent must be obtained to destroy documents to which the client is entitled. Centres must comply with relevant legal profession rules in their jurisdiction. Informed consent should ideally be obtained at the outset of the matter and in writing. This could be done in a letter of engagement/client agreement or a client authority, for example:

Once your file has been closed [Centre] is required to keep it for a period of 7 years after which time your file will be destroyed. Please sign below to indicate your consent to this process.

See also the sample letters of engagement at **Appendix J**.

- 8.14.8 It is recommended as good practice that centres make and maintain a record of the name, file number and destruction date of each file destroyed.
- 8.14.9 A useful sample *File Destruction Checklist* is at **Appendix I** to this Guide. This checklist was drafted by and for Queensland CLCs. Centres in other states or territories should ensure that their specific jurisdiction's requirements are met, and amend this list as appropriate before using.
- 8.14.10 Special considerations apply to the destruction of files containing instructions for wills and powers of attorney (POA), draft wills and POA and associated documentation. This is because problems (for example, questions of capacity, lost wills, negligence) do not crystallise until the testator's death or the POA is exercised, which may be many years after the document is executed. It is strongly recommended as good practice that files containing instructions for wills and POA and draft wills and POA not be destroyed for at least 6 years after a cause of action might accrue. For example, a cause of action might not accrue to a named beneficiary until the testator has died and the executor has assumed office. If the centre retains the original will it must not be kept on the file, rather it must be kept in a secure place with a Wills/Safe Custody Register (however described) that complies with applicable legal profession legislation.

⁶⁴ Centres will need to consider any implications of the relevant privacy laws in relation to clients' entitlements to information held about them: see **8.19**.

8.15 Client legal privilege

This is a Mandatory Standard.

8.15.1 Client legal privilege can be defined as:

the right of a person to have withheld from evidence communications between that person and his/her adviser (or between the legal adviser and a third party), made in the course ... of obtaining legal advice or with reference to litigation.⁶⁵

Those communications can be in hard copy, electronic or other forms.

8.15.2 When considering the topic of privilege, the centre should ensure that it has policies and procedures to identify and protect privilege. Staff and volunteers should be trained in this area.

8.15.3 While other professions such as accountants and social workers may also be governed by professional codes that require those professionals to treat client information as confidential, only client legal privilege is 'absolute' as opposed to 'qualified' in nature.

8.16 Third party access to client information

8.16.1 There are some situations where a centre is obliged to give access to client information/records to a third party, for example, pursuant to discovery orders or subpoenas or obligations under legislation to report certain types of offences. A centre can also obtain a client's consent to be able to disclose information/records to a third party.

8.16.2 Each court has its own rules that set out the way in which information relevant to a court case can be obtained from the parties to the dispute and from third parties, or non-parties as they are often known. If a centre receives a request of this nature it should seek legal advice and also assistance from the PII representative. The centre should also advise the client of the request, unless they are legally obliged not to.

Third party or non-party disclosure

8.16.3 Third party or non-party disclosure occurs where a party in legal proceedings seeks documents or records held by a third party.⁶⁶ This is in addition to the power to issue a subpoena against documents held by a third party. Non-party disclosure can be required when:

- the document sought is directly relevant to an allegation at issue in the pleadings
- the document sought is in the possession or under the control of the respondent (that is, the recipient of the notice to disclose), and
- the document is one that could be required to be produced at trial.

8.16.4 Where a notice of non-party disclosure is received by a client or by the centre itself, the centre should check that the notice states the allegation about which the document is directly relevant, and certifies that there is no other way to obtain the documents.

⁶⁵ CCH *Macquarie Concise Dictionary of Modern Law* (CCH Australia Limited North Ryde 1988) page 77. See also the definition of 'legal professional privilege' in LexisNexis, *Encyclopaedic Australian Legal Dictionary*, which includes case references.

⁶⁶ In Qld: *Uniform Civil Procedure Rules 1999*, s 242.

8.16.5 The non-party can object to disclosure on a number of grounds, such as:

- the expense or inconvenience of production
- the irrelevance of the document
- lack of particularity
- confidentiality
- effects of disclosure on any person
- failure to effect proper service.

8.16.6 In the event that the centre receives a request of this nature it should seek legal advice and should seek assistance from the PII representative.

Subpoenas

8.16.7 A subpoena to produce documents differs from a notice for non-party disclosure. A subpoena is a legal document issued by the court to produce documents, give evidence, or both.⁶⁷ A subpoena requires attendance before the court and can be requested by either party or issued by the court of its own accord. Like disclosure, an argument can be put to the court that the subpoena should be set aside for reasons such as:

- the request is irrelevant
- the information or documents are privileged
- responding would be oppressive, including involving substantial expense
- failure to comply with the rules (for example, not accompanied by 'conduct money' or not properly served).

8.16.8 It is important to seek advice and prepare a response as soon as a subpoena is received and not leave it to the last minute, or fail to attend court to respond, even if the centre's argument is that it did not have to comply.

8.16.9 Failure to comply with a subpoena is contempt of court.

8.17 Coercive powers

8.17.1 There are some statutory examples of coercive powers where a person can be compelled to provide information even where the:

- information is privileged
- information is confidential
- person giving the information may incriminate themselves
- person giving the information may incriminate another person.

Commissions of inquiry and statutory agencies, for example, often have information gathering powers that are very broad ranging.

8.17.2 It is important in these cases to:

- check the relevant legislation and its requirements and protections if any
- check any penalties for non-compliance

⁶⁷ Cth: *Federal Court Rules 2011*, r 24.12; ACT: *Court Procedures Rules 2006*, reg 6601; NSW: *Uniform Civil Procedure Rules 2005*, reg 33.2; NT: *Supreme Court Rules*, reg 42.02; Qld: *Uniform Civil Procedure Rules 1999*, s 414; SA: *Supreme Court Civil Rules 2006*, r 172; Tas: *Supreme Court Rules 2000*, reg 495; Vic: *Supreme Court (General Civil Procedure) Rules 2015*, reg 42.02; WA: *Rules of the Supreme Court 1971*, O 36B r 2.

- seek legal advice if necessary and inform the PII representative, and
- inform and consult or advise any client whose information is involved.

8.18 Freedom of information

Freedom of Information (FOI) and Right to Information (RTI) laws provide the public with a right to access documents held by government departments, agencies and ministers. FOI laws do not apply to the private or NGO sector, although there are some government-owned corporations that are subject to FOI laws. There are FOI laws at Federal, State and Territory level.⁶⁸ Few community organisations such as centres will be subject to FOI or RTI laws. In the event that the CLC receives a request of this nature it should seek assistance from the PII representative.

8.19 Privacy laws

- 8.19.1 Privacy laws exist at a Federal, State and Territory level.⁶⁹ Each centre needs to determine which laws apply and what steps need to be taken to ensure compliance with the relevant law(s). Centres may also be required to comply with privacy obligations under one or more funding agreements.⁷⁰
- 8.19.2 It is recommended that centres develop a privacy policy. A sample privacy policy is included at **Appendix H**. Centres may also wish to develop separate and/or additional privacy procedures.
- 8.19.3 In the event that the centre receives a request where compliance with the request may breach privacy obligations, it should seek assistance from a relevantly experienced legal adviser and the PII representative.

8.20 Library and archives laws

Library and archives laws exist at a state and federal level. Library and archives laws regulate the storage of official and public records and allow for public access to those records under specific access criteria. Generally, it is safe to assume that these laws will not apply to records kept by CLCs. In the event that a CLC receives a request of this nature it should seek assistance from the PII representative.

⁶⁸ Cth: *Freedom of Information Act 1982*; ACT: *Freedom of Information Act 2016 (which commences on 1 July 2017)*; NSW: *Government Information (Public Access) Act 2009*; NT: *Information Act*; Qld: *Right to Information Act 2009*; SA: *Freedom of Information Act 1991*; Tas: *Right to Information Act 2009*; Vic: *Freedom of Information Act 1982*; WA: *Freedom of Information Act 1992*.

⁶⁹ For example: *Privacy Act 1988* (Cth); in the ACT: *Information Privacy Act 2014*, *Health Records (Privacy and Access) Act 1997*, *Freedom of Information Act 2016 (which commences on 1 July 2017)*, *Territory Records Act 2002* (public records), *Human Rights Act 2004* (right to privacy); in the NT: *Information Act 2002* (privacy, FOI and public records); in NSW: *Privacy and Personal Information Protection Act 1998*, *Health Records and Information Privacy Act 2002*, *Government Information (Public Access) Act 2009*, *State Records Act 1998*; in QLD: *Information Privacy Act 2009*, *Right to Information Act 2009*, *Public Records Act 2002*; in SA: *State Records Act 1997*; in TAS: *Personal Information Protection Act 2004*, *Right to Information Act 2009*; in Vic: *Information Privacy Act 2000*, *Health Records Act 2001*, *Privacy and Data Protection Act 2014* *Charter of Human Rights and Responsibilities Act 2006*, *Freedom of Information Act 1982*, *Public Records Act 1973*; in WA: *Freedom of Information Act 1992*, *State Records Act 2000*

⁷⁰ For example, Centres funded and reporting under the National Partnership Agreement on Legal Assistance Services (NPA) must comply with Commonwealth's National Legal Assistance Data Standards Manual and NPA data reporting requirements. Principle 5 of the Manual requires data to be 'collected, stored and disseminated in accordance with Australian Privacy Principles or the equivalent state or territory privacy law, as well as the relevant legislative and professional requirements'. In addition, the standard terms under funding agreements under the National Partnership on Legal Assistance in some jurisdictions include privacy obligations and requirements.

CHAPTER 9

Cross-checking procedures

In this chapter:

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	9.2.4 Branch offices, cross-border services, and services with more than one Responsible Person	128
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9.1 Introduction

9.1.1 Cross-checking is critical to implementing the National PII Scheme: it ensures and demonstrates that a centre is complying with the Mandatory Standards of the Guide. Participation in cross-checking is required by Standard A1.5 of the Standards set out in the *NAS Guidelines*. Demonstrating satisfactory compliance with this Guide's Mandatory Standards is essential for a centre to participate in and have cover under the National PII Scheme, to satisfactorily meet the NACLC Accreditation Criteria and to comply with the criteria to be a full member of a state or territory association for CLCs.

9.1.2 Cross-checking is also an integral function of the role of the PII committees and PII representatives for monitoring risk management within centres, and for helping individual centres measure their performance on key issues from year to year. It is a method of professional peer review that facilitates good practice and encourages principal solicitors to reflect on the practice systems in their centres and ways in which they can be improved. It provides an opportunity for PII representatives to work with centres to identify and attempt to resolve local or systemic issues that come to light during the cross-checks. Where those issues are not resolved they are taken to the state or territory association and/or the National PII Network for discussion and resolution.

9.2 Participation in annual cross-check and satisfactory compliance with Mandatory Standards of the Guide

This is a Mandatory Standard.

9.2.1 Each centre that is or wishes to be a full member of a state or territory association of CLCs must participate in the annual cross-check, and must demonstrate satisfactory compliance with the Mandatory Standards of the Guide.

9.2.2 An annual cross-check of all centres that are full members of a state or territory CLC association is coordinated by each state or territory PII committee (or similar committee), often supported by the state or territory association, to monitor each participating centre's compliance with the Mandatory Standards in this Guide. All services, programs and projects of each centre are included in the cross-check. The cross-check involves a visit to the centre, and is carried out using the *Cross-check Questionnaire* (see **Appendix D**), which is completed by one or two cross-checkers from another centre/s, the centre's Responsible Person, all Nominated Persons and a volunteer from the centre. Cross-checkers will usually be the Responsible Person in their centre (unless otherwise agreed by the PII Representative).⁷¹

9.2.3 All centres⁷² are cross-checked in this manner, and the completed questionnaires, which include responses by the Responsible Person to any issues arising during the course of the cross-check, are assessed by the PII representative/s. The PII representative may also provide a general report to the PII committee advising of the most common or any systemic faults or issues detected by the cross-checks. The cross-check is designed to check individual centre systems and procedures to ensure that the Mandatory Standards of this Guide are met. A cross-check is **not** a substantive check of the accuracy or quality of the Legal Advice or other Discrete Assistance or Ongoing Service that is given. The Responsible Person in each centre

⁷¹ In exceptional circumstances, and only with prior approval of the state or territory PII Representative, the Responsible Person may delegate the cross-checking role to another senior lawyer within their centre. Prior approval is still required even where the proposed delegate is a Nominated Person.

⁷² Under the NAS, all full member centres are required to be cross-checked even if they are not part of the National PII Scheme.

is responsible for the substantive legal correctness of all *Legal Advice* and other Services to Individuals and relevant Services for the Community (such as CLE), and is responsible for implementing systems and procedures by which that content quality can be checked. The cross-check does verify that the Responsible Person has put in place those and other risk management procedures.

Branch offices, cross-border services, and services with more than one Responsible Person

9.2.4 Where centres have offices or otherwise deliver Services in more than one state or territory,⁷³ and/or with more than one Responsible Person, there will be different requirements for the cross-check procedures, depending on how the centre operates:

A centre that operates as *more than one* distinct legal practice under the one legal entity (whether overseen by one or more than one Responsible Person) is required to undergo a separate full cross-check on each distinct legal practice. Each cross-check should be signed by the Responsible Person for the respective legal practice.

A centre that operates as one legal practice encompassing separate projects, programs or services or branch offices, is required to undergo a full Cross-check Questionnaire in relation to the ‘head office’ (in jurisdiction A), and additional ‘branch office checks’ on the other offices/projects/services in jurisdiction B as per the usual requirements of this Guide for branch office checks, and using Part D of the questionnaire (see **Appendix D**). The ‘branch office checks’ are to be completed against the head office’s full cross-check questionnaire. If there is more than one Responsible Person (for example, one for each branch office or service), then all Responsible Persons will need to jointly sign the same cross-check questionnaire.

9.2.5 A centre that is a member of more than one state or territory CLC Association, regardless of which procedure in 9.2.4 applies, is required to comply with the membership rules for each of those state or territory associations, including:

- 1) Attending the compulsory PII committee meetings of each of the states or territories in which the centre is a member; and
- 2) Participating in the cross-check processes of each state or territory in which the centre is a member if and as required by the respective association, by:
 - a) having the relevant cross-check questionnaires and/or branch office checks undertaken by a cross-checker from the state or territory in which the legal practice has an office or branch office;⁷⁴ and
 - b) undertaking a cross-check of another centre in each state or territory in which they have an office.

9.2.6 Where a branch office check is to be carried out by a different cross-checker than the person who carried out the full head office cross-check (for example, in the

⁷³ This does not refer to centres that are primarily based in one state, but that undertake outreach services in another state or territory, or which provide assistance to clients from another state or territory and where no centre files or records are stored in the other state or territory, provided that the relevant states and/or territories have identical or substantially similar professional conduct rules. In practices such as these but where the relevant states and/or territories do have substantially different legal professional conduct rules, the centre should discuss the cross-check requirements that will apply with their state or territory PII Representative/s.

⁷⁴ This is required in order to satisfy the provision of the common membership rules of all CLC state and territory associations that require the Convenors of the state and territory Associations’ Practice and Insurance Committees of which they are a member to be satisfied that the member centre has the necessary systems to comply with this Guide (see 1.4.4).

case of centres that have offices in more than one state or territory), both cross-checkers will need to discuss the full cross-check questionnaire prior to the branch office check being carried out, in order to ensure consistency.

9.3 Confidentiality

This is a Mandatory Standard.

- 9.3.1 Cross-checkers sign an undertaking on the *Cross-check Questionnaire* that any client and centre information obtained during the cross-check process will be kept confidential as part of the PII process.
- 9.3.2 PII representatives must generally treat information acquired during the cross-check process as confidential and not disclose information that is specific to a particular centre except on a need-to-know basis within and for the purpose of the administration of the Scheme (see **Chapter 3**). Where there is serious and ongoing non-compliance with one or more Mandatory Standards in the Guide, the PII representative and/or committee may have to raise the matter on a need-to-know basis with the state or territory association, the National PII Network and/or NACLC.

CHAPTER 10

Other Insurance

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10.1 Introduction

Insurance is a key risk management tool. There are a number of other insurances that CLCs should or may wish to obtain.

10.2 Public liability insurance

Public liability insurance is the insurance protection afforded to the public for loss arising from injury or property damage arising in connection with the centre's operations (for example, while visiting the centre, being visited by a representative of the centre, or at an event organised by the centre). All centres that are full members of a state or territory CLC association are entitled to be covered by a bulk public liability insurance scheme that has been for a number of years and is still presently provided by NACLCL at no cost to the centre.

10.3 Association liability and directors' and officers' insurance

Directors and officers ('D&O') insurance is designed to protect the personal assets of directors and officers from potentially unlimited financial liability for litigation if it is found that the directors or officers were personally liable for wrongful acts, errors or omissions in the performance of their management duties. NACLCL negotiates nationally and offers member centres an Association Liability Insurance policy that is customised to suit CLCs. It provides a range of insurance cover including for management liability (which includes D&O cover as well as cover for outside entity directors and for internal managers), association liability, employment practices liability (for example, for wrongful dismissal or discrimination claims), fidelity loss, and others. This insurance is available on application through a NACLCL master policy scheme.

10.4 Workers compensation insurance

Workers compensation insurance protects all worker and employee entitlements and costs incurred when a worker is injured – mentally, emotionally or physically. This compulsory insurance is not currently available as part of a NACLCL master policy scheme and should be obtained from an appropriate insurer in the centre's state or territory. A centre that has an employee or employees in another state or territory, will have to take out insurance for that worker in that state or territory.

10.5 Volunteers personal accident insurance

This insurance provides no-fault compensation to volunteers for loss of income or medical expenses flowing from an accident while performing volunteer work (for example, at the centre). This insurance is not currently available under any NACLCL master policy scheme.

10.6 Contents insurance or office pack insurance

Contents insurance covers the building or offices in which the centre is housed. Office Pack Insurance can cover property damage, business interruption losses, theft and money, and glass breakage, among other things. This insurance is not currently available as part of a NACLCL master policy scheme.

Agency Practice Standards

Self-Assessment Template

Purpose

This checklist is a tool to help agencies to assess their compliance with the Agency Practice Standards for Financial Counselling.

Who should use this checklist?

Any agency that offers financial counselling services should use this checklist.

When should this checklist be used?

We recommend that the checklist is used each year to check for compliance with the Agency Practice Standards.

The checklist format

The checklist format allows the agency to tick a column to show that the standards are being achieved or not achieved. There is room for the agency to comment on the rating and/or set out the evidence that underpins the rating.

STANDARD 1 – KEY SERVICE FEATURES

1.1. Service is free to clients

The agency does not impose any fees or charges upon clients in relation to any aspect of the financial counselling service.			
This will be achieved by:	Achieved	Not Achieved	Comment/Evidence
1.1.1. Ensuring that the agency, and each person acting on its behalf, does not request or accept payment of any fees or charges by clients.			
If the boxes above are not able to be ticked, please indicate what actions that Agency will take to ensure it meets this standard:			

1.2. Service is free of conflict of interest

The agency ensures that financial counselling services are provided free of any conflict of interest.			
This will be achieved by:	Achieved	Not Achieved	Comment/Evidence
1.2.1. The agency does not place itself in a position where a relationship with a third party could be seen to conflict with its obligation to provide independent financial counselling services to its clients.			
1.2.2. The agency does not accept a client where the relationship between an individual staff member and a third party could be seen to conflict with the agency's obligation to provide independent financial counselling services to that client. Staff in the agency have a duty to disclose such conflicts.			
1.2.3. The agency does not accept a client where the interests of an individual staff member could be seen to conflict with the agency's obligation to provide independent financial counselling services to that client.			
1.2.4. The agency does not accept a client where providing			

services to that client could be seen to conflict with its obligation to a previous or existing client.			
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If the boxes above are not able to be ticked, please indicate what actions that Agency will take to ensure it meets this standard:

1.3. Service is confidential

The agency ensures that it provides a confidential service and that it collects and stores client information in a manner that respects the client's privacy and maintains the client's confidentiality, subject to any legal limitations (including the Privacy Act 1988).

This will be achieved by:	Achieved	Not Achieved	Comment/Evidence
1.3.1. Ensuring that clients waiting in reception areas cannot inadvertently access or see the personal information of other clients that may be collected at that point or is visible on computer screens.			
1.3.2. Ensuring client interviews are able to be conducted without being overheard by other clients, staff or members of the public.			
1.3.3. Ensuring client registers and client files are kept securely and are only accessed by staff members who have been authorised to do so.			
1.3.4. Ensuring staff do not communicate about the client with a third party unless: <ul data-bbox="405 1050 1032 1311" style="list-style-type: none">• The client has authorised that communication, or• The appropriate supervisor in the service has authorised the communication due to the need to protect the client, a staff member or another person, from imminent risk of serious harm.			

1.3.5. Informing the client why the collection of information is necessary, how that information is stored and for how long, and how the client can access the information if they wish.			
1.3.6. Collecting only such personal information from clients as is necessary to assess the client's needs, provide financial counselling services and meet reporting requirements to funding bodies.			
1.3.7. Ensuring that hard copy and electronic information is stored securely.			
<p>If the boxes above are not able to be ticked, please indicate what actions that Agency will take to ensure it meets this standard:</p>			

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1.4. Service is accessible

The agency ensures that its services are accessible and welcoming to all clients, including people from culturally and linguistically diverse backgrounds, people with disabilities and other people with special needs.

This will be achieved by:	Achieved	Not Achieved	Comment/Evidence
1.4.1. Providing a range of access options including telephone, office visit and, in appropriate circumstances or where required by funding agreements, broader access options including outreach services, video conferencing, Skype or web chat.			
1.4.2. Ensuring interpreters are used where they are required.			
1.4.3. Facilitating reasonable adjustments so that people with disabilities can access the service, for example by making appropriate changes to building access.			

1.4.4. Ensuring reception areas provide a welcoming and comfortable environment.			
1.4.5. Greeting clients in a courteous helpful manner that conveys respect.			
1.4.6. Agreeing to clients' requests to have a support person present unless it is inappropriate, for example, where there may be a conflict of interest.			
If the boxes above are not able to be ticked, please indicate what actions that Agency will take to ensure it meets this standard:			

1.5. Service is equitable

The agency ensures that clients are treated in a fair and non-discriminatory manner.			
This will be achieved by:	Achieved	Not Achieved	Comment/Evidence
1.5.1. Ensuring all clients are treated with respect.			
1.5.2. Ensuring staff are able to provide culturally appropriate services to Aboriginal and Torres Strait Islander clients and to clients from			

culturally and linguistically diverse backgrounds			
1.5.3. Ensuring staff have an understanding of how to work with clients with special needs, for example people affected by domestic violence, homelessness, mental health issues, or addiction.			
1.5.4. Making reasonable adjustments to meet the special needs of clients.			
<p>If the boxes above are not able to be ticked, please indicate what actions that Agency will take to ensure it meets this standard:</p>			

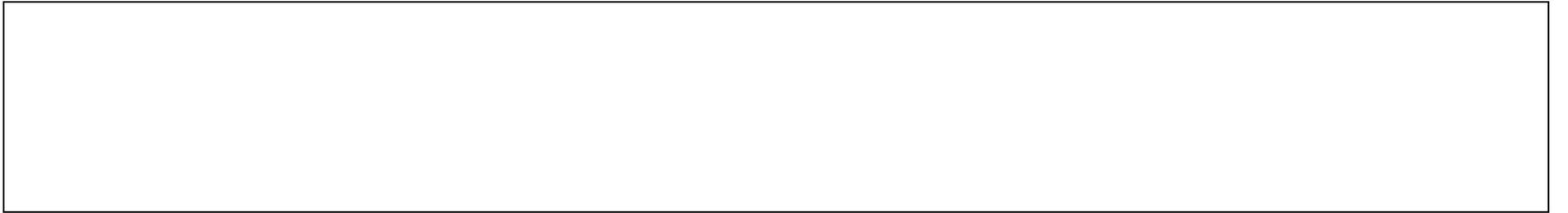
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1.6. Service complies with licensing relief

The agency ensures that it complies with the licensing relief for the agency, under both the *Corporations Act 2001* (ASIC Class Order CO3/1063) and the *National Consumer Credit Protection Regulations 2010* (Regulation 20).

This will be achieved by:	Achieved	Not Achieved	Comment/Evidence
1.6.1. Does not charge any fees or receive any remuneration arising from the financial counselling service.			
1.6.2. Does not run, and is not associated with, a financial services business.			
1.6.3. Ensures its financial counselling staff do not provide any financial product advice or credit activity advice outside the terms of the appropriate licensing exemptions.			

<p>1.6.4. Ensures its financial counsellors are members of, or eligible for membership of, the relevant State or Territory financial counselling association.</p>			
<p>1.6.5. Ensures its financial counsellors have adequate skills and knowledge to deliver the financial counselling service.</p>			<p>This item is addressed by standard 3.</p>
<p>If the boxes above are not able to be ticked, please indicate what actions that Agency will take to ensure it meets this standard:</p>			



1.7. Service complies with Code of Ethical Practice

The agency ensures that the financial counsellors employed comply with the Australian Financial Counselling Code of Ethical Practice.

This will be achieved by:	Achieved	Not Achieved	Comment/Evidence
1.7.1. The financial counsellor has a hard copy of the Code or the agency makes an electronic copy of the Code available.			
1.7.2. The financial counsellor has access to appropriate training about the Code.			
1.7.3. If ethical dilemmas arise, the Code is one mechanism used to help resolve them.			

If the boxes above are not able to be ticked, please indicate what actions that Agency will take to ensure it meets this standard:

1.8. Service integrates casework with policy and systemic advocacy

The agency ensures that casework experience is used to inform its policy and advocacy activities and that of other advocacy bodies.			
This will be achieved by:	Achieved	Not Achieved	Comment/Evidence
1.8.1. Encouraging and supporting financial counsellors to identify policy issues and advocacy opportunities arising from their casework.			
1.8.2. Encouraging and supporting financial counsellors, in ways consistent with the agencies own policies and practices, to contribute to policy development and advocacy opportunities with other organisations.			
If the boxes above are not able to be ticked, please indicate what actions that Agency will take to ensure it meets this standard:			

2. STANDARD 2 – CLIENTS: INTAKE, CASEWORK AND REFERRAL

2.1. Use appropriate intake procedures

The agency uses a systematic and comprehensive intake procedure for all financial counselling clients that assesses the client’s broader needs and ensures that financial counselling is offered only when it is the best option for the client.

This will be achieved by:	Achieved	Not Achieved	Comment/Evidence
2.1.1. Having a documented process that describes how <ul style="list-style-type: none"> • clients’ needs are assessed • clients’ cases are prioritised, including identifying urgent matters and how they will be dealt with • services are matched to clients’ needs 			
2.1.2. Ensuring staff inform the client about the services the agency is able to offer and support the client to make an informed choice about whether to participate in the service.			
2.1.3. Ensuring staff refer the client for other services as appropriate to address broader needs.			

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2.2. Provide casework in a way that builds client capacity

The agency delivered a service that builds the capacity and self-sufficiency of the client in managing their current and future financial issues.

This will be achieved by:	Achieved	Not Achieved	Comment/Evidence
2.2.1. The service maximises the client’s participation in planning, decision-making and the resolution of issues, so that the client determines the course of action.			
2.2.2. That staff assist the client to further understand the cause of their financial problems, identify changes to minimise further financial problems and build financial capability.			

2.3. Conduct casework according to good financial counselling practice

The agency ensures that the casework it conducts reflects good financial counselling practice.

This will be achieved by:	Achieved	Not Achieved	Comment/Evidence
2.3.1. The agency provides a range of resources and tools to assist staff to provide a service that reflects good financial counselling practice including triage tools, and checklists.			
2.3.2. In each case, consideration is given as to whether the client is liable for the debts that are alleged to be owing, and if owing, whether the amount is correctly calculated.			
2.3.3. The agency supports the financially counsellor to act as an advocate when negotiating with third parties.			
2.3.4. Where appropriate, the agency works collaboratively with other support workers who are assisting the client.			

2.3.5. The agency has procedures in place to deal with the situation where the client's ability to provide instructions is uncertain.			
2.3.6. The service provided is within the confines of a financial counselling service and does not exceed it.			
2.3.7. The agency has appropriate procedures in place to review the filework conducted by financial counsellors.			

2.4. Provide appropriate referrals

The agency should provide an effective referral service for clients who need other services in addition to financial counselling or where financial counselling is not the most appropriate service.

	Achieved	Not Achieved	Comment
2.4.1. Maintaining up to date information about legal, health, social and support services that are able to accept referrals.			
2.4.2. Liaising with legal, health, social and support services to develop referral pathways to assist clients to access those services.			

2.4.3. Using warm referrals to assist clients to contact other services in cases where that is necessary.			
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2.5. Provide a compliant handling mechanism

The agency has an effective system for handling complaints.			
This will be achieved by:	Achieved	Not Achieved	Comment/Evidence
2.5.1. Having a documented complaint handling process that is fair, accessible, responsive and efficient.			
2.5.2. Ensuring that clients are aware of their right to make a complaint and how to go about it.			

3. STANDARD 3 – HUMAN AND PHYSICAL RESOURCES

3.1. Engage qualified financial counsellors

The agency engages qualified financial counsellors who have appropriate training and experience, or who, once employed, obtain the relevant qualification.

This will be achieved by ensuring that each staff member who provides financial counselling services for an agency:	Achieved	Not Achieved	Comment/Evidence
3.1.1. Has undergone induction training with the agency.			
3.1.2. Is a member of, or is eligible to be a member of, the financial counselling association in the state or territory in which the financial counsellor works.			
3.1.3. Holds a Diploma of Community Services (Financial Counselling) or is actively studying for this qualification.			
3.1.4. Has the level of skills and knowledge sufficient to provide good quality financial counselling services having regard to the type of service that person provides and having regard to the level of financial counselling expertise and the level of professional supervision available to that			

person.			
3.1.5. Is committed to offering services that are non-judgmental and in the best interests of the client and adequately understands both the personal and systemic causes of financial hardship and the impact financial difficulty can have on an individual's life.			

3.2. Support professional development

The agency supports the professional development of financial counsellors who deliver services on its behalf. In particular the agency ensures that financial counsellors are provided with opportunities for ongoing professional development and professional networking.

This will be achieved by:	Achieved	Not Achieved	Comment/Evidence
3.2.1. Providing access to the necessary information resources so that financial counsellors can maintain and improve their skills and knowledge.			
3.2.2. Supporting financial counsellors to continue their professional development by encouraging their attendance at professional development seminars, courses, conferences and other events that meet the requirements for			

membership set by state and territory financial counselling bodies. This support should include release from usual duties to attend such events during ordinary working hours and payment of reasonable costs for such events.			
3.2.3. Supporting financial counsellors to participate in state and territory financial counselling bodies. This support should include supporting staff to attend professional development opportunities, professional networks or conferences organised by these bodies and, where appropriate, supporting staff to take up positions of responsibility within professional associations.			
3.2.4. Supporting financial counsellors to participate in reflective practice, including facilitating access to programs outside the agency.			

3.3. Provide supervision

The agency provides adequate professional financial counselling supervision for financial counsellors and fosters a culture of reflective practice.			
This will be achieved by:	Achieved	Not Achieved	Comment/Evidence

3.3.1. Providing professional supervision which covers both technical (casework) and counselling skills to financial counsellors at the level required for membership of state and territory financial counselling bodies.			
3.3.2. Where such professional supervision is not available within the agency, covering the costs of establishing regular, ongoing, qualified external professional supervision relationships for financial counsellors working within the agency.			

3.4. Provide adequate physical resources

The agency ensures that financial counsellors have access to adequate physical resources in order to do their jobs.			
This will be achieved by ensuring that each financial counsellor has access to:	Achieved	Not Achieved	Comment/Evidence
3.4.1. A telephone			
3.4.2. A computer with access to the internet			

3.4.3. A scanner, photocopier and locked filing cabinet			
3.4.4. A space to interview clients that maintains privacy and confidentiality			

4. STANDARD 4 - OCCUPATIONAL HEALTH AND SAFETY

4.1. Provide support to staff dealing with difficult clients

The agency provides professional and personal support to staff in dealing with difficult or aggressive clients.

This will be achieved by:	Achieved	Not Achieved	Comment/Evidence
4.1.1. Ensuring there are policies, procedures and training in place to support staff in dealing with difficult client interactions			
4.1.2. Providing regular opportunities for debriefing and, where necessary, critical incident debriefing			

4.2. Provide a safe workplace

The agency provides a physical environment that is healthy and safe and suitable for the requirements of financial counselling.

This will be achieved by:	Achieved	Not Achieved	Comment/Evidence
4.2.1. Providing a safe physical environment. In particular, all areas used for contact with clients should be subject to a risk assessment, and appropriate steps taken to minimise or eliminate risks to safety, for example, due to aggressive behaviours by clients.			

4.2.2. Each agency should ensure that they have policies and procedures that cover the safety and security of staff working outside of the office.			

4.3. Ensure workloads are manageable and appropriate

The agency ensures that the workload of each staff member is manageable having regard to the level of skill, experience and any special employment arrangements for that staff member.			
This will be achieved by:	Achieved	Not Achieved	Comment/Evidence
4.3.1. Ensuring that workloads generally, as well as caseloads specifically, are reasonable and established in consultation and negotiation with the financial counsellor.			

5. STANDARD 5 – RECORD KEEPING

5.1. Maintain accurate client records

The agency has in place a system for opening, maintaining and closing client files that allows keeping of accurate records in relation to each matter where it provides financial counselling services.

This will be achieved by:	Achieved	Not Achieved	Comment/Evidence
<p>5.1.1. Opening a file for each client.</p> <p>5.1.2. Maintaining a central record of each file opened that allocates a unique identifier such as a number, code or name to each file.</p> <p>5.1.3. Maintaining an orderly system for the storage of files so that files can be easily located and retrieved.</p> <p>5.1.4. Maintaining a diary or bring-up system to ensure that important dates and time limits are identified and that files receive regular attention.</p> <p>5.1.5. Maintaining a system for the closure of files to ensure that files are reviewed prior to closure.</p> <p>5.1.6. Notifying clients in writing that their file has</p>			

<p>been closed, explaining why the file has been closed, how the file will be stored and for how long, enclosing any relevant correspondence and confirming, where feasible, that creditors have been notified.</p> <p>5.1.7. Where feasible, notifying creditors that the client's file has been closed, that the agency is no longer acting for the client and any third party authorities are revoked.</p> <p>5.1.8. Maintaining an archiving system that allows closed files to be retrieved within a reasonable period of time.</p> <p>5.1.9. Ensuring that records are kept for the period of time required by the legislation that applies to those records.</p>			
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5.2. Keep complete and legible files

<p>The agency keeps complete and legible records in relation to each matter where it provides financial counselling services.</p>			
<p>This will be achieved by ensuring files contain:</p>	<p>Achieved</p>	<p>Not Achieved</p>	<p>Comment/Evidence</p>
<p>5.2.1. All relevant information about the client, including their personal details and any special requirements.</p>			

<p>5.2.2. All information relevant to the case, including information on the client's income, expenditure, assets, liabilities, numbers and ages of dependants and housing and any other data as required.</p> <p>5.2.3. Copies only of all documents provided by the client, with the originals returned to the client.</p> <p>5.2.4. Copies of authorities signed by the client to allow the agency to contact third parties on the client's behalf.</p> <p>5.2.5. Copies of any signed instructions by the client in relation to the conduct of the matter, or notes of discussions with the client confirming their instructions.</p> <p>5.2.6. Copies of all correspondence (including letters, emails, facsimiles) sent or received on behalf of the client.</p> <p>5.2.7. Copies of all documents prepared for or on behalf of the client.</p> <p>5.2.8. Notes made by the financial counsellor of all contacts with the client.</p>			
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<p>5.2.9. Notes made by the financial counsellor of all contacts made with third parties on behalf of the client.</p> <p>5.2.10. Notes of any research conducted on behalf of the client.</p> <p>5.2.11. Copies of any agency checklists or forms used on this file.</p>			
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6. STANDARD 6 – ACCOUNTABILITY

6.1. Reporting

The agency fulfils the reporting requirements of its funders.

This will be achieved by ensuring files contain:	Achieved	Not Achieved	Comment/Evidence
6.1.1. The agency submits reports to its funders in the required format and within the required time frames.			
6.1.2. The agency advises funding bodies of any material changes to the organisation or service which may affect service delivery as soon as possible.			

6.2. Data collection and monitoring

The agency collects and monitors data so that it has an understanding of the effectiveness of its financial counselling services.

This will be achieved by ensuring that the agency collects and analyses information concerning:	Achieved	Not Achieved	Comment/Evidence
6.2.1. The quality of the service delivered including, where appropriate, the results of reviews of files.			
6.2.2. The productivity of the service, including, where appropriate, the number of clients contacting			

<p>the agency, the number of files opened, the number of files finalised, the time spent on each file.</p> <p>6.2.3. Levels of unmet demand for the service.</p> <p>6.2.4. Demographic information about the clients who use the service.</p> <p>6.2.5. Feedback from clients about the service including, for example, follow-up client surveys after a file has been closed or client evaluation forms.</p> <p>6.2.6. The outcome for the client as a result of service.</p> <p>6.2.7. Systemic issues that are identified in the course of service delivery.</p>			
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6.3. Evaluation

<p>The agency participates in evaluation concerning the effectiveness of its financial counselling programs.</p>			
<p>This will be achieved by:</p>	<p>Achieved</p>	<p>Not Achieved</p>	<p>Comment/Evidence</p>
<p>6.3.1. Conducting evaluation on a regular basis concerning service design, delivery and outcomes, including consideration of</p>			

effectiveness and efficiency.			
6.3.2. Acting on relevant client feedback or other stakeholder feedback to change and improve service delivery			
6.3.3. Participating in external evaluations of the financial counselling sector or more broadly, if appropriate			

STANDARD 7 – COMMUNITY DEVELOPMENT

6.4. Working with the community

The agency should work with the community to actively represent the needs of people experiencing financial difficulties.

	Achieved	Not Achieved	Comment/Evidence
6.4.1. The service adopts a planned approach to working with the community based on the identified local, regional and state-wide community needs.			
6.4.2. Strategies used in advocacy and community education about financial issues are appropriate for the purpose and the audience.			

6.5. Building partnerships and networks to support service delivery

The agency should build strong partnerships and integrated networks to support service delivery.

	Achieved	Not Achieved	Comment/Evidence
6.5.1. The agency participates in community networks and forums			
6.5.2. The agency targets its networking activities to those services that are most relevant to supporting the delivery of financial counselling services.			

Compulsion, convergence or crime?

Criminal justice system contact
as a form of gambling harm

Centre for Innovative Justice
2017





Executive Summary

This Report calls for a conversation about gambling and contact with the criminal justice system.

Rarely mentioned as a legal policy consideration, this report suggests that gambling may be a feature of offenders' lives in more ways than the community might expect — a 'sleeping' issue, as project participants described it. Yet the overwhelming presence of mental illness, Acquired Brain Injury, family violence; childhood trauma; drug and alcohol abuse; homelessness and other forms of vulnerability in offender populations mean that the existence of less visible problems like gambling is not always clear.

Given that it is only in the last few decades that gambling has shifted from a predominantly unlawful pursuit to one encouraged as a mainstream leisure activity, it is not surprising that it has failed to register in any meaningful way on the legal system's radar. Similarly, clinical understanding of the severity with which gambling problems can manifest — reflected in the relatively recent inclusion of gambling within clinical tools which diagnose other forms of addiction — has been slow to reach legal discourse.

In fact, despite previous recommendations that relevant data collection occur, the legal system does not ask *any* questions about the presence of gambling within offender populations, outside specific and quite limited contexts. What's more, the small amount of information that we *do* have from the 'front end' of the system, being presentation for legal advice or at court, conflicts with available studies of problem gambling prevalence in prison populations. This means that we simply do not know, overall, the exact extent to which gambling harm intersects with the criminal justice system and, if it does, in what way.

When funded by the Victorian Responsible Gambling Foundation to explore the intersection of gambling harm and the criminal justice system, therefore, the CIJ's task was to start to draw together the information which *does* exist, but also to open a door for it to be collected in the future.

Through comprehensive literature review; analysis of raw data provided by various agencies; an audit of submissions to the Royal Commission on Family Violence; analysis of sentencing remarks in over 100 cases in Victorian superior courts; and through focus group discussions and targeted consultations, the CIJ gained access to views not previously explored in existing Australian research. This was not only to capture the understanding which currently exists, but to create opportunities for this understanding to grow.

In order to create these opportunities, this project started to map the pathways which propel problem gamblers into contact with offending, offenders into gambling, and any context in between. The most obvious example of this occurs along a linear pathway in which a person develops a gambling problem and then commits an offence — such as theft or drug trafficking — to resource it.

As the CIJ’s research across legal and support sectors confirmed, however, this is only one of the pathways which take people between gambling and offending — and sometimes back again. Others include the way in which gambling; gambling venues or gambling related debt can, amongst other things:

- increase the risk of recidivism upon release for people convicted for *non-gambling* related offences;
- propel people from disadvantaged socio-economic status into crime just to feed their families;
- lead people (including a gambler’s partner or family members) to be *coerced* into offending;
- manifest as a form of economic abuse in the context of family violence;
- be foisted on a victim of family violence by her partner;
- draw victims of family violence into criminogenic environments as a way of seeking respite;
- lead to theft and deception of extended family by adult children in the context of elder abuse.

In other words, there are many potential pathways which can take people between gambling and crime. As the diagram below suggests, there are many factors often converging to make people more vulnerable to gambling; more vulnerable to various forms of harm which both *contribute to* and *result from* gambling behaviour; and then more vulnerable to contact with the criminal justice system as a result.



The pressing questions then become: what does and *should* the justice system do when this convergence occurs?

Having explored a more diverse and rich picture of the pathways which lead between gambling and crime, this report then turns to answer the first of these questions. In terms of what the system currently does, the CIJ commenced this project with the assumption that a gambling problem or addiction may be taken into account in sentencing; or that raising it before a court may present an opportunity for a person with a gambling problem to be referred to relevant treatment. In reality, however, the situation is less clear. In fact, as this research revealed, issues of gambling problems or addiction are rarely raised by clients with their lawyers and, where they are, rarely led before a court.

In fact, the CIJ's analysis suggests that, along any pathway which leads people to the superior courts, individuals experiencing gambling problems are rarely met with a warm reception. Certainly, as will be explored in some detail, recent case law sets the bar fairly high in terms of recognising a sufficient nexus between a gambling problem and the offending to which it is argued the gambling contributed. What's more, the case law seems to suggest a subtle variation in the way in which courts assess the question of 'choice' depending on whether an offender has an alcohol, illegal drug or gambling addiction. Meanwhile, a substantial proportion of gambling related offending involves such a significant amount of money or drugs, for example, that judges are often compelled to impose a custodial sentence.

Even when the offending is of a less serious nature and the contact is at the local court level, however, this report finds that individuals face somewhat of a legal lottery when presenting at court. In fact, some lawyers described the decision about whether or how to lead evidence about their client's addiction as 'playing the odds', depending on who is on the bench. This means that, although some clients may receive the referrals to services which they need (as well as the leverage of the justice system to support these referrals) others can receive a predominantly punitive response.

The report's resulting findings are not that courts should take a more sympathetic approach to offenders who present with gambling problems *per se*. Certainly, the CIJ readily acknowledges the challenges of identifying those whose crimes are motivated purely by greed, and those who are driven by genuine addiction or other forms of hardship. Rather, the findings are that courts are not currently furnished with adequate information, either about therapeutic options for sentencing; nor about the contemporary neuroscience which links gambling addiction to other forms of addiction in fairly irrefutable ways. Pleasingly, the process of conducting the research opened doorways to sharing this information, with judges and lawyers alike indicating that they wished to be informed and to develop a greater understanding of the complexities involved.

Improving this understanding is vital if approaches within the criminal justice system are to keep pace with the policy shift away from focusing solely on problem gambling as a problem for the individual — a pathology which needs to be addressed, or an affliction which needs to be cured — towards a broader concept of gambling harm not only caused to individuals, but to their families, friends, employers and community at large.



Accordingly, in seeking to answer the second question — being what *should* the criminal justice system do when gambling and crime converge — this report argues that contact with the criminal justice system should be perceived as one of those harms. It therefore recommends various ways in which this intersection with the criminal justice system can be reconceived and redirected — not as an interaction which entrenches harm, but one which functions as a positive intervention in a gambler’s life. The report also recommends that this intervention should occur *regardless* of whether or not gambling is the driving factor which has brought someone to court.

To do this, of course, the criminal justice system must start tuning into gambling as a factor which may be ‘in the mix’ of an offender’s life. In other words, it needs to start asking questions — not just to interrogate this ‘sleeper’ issue and indicate prevalence, but also to use this interaction to draw out underlying issues, and to motivate offenders to contemplate future change.

It also means that the criminal justice system must start engaging with emerging science concerning addiction — grappling with the evidence which suggests that addiction to gambling and addiction to drugs or alcohol, for example, may be far more similar than the community might expect. Equally, the system of supports available to problem gamblers must start to understand the imperatives of the criminal justice system, engaging with the challenges involved in sentencing, and developing a considered and robust program to which offenders might be referred.

Meanwhile, the report also urges Gambler’s Help support services to identify and respond more effectively when family violence is in the mix for the clients that they see. To do this they must be supported with adequate training to ensure that disclosure does not inadvertently increase risk; and to know where to refer clients when this issue is exposed. In other words, people need to come out of their silos, to build on the cross-disciplinary work already occurring and recognise that gambling and vulnerability of *any* kind are a potentially dangerous mix.

Overall, this Report has not been about identifying a magic number. With so little data gathered and so few questions systematically asked, we are still at the beginning of the conversation about how gambling should be approached in the criminal justice system. This report is therefore intended to function as a first port of call for legal *and* social policy audiences who might want to start engaging with the complexity of gambling harm and its implications for the criminal justice system a little more deeply.

Through its exploration of the ways in which gambling can contribute to offending and the other way around; through analysis of the data that *is* available; and through discussion with judges, Magistrates, lawyers, and service providers of multiple kinds, the CIJ’s aim for this project has been not only to increase *understanding* about the intersection of problem gambling and the criminal justice system, but also to increase the *interest* of this system in finding a more useful way to respond.

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Background and methodology

In 2016, the Centre for Innovative Justice ('the CIJ') was funded by the Victorian Responsible Gambling Foundation ('the VRGF') to examine the intersection of gambling harm and the criminal justice system. The purpose of the project was to inform the existing knowledge base of how gambling and the criminal justice system interact and to identify what action should be taken to minimise this harm.

Given a short timeframe, the CIJ opted to train its lens on people's contact with the court system. This decision was made in part because the only comprehensive work previously conducted on this subject in Victoria — research originally done under the auspices of the Department of Justice and Regulation (DOJR) — gave particular emphasis to the Corrections system, but did not capture the views of *any* members of the legal profession; court personnel or the judiciary.

Nearly ten years on from when the bulk of this initial work by DOJR/VRGF was conducted, questions about the relevance of gambling in offenders' lives are still not asked by agencies or services with whom they have contact at this earlier point in the legal system. The decision to focus primarily on the courts and legal profession was therefore made to lay the ground for this data collection to occur in the future.

With these parameters identified, the CIJ also confined its exploration to the intersection of *legal* gambling activities and criminal justice system contact, rather than various forms of illegal gambling. The project has therefore not considered the challenging issues of underage gambling (an issue, nevertheless, of emerging concern) or gambling-related organised crime. Rather, the focus of the research was on the pathways which take ordinary individuals between gambling activity which *is* legal and other activities which are *not* — and where and how the legal system might step in to intervene.

For the purposes of an exploratory project in an area in which limited data is collected, a mixed methods approach was considered necessary. This approach involved Literature Review; examination of small samples of de-identified data provided by various agencies; audits of submissions to the Royal Commission into Family Violence; analysis of sentencing remarks from over 100 Victorian superior court cases; qualitative focus group discussions with legal professionals and a range of service providers; and targeted consultations with judicial officers and certain individual stakeholders.

Literature Review

To support the project, the CIJ conducted a comprehensive literature review, focusing primarily on literature emerging since 2010, when the bulk of the work for the research initiated by DOJR (mentioned above) was conducted. The wide-ranging review searched for literature relevant to the subject of: 'issues surrounding the intersection of legal gambling within the criminal justice system', using the following multidisciplinary databases: JSTOR; Academic Search Complete; combined Informat databases; Google scholar; TROVE; Google. The search also targeted specialist databases, for example PubMed and Austlii (research). The search used combinations of the following key words and Boolean operators: 'gambl*' AND 'criminal justice'; 'gambl*' AND 'crime'; 'gambl*' AND 'illegal behavi*'. In order to locate additional articles and reach 'saturation' — the point at which the collection of new articles sheds no further light on the issue under investigation — a manual search was conducted through the reference lists of articles. Finally, additional efforts were made to find unpublished or grey literature through contacting organisations and other researchers working in this area.

Given the number of resources returned through this search strategy, it was necessary to exclude some studies and resources. A single reviewer was responsible for screening all titles and abstracts that were retrieved for relevance. All studies on gambling disorders within youth justice and on illegal gambling were excluded. Also excluded were 'false positives' — studies which were retrieved in the search but clearly were not related to the subject of inquiry.

Despite using the year 2010 to bracket the review, the project still draws on findings from older studies, where considered pertinent. In these instances, however, reference and reinforcement of the work through recently published or unpublished work are provided to ensure ongoing significance and relevance. Also worth noting is that the review gives priority to knowledge in an Australian context because there are limitations in transferring some of the knowledge across jurisdictions. However, the discussion throughout the report also involves examples of international research where authors touch on policy and practical issues in productive and innovative ways, thereby aligning with aims of undertaking the literature review.

Overall, the literature review provided a theoretical basis and some empirical evidence in support of the project. Despite the methodological debates apparent in the literature — much of which was self-defeating — the literature also indicated the shift towards a broader and more nuanced concept not only of gambling-related offending but gambling-related harm.

Data collection

De-identified data was provided to the research team by a small number of agencies. The samples of data were purposive and determined by availability and willingness of the people and organisations contacted. Rather than reporting findings that apply to overall offender or other populations, therefore, these informed a deeper and more nuanced understanding of the relevant issues, including the way in which gambling can co-exist with other forms of disadvantage or offending. The extent of this data ranged from:

- ‘Snapshot figures’ of callouts to the statewide FV helpline, Safe Steps, made at a certain time of the year;
- Client data collected by the Magistrates’ Court of Victoria in relation to clients referred to the Courts Integrated Services Program (CISP) during 2015/2016, where ‘problem gambling’ was identified at the point of intake (118 out of 3447 clients) and ‘problem gambling, past and present’ identified during case management (273 out of 1574 clients).
- Results from surveys administered to clients (N = 226) by Victoria Legal Aid at the point of duty lawyer intake. Surveys were concurrently distributed to clients at five court locations (Melbourne, Sunshine, Werribee, Frankston & Heidelberg) over a period of four weeks from 18 October to 18 November 2016.

Clients seen by duty lawyers in the summary crime lists were given the survey, in order to minimise the imposition on the time of lawyers and court staff. Clients were informed that the survey was voluntary and that, if they chose to complete it, they did not need to complete all the questions if they did not wish to. This was to ensure that clients did not feel pressured in any way to complete the survey or that their receipt of a duty lawyer service was dependent upon their participation.

Given that participation in this project was entirely voluntary and was conducted with the explicit consent of the VLA clients, the sample therefore represents clients who elected to complete the survey at the time, rather than the number of clients overall who were seen by the duty lawyer services. Given the demographics of clients in this cohort and the stressful context of their appearance at court, the completion rate of 226 surveys was considered by the CIJ and VLA alike to be substantial.

No identifying information was collected and all data collected was stored securely. The survey tool consisted of 15 questions: 6 relating to the gambling practices of the client, and 9 regarding basic demographic information (some of which participants opted not to answer). The survey was designed by VLA in consultation with the CIJ, and finalised through internal VLA processes. Results from the data were analysed by VLA internally and provided to the CIJ in de-identified form. The survey instruments can be found as an Appendix to this report (Appendix A).

Case law search and analysis of sentencing remarks

An analysis of the sentencing remarks in over 100 Supreme and County Court cases built on a source used in the earlier VRGF report. The approach to this analysis was purposive, being primarily aimed at identifying specific information to illustrate theory or previous findings in a local context. The search was then pruned for false positives, excluding a number of cases where gambling was mentioned but unrelated to the case or the research questions. Cases remaining for inclusion were then read and interpreted purposively from a qualitative perspective, informed by the literature review.

Audit of submissions to the Royal Commission into Family Violence

To start to explore the intersection of family violence and gambling harm beyond emerging peer reviewed and grey literature, an audit of submissions to the Victorian Royal Commission into Family Violence was conducted. The audit indicated that submissions from at least 47 organisations (and numerous additional individuals) out of approximately 1000 submissions overall addressed the issue of gambling. Once identified, organisational documents were then analysed in greater detail, reflecting considerable practitioner and cross-sectoral support for a range of findings in the peer-reviewed literature regarding the nexus of gambling and family violence.

Focus group discussions, interviews and targeted consultations

To complement the limited quantitative information available, as well as the case analysis and audits described above, the CIJ conducted a series of focus group discussions and interviews with legal practitioners and service providers across a range of metropolitan and regional locations, as well as some targeted consultations.

Participants were recruited through their relevant agency, with the CIJ's initial Literature Review and substantial existing networks facilitating the identification of agencies to be contacted. Invitations to participate in discussions were provided to the relevant peak body; regional office (in the case of Victoria Legal Aid) or agency senior officer. The invitation was then distributed to relevant staff by the respective senior personnel. Given the demands on the legal and service provision sector, participants elected to attend subject to availability or as a representative of their agency as agreed internally within the organisation. Information regarding who was unable to attend or who declined to participate was therefore not made available to the CIJ.

Sites for focus group discussions with VLA staff were nominated by VLA head office to offer a representative geographic spread and to complement, to an extent, the burden imposed on VLA staff conducting the surveys in other locations. The exception was the focus group with staff at the Sunshine VLA office, who were keen to participate in both activities, given the relevance of the issue for their particular clientele. The CIJ then attended these sites for the purposes of each focus group, being Geelong (N = 8); Sunshine (N = 10) Ringwood (N = 5) and Morwell which also included practitioners from the Bairnsdale office via teleconference (N = 9).

The CIJ also attended focus groups facilitated by the Law Institute of Victoria (N = 18); Victorian Association for the Care and Rehabilitation of Offenders (N = 6) and the Victorian Aboriginal Legal Service (N = 6) as well as several other sites for the purposes of individual interview (Odyssey House in Richmond (N= 1); Australian Vietnamese Women's Association in Braybrook, (N= 2); and Sunshine Magistrates' Court court support and CISP staff (N = 3)).

Remaining focus groups were held at the CIJ with representatives from Community Legal Centres (two sessions — N = 5 & N = 6 respectively); Financial Counselling and Gambler's Help services (N = 5); Family Violence services (N = 5) and other community-based services, including drug and alcohol (N = 2) and offender support programs (N = 1). A handful of further interviews were conducted over the phone with participants who expressed an interest in the research but could not attend the focus groups in person (EACH Eastern Gambling Service (N = 1); Aboriginal Family Violence Prevention Legal Service (N = 1); Financial counsellor from the Neighbourhood Justice Centre (N = 1) the Defendant Health Liaison Service at the Tasmanian Magistrates' Court (N = 1); and the Salvation Army (N = 1).

Consultations were also conducted with judicial officers (County Court, Magistrates' Court and Children's Court) at the relevant court location, with participants responding to the invitation of the relevant head of jurisdiction. Consultations were possible at the County Court (N = 6); Melbourne Magistrates' Court (N = 9); Melbourne Children's Court (N = 7) and Geelong Magistrates' Court (N = 3). Limitations on the time and sitting obligations of relevant courts ultimately meant that individual consultations were conducted with Magistrates sitting at Dandenong, Morwell and Sunshine Magistrates' Courts respectively.

In addition to these broader discussions (which included participants with varying levels of interest and knowledge) specific individuals were identified for the purpose of targeted consultations where their specialist knowledge or experience made their contributions particularly valuable. This included:

- Magistrates and court staff from the SA Problem Gambling Treatment List (N = 4);
- Staff from Offenders' Aid and Rehabilitation Service, SA who run a specialist gambling counselling program (N = 2);
- The Director of a specialist Gambling Legal Service, Wesley Legal Mission in NSW (N = 1);
- The Sentencing Advisory Council (N = 1);
- The Adult Parole Board (N = 1);
- The NSW Office of Gaming & Liquor (N = 1);
- Judge Mark Farrell, the US judge who established the first specialist Gambling Treatment Court in Amherst, New York; and
- His Honour Justice Robert Redlich of the Victorian Court of Appeal, whose 2008 decision and sentencing remarks have been so influential in relevant case law.

Comments have not been attributed to project participants beyond a description of the relevant setting. Participants were notified at the beginning of the discussion that there would be no direct attribution. This was particularly important where legal practitioners may have otherwise felt reluctant to comment on judicial practices or attitudes. Attribution of comments is limited instead to those identified for targeted consultation and already named in this Report.

Given the limited timeframe in which the project was conducted, this qualitative data collection was not exhaustive and the CIJ expects that there will be many more legal practitioners and service providers who will have more to add upon release of this Report, and the CIJ welcomes their ongoing feedback.

Nevertheless, the CIJ is extremely grateful to all project participants — agencies, members of the legal profession, court staff and members of the judiciary — for their participation and for identifying data or background information where possible, particularly given the current demands on the criminal justice system and human services sector overall. No other project in Australia has been able to engage with the legal profession or judiciary on this topic to the extent reflected here and the CIJ is hopeful that this process has opened the door to further engagement with this issue down the track.

A note on gambling terminology

When initiating this project, the CIJ was careful to recognise the distinction between ‘responsible gambling’ and ‘problem gambling’ which government policy makes. Certainly, the VRGF aims to encourage people to be ‘responsible’ when gambling, rather than to allow it to become a ‘problem’ or to gamble more than they can afford.

To this end the VRGF recently commissioned and released a study which defined responsible gambling consumption as ‘exercising control and informed choice to ensure that gambling is kept within affordable limits of money and time, is enjoyable, in balance with other activities and responsibilities, and avoids gambling-related harm’.¹ Principles for responsible consumption of gambling outlined by that study are:

- affordability
- balance
- informed choice
- control
- enjoyment
- a planned approach to gambling (gambling for entertainment rather than to make money)
- harm-free.²

At the same time, of course, governments of all persuasions rigorously encourage gambling to an unprecedented and, many would say, concerning extent. This tension — or contradiction — is therefore important to identify, as was noted by almost all project participants. In other words, almost all suggested that, while they were keen to learn more and to develop more effective responses, those responses would only achieve so much while governments prosecute the case for gambling as a mainstream leisure activity to the extent that currently occurs. This should therefore be a consideration which readers bear in mind.

For people with lived experience of gambling problems, of course, the distinction between ‘responsible’ and ‘problem’ gambling can become rather blurred. So too, it seems, can the distinction between ‘problem’ or ‘pathological’ gambling and fully blown gambling addiction — at least as far as individual experience and contact with the justice system is concerned. This is particularly the case when myriad other factors which propel people into contact with the justice system are at play. For example, the harm of debt experienced by a person who has a relatively minor gambling problem can be far greater when compared with the same debt experienced by a fully blown addict, depending on the level of socio-economic advantage that these individuals enjoy.

Accordingly, while recognising the value of clinical diagnoses of addiction in facilitating their access to support, the CIJ is cautious about pathologising individuals at the expense of any analysis which keeps structural and systemic factors in view. For this reason, this Report maintains fluidity in the terminology it employs, using the term ‘problem gambling’ and ‘gambling addiction’ where specifically appropriate, but overall preferring an analysis based on concepts of ‘gambling harm’. This is in accordance with recent research commissioned by the VRGF which looks at the extent that this harm can have, not only on the individual who gambles, but on those around them. Notably, the predominant term used by the VRGF in its public advertising material is now ‘gambling harm’.

Part One of this Report therefore examines issues of problem gambling prevalence and this conceptual shift towards concepts of gambling harm. Part Two then examines its application to the criminal justice system and the pathways which lead more generally between gambling harm and crime. Part Three examines the way in which the criminal justice system is currently responding to these pathways and Part Four offers examples and opportunities for this response to shift towards functioning as a positive intervention, rather than becoming a further form of gambling-related harm.

¹ Hing, N., Russell, A., and Hronis, A., “Behavioural indicators of responsible gambling consumption,” (2016). Melbourne: Victorian Responsible Gambling Foundation. 3.

² Ibid. 3–4.

A note on legal terminology

This report is intended to bring legal and clinical/therapeutic spheres together to develop a better response when contact with the criminal justice system becomes a form of gambling harm. As such it covers a wide range of legal terminology which may not be familiar to all readers. Below is a glossary of certain acronyms or terminology which may need clarification for those working outside the legal sphere.

CISP — Courts Integrated Services Program. A service which provides holistic assessment and supports to offenders with complex needs.

CLC — Community Legal Centres — independent state and federally funded centres providing free legal advice.

CV — Corrections Victoria

DPP — Department of Public Prosecutions

HCA — High Court of Australia — the highest/most authoritative court in the nation, to which appeals of certain cases in state and territories can be made.

MCV — Magistrates' Court of Victoria — the local court level, which hears the greatest volume of criminal matters in any jurisdiction.

Precedent — case law made by judges, in which a decision and reasoning on a certain matter is followed by other judges in subsequent decisions.

Offender Support Programs — publicly and philanthropically funded agencies which provide community based support to offenders once they are released from prison, sometimes while they are still in prison, and sometimes for their families as well.

R — in case citations, 'R' stands for Regina, or the Crown, being the body prosecuting the offence.

SC — Supreme Court of Victoria — the most superior court in Victoria, though appeals from this court go to the VSCA — the Victorian Supreme Court of Appeal

VCC — County Court of Victoria — the district court level, which hears criminal matters of a certain gravity and the biggest volume of offences directly related to gambling.

VLA — Victoria Legal Aid — body providing publicly funded legal assistance to those on limited incomes.

Part One – Understanding the journey towards concepts of gambling harm

Prevalence of gambling problems within the community

Far from an occasional ‘flutter’, gambling is now a prominent leisure activity in Australian culture. In fact, Australia has the dubious honour of spending more per capita on gaming than any other population — including countries with destinations considered to be gaming Meccas.³ The revenue for jurisdictions from gambling is increasing yearly, with poker machine losses for Victorians rising to \$26 billion in 2016.⁴

Certainly, in 2010, when national gambling statistics were most recently published, around 70% of Australians participated in some sort of gambling activity.⁵ Given the increasing availability of Electronic Gaming Machines (EGMs) and online gaming ‘apps’ — as well as an abundance of advertisements which alternatively attribute a kind of masculinity or mateship to online sports betting; a community or ‘family’ flavour to pokies venues; or a certain glamour to casino visits — the number of Australians gambling in one way or another may well have increased since that time.⁶

There is a significant difference, of course, between recreational gambling that remains within the individual’s control and ‘problem gambling’. To this end, the same 2010 study estimated that 115,000 Australians were ‘problem gamblers’ and that 280,000 were at ‘moderate risk’. This represents 0.7 percent and 1.7 percent of the adult population respectively.⁷ Meanwhile, problem-gambling prevalence rates of each jurisdiction, established through more recent, single-jurisdiction studies, are set out below:⁸

VIC 2014	ACT 2009	TAS 2013	QLD 2011–12	NSW 2011	SA 2012
0.72	0.50	0.50	0.48	0.80	0.60

If 70% of Australians gamble but only 0.7% have a problem with it, to what extent should that be a concern? As the Productivity Commission cautions, ‘small population prevalence rates do not mean small problems’.⁹ For example, in 2011, 0.5% of the population were estimated as homeless;¹⁰ and in 2013, approximately 2% of Australians over 14 years had used methamphetamines in the previous 12 months.¹¹ If we view homelessness or drug addiction as significant policy or criminal justice issues, this means that harm from gambling problems also requires our attention.

3 <http://www.theaustralian.com.au/business/business-spectator/australians-are-worldleading-gamblers-but-the-houses-winnings-are-slipping/news-story/b1c2369c7c1634b353697421c3bb3b74>

4 <http://www.theage.com.au/victoria/victorians-poker-machine-losses-rise-to-26-billion-20160724-gqch5g.html>

5 Productivity Commission, ‘Gambling: Productivity Commission Inquiry Report — Volume 1,’ (2010).

6 This said, a systematic review of worldwide prevalence rates released in 2016 found Australia at 0.05%, below the rates of Canada and the US respectively. F Calado and M Griffiths, ‘Problem Gambling Worldwide: An Update and Systematic Review of Empirical Research (2010–2015)’ (2016) 5(4) *Journal of Behavioural Addictions* 592.

7 Productivity Commission, above note 5.

8 VRGF, ‘Study of Gambling and Health in Victoria: Findings from the Victorian Prevalence Study 2014,’ (2015) p 60. At: https://www.responsiblegambling.vic.gov.au/_data/assets/pdf_file/0018/25551/Study_of_gambling_and_health_in_Victoria.pdf

9 Productivity Commission, above note 5, p 12.

10 <http://www.homelessnessaustralia.org.au/index.php/about-homelessness/homeless-statistics>

11 <http://www.druginfo.adf.org.au/topics/quick-statistics>.

Costs: economic and social

The common refrain of state and territory governments, of course, is that the gaming industry reaps myriad benefits for the Australian taxpayer. Almost a decade ago, when the Productivity Commission examined this issue, these benefits ranged between \$12.1 and \$15.8 billion.¹² While no more recent *national* estimates exist for revenue, this provides an indication of what governments argue they are then able to spend on roads, hospitals and schools — as well as, of course, support for those who experience gambling harm.

The tension identified by many project participants, however, is that these benefits are not necessarily assessed against the *costs* of gambling. The Productivity Commission has attempted this assessment, identifying that costs such as suicide, depression, relationship breakdown, lowered work productivity, job loss, bankruptcy and, most relevantly to this project, crime — are estimated to be at least \$4.7 billion.¹³ The Productivity Commission contends that greater investment in minimising these significant costs — including measures with even ‘modest efficacy’ — would increase the *net* benefits generated through gambling activity, at least from a financial perspective.¹⁴

This point was echoed in the project’s discussions and consultations, a number of participants recalling previous practice by gambling venues, such as clubs and hotels, which included the investment of a significant portion of their revenue back into local communities. Perceptions were that this practice had decreased in recent years, meaning that the cost to the local community through gambling losses was no longer being mitigated by the investment being returned to the community in other ways.

Efforts to quantify gambling problems in more meaningful, holistic terms, of course — efforts which assess both the direct and *indirect* costs, being an analysis of ‘gambling harm’ — suggest that it is a social issue on ‘a similar order of magnitude’ to major depressive disorder and alcohol misuse and dependence.¹⁵

In fact, recent Victorian estimates indicate that the total burden of gambling-related harm in 2016 was greater than most of the state’s other common health conditions — including diabetes, epilepsy and eating disorders.¹⁶ Meanwhile, recent research also suggests that the public may have reached saturation point in terms of the encroachment of gambling that it is prepared to accept.¹⁷

12 Productivity Commission, above note 5.

13 *Ibid.*, p 21.

14 *Ibid.*

15 Browne, M. et al., “Assessing gambling-related harm in Victoria: a public health perspective,” (2016). Melbourne: Victorian Responsible Gambling Foundation. 3.

16 *Ibid.*

17 McAllister, I., “Public opinion towards gambling and gambling regulation in Australia,” *International Gambling Studies* 14, no. 1 (2013).

Vice, disease or addiction?

Certainly, conceptions of gambling have shifted dramatically over the last century. It might be hard for younger generations to believe that gambling activity was once portrayed as a vice and interpreted from a purely moral stance. In North America, for example, psychiatrists, clergy, and some politicians characterised it 'as an ideologically insidious affront to the Puritan work ethic; [undermining] faith in thrift, industry, and Providence, not to mention belief in the value of a dollar'.¹⁸

In fact, gambling was demonised right around the world due to the activity's associations with and — ironically in the context of this project — regulation through crime and the criminal justice system. In 1950s America, all forms of gambling were illegal;¹⁹ while India's laws have still only legalised some forms of gambling, namely horse racing; the card game 'rummy'; lotteries conducted by a few state governments; and casinos in certain states.²⁰

In Australia, different forms of gambling have been prohibited at different times. Though prohibitions have almost never been effective, it is useful to remember that a modern day phenomenon like sports betting was still illegal until the 1980s. Equally, though celebrated for its nostalgic associations, 'two-up' — where players gamble on how two coins fall when thrown in the air — was only legalised for the first time in 1973 when Australia's first casino also opened in Hobart. Until that year, casino gambling had been prohibited — a far cry from contemporary contexts in which it is a central activity in many Australian jurisdictions, including Victoria. Similarly, EGMs were first allowed in registered clubs in NSW in 1956, but were not introduced into other jurisdictions until decades later, with Victoria entering the fray in the early 1990s. As in NSW, they quickly became the most popular form of gambling activity.²¹

Overall, for much of the twentieth century, public policy was predominantly directed at reducing gambling's association with crime, and its regulation involved criminal justice authorities. However, the symbolic centre of government policy-making in relation to gambling has now shifted significantly to 'sporting and leisure', and with it, the authorities involved have also changed.²² In Victoria, as in most other jurisdictions, this includes being regulated through agencies charged with regulating liquor, gaming and racing, rather than with regulating criminal justice. It appears, then, that this is a mainstream issue here to stay — that it is too late, as one Federal Government spokesperson suggested, to 'unscramble that egg'.²³

18 Cavion, L., Wong, C., and Zangeneh, M., "Gambling: a sociological perspective," in *In the pursuit of winning problem gambling theory, research and treatment*, ed. Masood Zangeneh, Alex Blaszczynski, and Nigel E. Turner (New York: Springer, 2008). 96.

19 Bernhard, B., 'The Voices of Vices: Sociological Perspectives on the Pathological Gambling Entry in the Diagnostic and Statistical Manual of Mental Disorders,' *American Behavioral Scientist* 51, no. 1 (2007). 30.

20 Benegal, V., "Gambling experiences, problems and policy in India: a historical analysis," *Addiction* 108, no. 12 (2013). 21

21 For further discussion and debates regarding the history of gambling in Australia see Australian Institute for Gambling Research. 'Australian Gambling: comparative history and analysis,' (1999); and Breen, H., 'Visitors to Northern Australia: Debating the History of Indigenous Gambling,' *International Gambling Studies* 8, no. 2 (2008).

22 McAllister, above note 19, 146.

23 Alan Tudge, at the time Parliamentary Secretary for Finance, *Sydney Morning Herald*, 27.09.16

<http://www.smh.com.au/business/consumer-affairs/gambling-is-killing-one-australian-a-day-but-it-rakes-in-billions-in-tax-20160927-grpypl.html>

Medical models

Though encouraged as a mainstream *leisure* activity, contradictions continue to pervade our perceptions once gambling falls into the 'problem' domain. While some continue to view excessive gambling as a moral failing of the individual, clinical and therapeutic spheres now frame it through the language of medicine. In fact, gambling disorder has now been recognised as an addiction. Though late to the diagnostic party when compared with other variations, clinical tools now exist which can assess the extent to which an individual may indeed be suffering from an addiction to gambling. The most well-known is the American Psychiatrists' Association's *Diagnostic & Statistical Manual of Mental Disorders* (the 'DSM').²⁴

The DSM has had various iterations. The fourth edition, released in 1994, included problem gambling for the first time, but designated it as one of many 'impulse control disorders', as well as including a criterion of 'illegal acts'. DSM 5 in 2013 reframed 'gambling disorder' as an 'addiction' and removed 'illegal acts' (now more broadly included in 'lying to others'). For diagnosis under the DSM 5, a person's behaviour in the past year must meet at least four of the following:

1. Is often preoccupied with gambling (such as reliving past experiences, or thinking of ways to get money with which to gamble in the future);
2. Needs to gamble with increasing amounts of money in order to achieve the desired excitement;
3. Repeated, unsuccessful resorts to control, cut back or stop gambling;
4. Feels restless or irritable when attempting to cut down or stop gambling (withdrawal symptoms);
5. Often gambles when feeling distressed;
6. After losing money gambling, often returns another day to get even ('chasing' one's losses);
7. Lies to family members, therapist or others to conceal the extent of gambling;
8. Jeopardised or lost a significant relationship, job or educational opportunity because of gambling;
9. Relies on others to provide money to relieve a desperate financial situation caused by gambling.

The fourth and fifth editions of the DSM caution that diagnosis is not to be used for the legal purpose of demonstrating the presence of a mental disorder or other legal standard, for instance disability.²⁵

The Problem Gambling Severity Index (PGSI) of the Canadian Problem Gambling Index is the most widely used in Australian studies and asks individuals how often they participate in gambling activities (i.e., casino gambling, sports betting, lottery); how much money they bring to the gambling venue; how much money is risked per occasion; and the harmful consequences the individual has experienced as a result (i.e. health consequences, stressful events). Scores range from zero to eight or higher, with the higher scores indicating severe negative effects on a person's life.²⁶

This medical discourse has simultaneous advantages and disadvantages. On one view, the characterisation of problem gambling as a public health concern — and problem gamblers as ill — has facilitated increases in support. It has also potentially facilitated an increase in disclosures and help seeking behaviour, although research has found that legal problems can be associated with reduced help-seeking behaviour, a challenge which will be further discussed later in this report.²⁷

24 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5®)*, (Washington, D.C: American Psychiatric Publishing, 2013).

25 National Centre for Responsible Gambling, "Gambling and Health in the Justice System: A Research-based Guide about Gambling Disorders for Judges, Parole Officers, Attorneys and Other Professionals Involved in the Justice System," (2015). 12–13.

26 For a complete review of the screens available for problem gambling, see Victorian Responsible Gambling Foundation, "Problem Gambling and the Criminal Justice System," (2013). Melbourne: Victorian Responsible Gambling Foundation.

27 For further discussion of the barriers to, and factors of, help-seeking see Gainsbury, S., Hing, N., and Suhonen, N., 'Professional help-seeking for gambling problems: awareness, barriers and motivators for treatment,' *Journal of Gambling Studies* 30, no. 2 (2014).

Conversely, this kind of framework can risk pathologising the individual concerned, while leaving the structural imperatives intact. Certainly, today's diagnostic criteria remain entrenched in ideas of 'vice', individualising a problem which, in reality, is socially and politically constructed. Indeed, based on a comparison of the diagnostic criteria with how gambling is portrayed in historical writings, one commentator contends:

FF *...the degree of certitude invoked by today's experts is eerily reminiscent of the certitude possessed by yesterday's experts. We might wonder, then, how the legacy of our own unique chapter in problem gamblers' history—a chapter when psychology, medicine, and academe have custody of this sensitive population—might be interpreted when tomorrow's accounts are written.*²⁸

Nevertheless, the medical model has enabled a range of services to become available to gamblers who need help. Across each jurisdiction in Australia a combination of clinical; non-clinical, financial counselling and community education services are funded through a 'hypothecated tax or levy on gamblers' losses'.²⁹

Many of these respond to the high rates of other comorbid issues which appear among problem gamblers in general populations. Of these, the most common is nicotine dependence (60.1%), followed by a substance use disorder (57.5%). Certainly, co-existing drug and alcohol problems amongst clients was a constant theme in the project, with multiple participants suggesting that the stigma associated with gambling meant that clients would 'rather tell their family that they have a serious drug problem than that they gamble'. For example, Odyssey House, an agency which offers drug and alcohol services but which also screens for gambling, reported that help-seeking behaviour and disclosure for gambling was still a struggle for many clients.³⁰

Meanwhile, the literature also associates comorbidity of gambling and anxiety at a rate of 37.4%.³¹ To this end, project participants reported that 'depression is the norm, it goes without saying', but that this then also comes with overlays of 'agoraphobia, obsessive compulsive disorder...the list goes on.' In other words, individuals with gambling problems or disorder frequently indicate other problems or disorders. The question then becomes: which issue comes first?

Research suggests that progression from non-problem gambling to at-risk gambling is associated with alcohol dependence, anxiety and/or obesity, with these other problems *preceding* the development of a gambling problem.³² Research also suggests that addictions such as pathological gambling may serve as a means of coping with pre-existing trauma, including childhood sexual abuse, a finding confirmed by the observations of project participants. This means that gambling (like other addictions) is used to soothe and regulate emotion and to 'heal' damage caused by traumatic life events.³³

To this end, members of the *Three Sides of the Coin* performance group — a group of people with lived experience of problem gambling — speak of seeking refuge from depression or anxiety in gambling, only to seek further refuge from the depression and anxiety that gambling *itself* had then caused in the same activity.

FF *'After a while, the only identity I had was as a loser. It was all I had, though, so I kept going back.'*³⁴

28 Bernhard, "The Voices of Vices: Sociological Perspectives on the Pathological Gambling Entry in the Diagnostic and Statistical Manual of Mental Disorders," *American Behavioral Scientist* 51, no. 1 (2007). 30.

29 Martyres, K. and Townshend, P., "Addressing the Needs of Problem Gamblers With Co-Morbid Issues: Policy and Service Delivery Approaches," *Journal of Gambling Issues*, no. 33 (2016). 69.

30 Odyssey House, "Statewide training package and resources, alcohol and other drugs services," in *Many Ways to Help conference 2016* (Melbourne).

31 The term diagnostic comorbidity is used commonly to refer to co-occurring disorders, and subsumes conditions that occur simultaneously (i.e., current comorbidity), and disorders that occur independently in time (i.e., lifetime comorbidity) Cowlshaw, S. et al., "Pathological and problem gambling in substance use treatment: a systematic review and meta-analysis," *Journal of Substance Abuse Treatment* 46, no. 2 (2014). 98.

32 Billi, R. et al., *A longitudinal study of gambling and health in Victoria 2008–2012*, (2014). Victoria: Victorian Responsible Gambling Foundation. xi.

This study also found that the progression is associated with being male, speaking a language other than English, having a year 10 education or less.

33 Blaszczyński, A. and Nower, L., "A pathways model of problem and pathological gambling," *Addiction* 97 (2002); Dion, J. et al., "Sexual abuse, residential schooling and probable pathological gambling among Indigenous Peoples," *Child Abuse & Neglect* 44 (2015).

34 Three Sides of the Coin performance, Many Ways to Help Conference, Melbourne, October 2016.

Of particular and obvious concern, this pre-existing trauma or anxiety may culminate in contemplation of — and even attempts at — suicide, with 11.5% of problem gamblers in the studies referred to above reporting that they had seriously considered or attempted suicide.³⁵ Suicide and gambling are certainly correlated, but an exact assessment is not possible with existing data — particularly given that problem gamblers usually disguise their problem from family members and those around them. (See discussion of gambling-related suicide in relation to crime, below in Part Two).³⁶ Available treatment

Within these broad parameters, therapeutic and other treatment approaches differ, depending on the individual receiving support and their particular needs. The CIJ heard that a principle of Victorian gamblers' counselling is being 'client-led', 'putting the client at the centre of the system design' or 'working on what the client is prepared to work on'.³⁷

For Gambler's Help counsellors, this can include working on life-skills or past trauma, with 'gambling just a speck of what is going on for the client', right through to practical measures, such as helping with self-exclusion from gaming venues. Treatment and counselling in custodial environments obviously involves a range of different considerations. Detail on the various types of help available can be found on gambling service websites, though these resources are of differing quality across the country. Currently, Victoria's current gambling help is divided into core services, specialist services and self-help, as follows:

Core services

- Problem gambling therapeutic counselling, including local face-to-face service delivery.³⁸
- Problem gambling financial counselling, including local face-to-face service delivery.
- Gambler's Help Line, a 24-hour, seven days per week, statewide service. The helpline also offers *Ready to Change?*, a scheduled therapeutic telephone counselling service.
- Gambling Help Online, a national service providing 24-hour live (text-based) online counselling, email-based counselling and support, and a range of self-help information and information on local support services.
- Recovery Assistance Program (RAP), financial assistance for individuals and their families when gambling has resulted in financial crisis. RAP is administered by the problem gambling therapeutic and financial counselling services.
- Community Education, a range of locally appropriate interventions.

35 This figure compares with 1.1% of non-problem gamblers, according to The Centre for Gambling Research at the Australian National University (cited in Stone, C., Yeung, K., and Billi, R., "Technical Report Four: Social Determinants and Co-Morbidities: Multivariate Models of Co-Morbidities," *The Victorian Gambling Study: A Longitudinal Study of Gambling and Health in Victoria 2008–2012* (2016). Melbourne: Victorian Responsible Gambling Foundation, 17.)

36 Browne, above note 15.

37 Focus group participant, Financial counselling and Gambler's Help services, September 2016

38 Counselling providers are spread out across Victoria to allow statewide help. At the time of writing, they can be classified as: Metropolitan Melbourne: EACH, The Salvation Army, Banyule Community Health, Bentleigh Bayside Community Health, IPC Primary Care. Regional services: Bethany Community Support, Latrobe Community Health Service, Primary Care Connect, Child and Family Services Ballarat, Nexus Primary Health, Grampians Community Health, Gateway Community Health, St Luke's Anglicare. Aboriginal and Torres Strait Islander services: Victorian Aboriginal Health Service, Gippsland and East Gippsland Aboriginal Co-operative, Mallee District Aboriginal Service, Rumbalara Aboriginal Co-operative. <https://www.responsiblegambling.vic.gov.au/getting-help/find-a-counsellor>

Specialist services

According to the most recent review of the current service model available, Victorian Aboriginal Health Service (VAHS) provides referrals and treatment for Aboriginal and Torres Strait Islander communities, while a number of 'in-language' gambling counsellors operate in other Victorian services.³⁹ A number of agencies provide in-language counselling for CALD communities, including the Australian Vietnamese Women's Association; Indo-Chinese Community Support Organisation; and Victorian Arabic Social Services. The Victorian Gambler's Help Youthline also provides assistance for those under 25. Community education services are also provided through a range of different agencies, including the Bouverie Centre, while a number of self-help tools are online, through Gambler's Help Online and the 100 Day Challenge.

General financial counsellors, meanwhile (as opposed to those who specialise in both gambling and financial counselling), 'focused on the head stuff, not the heart'. For example, focus group participants reported that, for many gamblers, working on payment plans for debts and utility bills — and developing crucial 'financial literacy' — was a less confronting door to assistance than addressing the more significant reasons underlying their addictive or compulsive behaviour.

To this end, gambler's help counsellors and financial counsellors often saw the most crucial step in this as just limiting clients' access to cashflow which, due to online banking and 'pay day lenders' or 'Cashies', was unrestricted:

☐☐ *Fifty years ago, you waited till the Bank opened at 9am and then you wrote it all down in a little bank book. Now, you can have access to cash and to gambling 24/7 — you never see it come or go.*⁴⁰

*People have separate gambling accounts — they don't realise it's real money...*⁴¹

*I ask when an individual comes in for treatment 'when did you last gamble?' Ten years ago, it would be 'on the weekend'. Now because of smart phones, it's 'just then, in the waiting room outside'!*⁴²

*I encourage clients to find their own strategies. One decided that freezing his credit card in a bucket of ice was the best strategy. He still had it available, but if he wanted to use it he had to wait until the ice thawed. That gave him time to call me and talk it through.*⁴³

While all jurisdictions offer a range of services, a laudable emphasis in Victoria appears to be on cross-sector collaboration, illustrated through the VRGF's publication of cross-sector collaboration 'guidelines'⁴⁴ and associated funding streams.⁴⁵ Nevertheless, given this predominantly individualised approach — and a lack of cross-jurisdictional evaluations — it is not possible to compare the effectiveness of Australia's help service provision, particularly as it is difficult to evaluate these client-led approaches.⁴⁶ This means that approaches such as web-based and self-help interventions; twelve-step programs; financial counselling and assistance; self-exclusion and alternative therapies (e.g. acupuncture) attract less empirical support.⁴⁷

39 KPMG, "Review of Problem Gambling Treatment Services — Final report: service model," (2013). 23–25.

40 Focus group participant, Financial Counselling and Gambler's Help services, CIJ, September 2016.

41 Focus group participant, Law Institute of Victoria, October 2016.

42 Focus group participant, Financial Counselling and Gambler's Help Services, CIJ, September 2016.

43 Interview, Financial Counsellor, Odyssey House, November 2016.

44 Bouverie Centre, "Practice guidelines for cross-sector collaboration between health and welfare services and Gambler's Help," (2014).

45 Martyres et al, above note 29, p 74.

46 Any examination of the reviews of gambling services undertaken in each Australian jurisdiction is limited by a number of weaknesses, including the fact that only the reviews of systems in Victoria and NSW are publicly available; that neither of those reviews provides a sufficiently comprehensive interstate comparison; and that there are redactions in parts of the review documents. For these reasons, only limited conclusions can be drawn about different models across Australia.

47 Miller, H., "Seeking help for gambling problems," (2014). Victoria: Victorian Responsible Gambling Foundation.

Bringing science and therapy together

By comparison, robust evidence *does* exist for psychological interventions using variations of Cognitive Behavioural Therapy (CBT).⁴⁸ These have been assessed as 'significantly [reducing] symptoms of disordered gambling and associated behaviours such as frequency of gambling and expenditure'.⁴⁹ It is therefore of note that CBT is the predominant approach to treating pathological gambling across Australian therapeutic practice.

Of course, variations on CBT are far from 'the final word' on effective treatment of gambling disorder, with experts calling for 'increased diversification of well-designed outcome studies, focusing on *all* potential types of interventions' (our emphasis).⁵⁰ To this end, there are suggestions that American Psychiatrist Association standards 'set the bar too low' because it is possible to prove efficacy via only two studies.⁵¹

That said, those who work with gambling addicts in less clinical, client-led contexts may be justifiably frustrated by the failures of empirical frameworks to reflect the value of the work that they do, or the ethical challenges of evaluating these against the theoretical 'gold standard' of empirical research.⁵² As commentators point out, the demands of empirical research often mean that it takes decades to establish an evidence base — a long time for desperate clients to wait.⁵³

The CIJ suggests that, like any other community challenge, no single model of treatment or response is appropriate, but that instead a suite of approaches is required. Certainly, public health approaches to problem gambling reflect success in other areas — success which can often only be properly understood in considerable hindsight.⁵⁴ To this end interventions are now being designed to target the entire population along a 'spectrum' of intrusiveness — from limiting the availability of gambling; through community education; to more intensive treatments for individuals. This is about balancing the 'need' for each health program with the importance of maintaining people's personal sovereignty and, in this case, their liberty to gamble.

A further question, of course, is how much this should involve expanding public conceptions of gambling disorder, and bringing together current understanding in different spheres. Certainly, just as the community has taken time to understand that mental health problems can be as debilitating as physical health problems, so it has also been slow to accept that the impact of a gambling addiction may, in some cases, be as debilitating as the more visible effects of something like a drug and alcohol addiction. This challenge as it relates to the criminal justice system will be discussed in more detail in Parts Two and Three of this Report. More broadly, however, it is not all that surprising that the comparison has only recently been made. This is because a substance addiction — particularly an addiction to a substance like heroin or methamphetamine — can have a visible effect on someone's appearance, and can often make them unable to maintain any grasp on the rest of their life. Frequently losing employment, housing or social networks (if they previously existed), the physical effects of an addiction of this kind can make an addict appear quite unwell. Meanwhile, we assume that the substance itself is having an addictive impact, making the individual unable to exercise any control or choice over their actions.

48 Smith, D. et al., "Effects of Affective and Anxiety Disorders on Outcome in Problem Gamblers Attending Routine Cognitive-Behavioural Treatment in South Australia," *Journal of Gambling Studies* 31, no. 3 (2015).

49 Yakovenko, I. and Hodgins, D. C., "Latest Developments in Treatment for Disordered Gambling: Review and Critical Evaluation of Outcome Studies," *Current Addiction Reports* 3, no. 3 (2016). 300. Effect sizes have been demonstrated for up to 12 months.

50 Ibid, p 304.

51 Ibid.

52 A similar problem is faced by other programs which focus on psycho-educational approaches, such as Men's Behaviour Change Programs. See Centre for Innovative Justice, (2015) *Opportunities for early intervention: bringing perpetrators of family violence into view*, RMIT University, Melbourne.

53 Yucel, M., "Virtual reality: new avenues for research and therapy," in *Many Ways to Help conference 2016* (Melbourne).

54 Healy, M., "Lessons from the field: evaluating prevention projects and programs," in *Many Ways to Help conference 2016* (Melbourne).

By contrast, individuals with a gambling addiction may appear to be quite high functioning and physically healthy, often maintaining their job; their home; their car or their family and social life — sometimes over many years — without anyone else suspecting a thing. What's more, the behaviour that is necessary to sustain this addiction — not only gambling in secret but finding the resources to do it — often occurs over a long period and involves a significant amount of deception. While this is akin to drug addicts who may steal from family members in order to fund their addiction, the community perception may be that the drug addict has no control, but that a gambler, by contrast, has a 'choice'.

Emerging evidence from neuroscience, however, brings understanding about substance addiction and gambling addiction closer together. Studies in this field use neuroimaging to demonstrate that gambling activity can 'hijack' our brain's reward system — a system which evolved to trigger behaviours which ensure survival, such as eating — by binding to the same receptor sites, producing dopamine and causing adaptations which can change the brain's circuitry.⁵⁵ For example, a controlled study in the UK examined the neural basis of participants' reactions to gambling 'cues' and found that craving ratings in participants with gambling disorder increased following exposure to gambling cues compared to non-gambling cues.⁵⁶

Professor Marc Lewis — a Canadian researcher currently working in the Netherlands — commenced his work in neuroscience to understand his own previous experience of addiction. He found that the physical changes to the brain which occurred in the process of addiction were not caused by drugs themselves, but by the brain's 'motivational engine being driven by the dopamine pump', with less activity occurring in addicted brains and time collapsing into an 'eternal present of the chase'.

■ ■ *People think that it's the substance we introduce that changes the brain, i.e. the drugs, but it's the substance we manufacture ourselves, the dopamine — that does the job'.⁵⁷*

Lewis suggests that gambling addicts get trapped by 'now appeal', with the dopamine privileging momentary fulfilment over longer term priorities.⁵⁸ Gamblers, like substance users, may also develop what Lewis refers to as 'ego fatigue', with the capacity to resist gambling becoming weaker over time.

Ultimately, this system reinforces and escalates gambling behaviour, with an addict's brain needing higher odds and bigger stakes to achieve the same effect. This includes, as research suggests, through the use of 'near-misses' — moments where an EGM game's 'winning' symbols appear, making players believe that they are controlling the odds and that they should continue playing. Near-misses of this kind have been shown to trigger a brain stimulus equivalent to the effect of 'real-wins', meaning that it is the release of dopamine which satisfies the addicted gambler's urge, rather than the win or loss involved in the gambling activity itself.⁵⁹

55 Seear, K. and Fraser, S., "Beyond criminal law: The multiple constitution of addiction in Australian legislation," *Addiction Research & Theory* 22, no. 5 (2014). 439.

56 EH Limbrick-Oldfield et al, 'Neural Substrates of Cue Reactivity and Craving in Gambling Disorder'(2017) 7(1) *Translational Psychiatry* 1.

57 Lewis, M., "Addiction, Brain Change, and Gambling: Deep Learning, not Disease," Presentation to *Many Ways to Help conference 2016* (Melbourne); See also Lewis, M. D. "Dopamine and the Neural "Now": Essay and Review of Addiction: A Disorder of Choice." *Perspectives on Psychological Science* 6, no. 2 (2011).

58 Ibid.

59 Labuzek, K. et al., "The latest achievements in the pharmacotherapy of gambling disorder," *Pharmacological Reports* 66, no. 5 (2014).

The suggestion that this neuroscience has been deliberately used to induce, mislead and entrap vulnerable gamblers is the focus of current legal claims and policy concern.⁶⁰ Regardless of developments in these broader contexts, however, understanding the exact neuro-mechanisms at play in individuals suffering from gambling disorder may also assist to treat the disorder and regulate the activity more effectively.⁶¹

For example, the Statewide Gambling Treatment Clinic in South Australia offers clients an inpatient treatment service, where the 6–12 sessions of CBT and the kind of graded exposure therapy typically offered in an outpatient program are condensed into an intensive 2-week program of daily sessions in a hospital setting.⁶² This therapy involves triggering gambling urges that are not overwhelming and managing the associated feelings of anxiety in a controlled setting (i.e. with therapist supervision) until there is a reduction in the client's urge for that particular trigger.

Participants achieve this 'habituation' as they are exposed to a series of graded tasks, from simple sensory cues (such as pictures and sounds of gaming machines) to walking past a venue. Clients then repeat the graded tasks as 'homework' (i.e. without supervision). As confidence grows, the tasks become more demanding until the client no longer needs to avoid aspects of daily life which previously triggered gambling behaviour. Meanwhile, the aim is for participants to gain 'refuge and relief from their usual psychosocial distractions and day to day responsibilities'.⁶³ Participant feedback about this service suggests there are other advantages, particularly the range of procedures which made them feel that they had been 'checked from head to toe'.⁶⁴

This 'whole of person' care is crucial to addressing the underlying issues that contribute to the development of an addiction in the first place. This includes the childhood trauma; anxiety; depression; substance addiction or range of other issues identified as predisposing people to addiction as identified above.

To this end, Lewis found that effective recovery required individuals to teach their brain to look beyond the stigma associated with gambling to a 'future self who is good and trustworthy'. This includes identifying and 'surfing' the urges to gamble which come and go; and by addressing any trauma which creates a vulnerability to addiction in the first place.⁶⁵

More broadly, surveys of gambling counsellors suggest that, similar to the Statewide inpatient program, the techniques of CBT (role playing, in vivo exposure) are used in Victoria as well.⁶⁶ In fact, researchers at Monash University have been exploring the potential of virtual reality to increase the potency — and theoretically the effectiveness — of these kinds of treatments. Subjects of this trial wear a headset and enter a virtual casino, gambling away virtual money, while researchers monitor heart rate; sweat gland activity; body temperature; and brain activity. The idea is to help the subjects — and eventually, it is hoped, patients — 'regain mindfulness'. More broadly, the aim is also to improve assessment and treatment in practice.⁶⁷

60 <http://www.smh.com.au/federal-politics/political-news/pokieleaks-campaign-calls-for-gambling-industry-secrets-20160926-groino.html>

61 Labuzek, K. et al. above note 59.

62 During the period 2008–2009, approximately 1000 clients with gambling disorders sought treatment through SGTS. Of these clients, 53 were admitted to an inpatient program. Morefield, K. et al., "An Inpatient Treatment Program for People with Gambling Problems: Synopsis and Early Outcomes," *International Journal of Mental Health and Addiction* 12, no. 3 (2013): 367.

63 Ibid. 369.

64 Ibid. 370.

65 Lewis, above note 57.

66 Victorian Responsible Gambling Foundation, above note 26, p 117.

67 Yucel, above note 53. See also, <http://www.smh.com.au/technology/innovation/retraining-the-brain-to-halt-the-money-drain-20151024-gkhjq0.html>

Finally, the CIJ understands that medical trials of pharmacotherapy for gambling problems are also underway in Australia.⁶⁸ However, the various pharmacotherapies for gambling problems have received only limited support.⁶⁹ The newest meta-analyses conclude that *only* opioid antagonists (naltrexone and nalmefene) have demonstrated a small but significant effect, compared with placebo.⁷⁰ These drugs influence the dopamine system, reducing the intensity of gambling urges.⁷¹ Some service providers said that this evidence has convinced their organisations that there is merit in using these treatments in some contexts.⁷² However, Lewis suggests that the treatments must be understood as a 'conduit to survival, not to life'.⁷³

Other commentators note that:

■ ■ *...pharmacotherapy may not be considered an evidence-based treatment for disordered gambling alone, but limited evidence exists for its use in the treatment of comorbid gambling and mood/anxiety disorders such as bipolar spectrum...and obsessive compulsive disorder[s].*⁷⁴

While it is unclear where these developments in science will lead, overall it is worthwhile recognising how they help us to understand addiction and where gambling may sit in this equation.

68 <http://www.sbs.com.au/news/article/2012/12/18/anti-gambling-pill-goes-trial>

69 At this stage, those examined include elective serotonin reuptake inhibitors (SSRIs), mood stabilizers, dopaminergic medications, opioid antagonists, and glutamatergic medications.

70 Yakovenko and Hodgins, 'Latest Developments in Treatment for Disordered Gambling: Review and Critical Evaluation of Outcome Studies', *Current Addiction reports* 3, No. 3 (2016), 302.

71 These drugs may also have side-effects, including nausea. Brown, J. et al., "Problem Gambling: A Beginner's Guide for Clinical and Forensic Professionals," *Behavioral Health* 2, no. 2 (2016). 25. At the time of writing, the U.S. Food and Drug Administration (FDA) had still not approved medication for the treatment of disordered gambling.

72 Focus group participant, Alcohol and Drug service providers, CIJ, September 2016.

73 Lewis, M., "Addiction, Brain Change, and Gambling: Deep Learning, not Disease," in *Many Ways to Help conference 2016* (Melbourne).

74 Yakovenko et al, above note 70.

An analysis of gambling harm

The developments described above may progress our response to *individual* gamblers and their problem behaviour. As referred to earlier, however, attention has begun to shift towards a focus on broader gambling-related harm, harm which extends beyond the effects on the individual gambler.⁷⁵

While the community underestimates the severity of this harm,⁷⁶ this is in part because of a failure to distinguish the behaviour from its associated outcomes. For instance, 'financial difficulties' and 'lying to significant others' are often seen as symptoms *and* as harms of an individual's gambling problem. This may mean that individual harms have been emphasised at the expense of family and population harms.

Moving towards a broader conceptualisation, gambling-related harm has been defined as '[a]ny initial or exacerbated adverse consequence due to an engagement with gambling that leads to a decrement to the health or wellbeing of an individual, family unit, community or population'.⁷⁷ The Australian Gambling Research Centre offers further insight into what these consequences might include:

FF *Adverse consequences typically involve financial problems (including mortgage foreclosure, inability to pay bills/rent or inability to purchase essentials such as food) and relationship breakdown. These harms extend to the family and friends of [problem gamblers]...Work performance is often affected, resulting in absenteeism and potential job loss. Clinical distress is frequently reported, with suicide attempted in the worst cases. Problems extend to legal or even criminal issues when debts remain unpaid, or when theft or domestic violence result from financial or emotional strain.*⁷⁸

Further research has developed a 'taxonomy' of harm, which researchers developed by analysing data obtained from interviews; extant literature; focus groups; and public gambling help or support forums on the internet.⁷⁹ Categories of harm proposed in this taxonomy are, broadly:

- financial harms;
- emotional or psychological distress;
- detriments to health;
- reduced performance at work or study;
- cultural harm;
- lifecourse and intergenerational harm;
- relationship disruption, conflict or breakdown; and
- criminal activity.

The following discussion addresses the final three dot points.

75 See for example, Australian Gambling Research Centre, "Self-exclusion," and "Limit setting" *Review of electronic gaming pre-commitment features* (2016).

76 Australian Gambling Research Centre, "Communication needs and the Australian gambling field," (2015). 11.

77 Langham, E. et al., "Understanding gambling related harm: a proposed definition, conceptual framework, and taxonomy of harms," *BMC Public Health* 16, no. 1 (2016). 4. For further detail, see Langham et al.'s discussion (p. 5).

78 Australian Gambling Research Centre, above note 75, 2.

79 Langham et al., above note 77. See also, Browne et al, above note 15.

Intergenerational harm

Examinations of harm experienced at the family level⁸⁰ can be built on to identify ‘legacy harms’⁸¹ — those that continue to occur (or emerge) even if the person’s engagement with gambling ceases and which potentially become life course and intergenerational. Certainly, research indicates that the children of problem gamblers are two to ten times more likely to experience gambling problems than people without a parent or sibling with a gambling problem. Specifically, people whose fathers have gambling problems are reported as 11 to 14 times more likely to have gambling problems, while those with mothers with gambling problems were 7 to 11 times more likely.⁸² These children may experience other harm, including various forms of maltreatment, with some evidence suggesting that problem gamblers may be more likely to physically abuse; punish harshly; or neglect their children.⁸³

To this end, one AGRC project — part of the Australian Temperament Project (ATP) — may shed light on the intergenerational experience of gambling harm. ATP, a longitudinal study running for over 30 years which has followed a large group of children from infancy to adulthood, is currently collecting data from these children, their parents and now the children’s offspring. Data previously collected concerned participants’ emotional and behavioural adjustment; risky behaviours (e.g. drug and alcohol use, driving); and antisocial behaviour.

More recently, Wave 16 of ATP also included questions about gambling, specifically concerning gambling participation; problem gambling; and early modelling and exposure to gambling. The results from the AGRC’s analysis should provide valuable lessons for the way in which we approach concepts of gambling harm.⁸⁴ A recent AGRC International Youth Development Study also suggests that there is a need to focus on other biological; personality; cognitive; and community level factors as possible targets to reduce risk of problem gambling.

80 Australian Gambling Research Centre, "The impact of gambling problems on families," *AGRC Discussion Papers* (2014).

81 Langham et al., above note 77.

82 Dowling et. al, cited in Australian Gambling Research Centre, above note 80, p 5.

83 Lane, W. et al., "Child maltreatment and problem gambling: A systematic review," *Child Abuse & Neglect* 58 (2016).

84 Australian Gambling Research Centre, <https://aifs.gov.au/agrc/projects/gambling-australian-temperament-project> See also K Scholes-Balog and N Dowling, 'Longitudinal Protective Factors for Problem Gambling and Related Harms: Building Resilience Among Young Adult Gamblers' (Victorian Responsible Gambling Foundation, 2017).

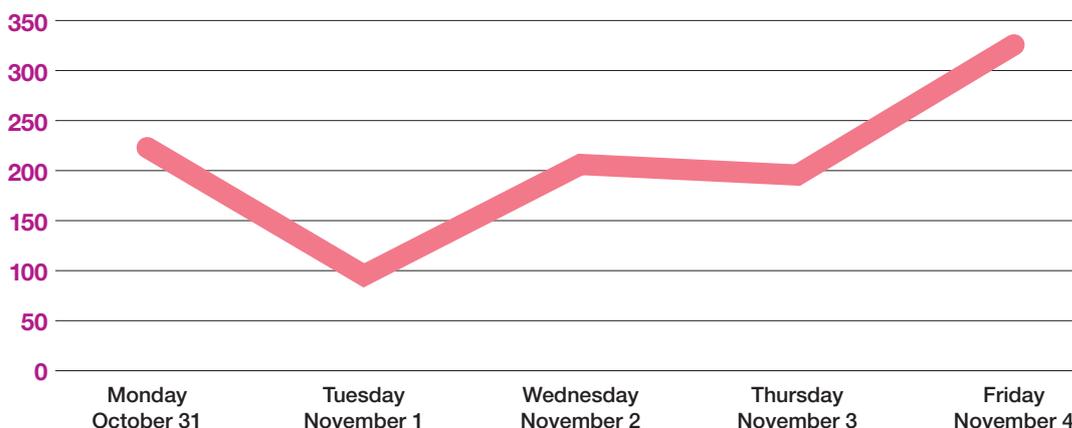
Family violence

Also important to focus on more effectively in any analysis of gambling harm is the category of 'relationship disruption, conflict or breakdown' or, as the AGRC definition describes, 'domestic violence [which] result[s] from financial or emotional strain'.

These characterisations are concerning, in the CIJ's view, for reasons which are explained below. Regardless, however, a recent meta-analysis of 14 different studies found that, among problem gamblers, 38.1% report being victims of intimate partner violence and 36.5% report being perpetrators. Interrogated the other way, 11.3% of perpetrators of family violence more broadly identify as problem gamblers.⁸⁵

Meanwhile, another recent study found that, when adjusted for other indicators, there was a statistically significant correlation between poker machine density and police-recorded domestic violence rates among postcodes.⁸⁶ Similarly, police recorded 20% fewer family violence incidents when postcodes with no poker machines were compared with postcodes with at least 75 pokies per 10,000 people. In other words, there were more police-recorded violence in areas with more poker machines.⁸⁷

Safe Steps (Victoria's statewide family violence crisis response service), provided raw data which indicated that calls to this service spiked uniquely following periods of significant gambling activity. These figures showed that calls on Cup Day were significantly lower than on most Tuesdays, reflecting the fact that women are less likely to call while perpetrators are at home, but that after Cup Day, total calls increased by 115% and by the end of the week still sat at almost 80% more than average.⁸⁸ It should be noted, of course, that this period in Victoria's calendar is also associated with a significant increase in alcohol consumption, with international trends showing an association between large scale sporting events overall, such as football finals, and increases in domestic violence hospital admissions.⁸⁹



The CIJ welcomes the recognition of the impact of gambling on family relationships, and of the co-existence of family violence and gambling. However, it cautions against slipping into any assumption that the violence or abuse has been *caused* by gambling-related 'financial or emotional strain' as it is described the taxonomy of harms above. This is because this classification risks excusing the violence, and fails to examine its core motivation.

85 Dowling, N. et al., "Problem Gambling and Intimate Partner Violence: A Systematic Review and Meta-Analysis," *Trauma Violence Abuse* 17, no. 1 (2016).

86 Markham, F., Doran, B., and Young, M., "The relationship between electronic gaming machine accessibility and police-recorded domestic violence: A spatio-temporal analysis of 654 postcodes in Victoria, Australia, 2005–2014," *Social Science & Medicine* 162 (2016).

87 Ibid.

88 Figures provided to the CIJ by Safe Steps, email from Annette Gillespie, CEO, Safe Steps Family Violence Response Centre, 30 November 2016.

89 Turning Point Alcohol & Drug Centre and Vichealth, (2011) *Drinking cultures and social occasions: alcohol harms in the context of major sporting events*; Sachs, C.J., & Chu, L.D., "The association between professional football games and domestic violence in Los Angeles county," *Journal of Interpersonal Violence* 1192 (2000).

On this construction, violence or abuse becomes an almost inevitable and forgivable consequence of emotional or financial strain — strain either caused by a woman gambling and her partner ‘lashing out’ in frustration, or a man gambling and lashing out because his wife has allegedly been ‘nagging’ him about the financial pressure they are under. Either way, the violence or abusive behaviour in this analysis is constructed as the fault of the woman. If we had any doubts, this conceptualisation appears amongst some of the earlier — and more disturbing — theorising about intimate partner violence itself:

■ ■ *Interfering with a partner’s attempt to punish the children, nagging, arguments over drinking and gambling...these are all part of the role of the victim in family violence.*⁹⁰

In the CIJ’s view, this analysis is abject nonsense. As the Victorian Royal Commission into Family Violence clearly stated, gambling or other co-morbidities do not cause violence-supportive attitudes or behaviour, nor the control and coercion which perpetuates them. Just like issues such as mental health or substance abuse, however, gambling can co-exist with family violence, and often escalate its frequency or severity.

As described by one participant, gambling can be ‘the spark that fuels the tinder underneath’,⁹¹ one of the factors which function as a barrier and make it harder for a perpetrator to ‘choose non-violence’.⁹² Certainly, throughout the CIJ’s broader work around family violence, problem gambling has frequently been mentioned — though almost as an afterthought — ‘in the mix’ co-existing with family violence.⁹³

For this current project, project participants similarly reported that a history of family violence was in the background of many of the female problem gamblers that service providers and lawyers saw. Furthermore, it almost always *preceded* the gambling, and sometimes drove victims to seek respite in the warmth and relative security of a gaming venue, or in the repetitious nature of a pokies addiction.

In fact, in its audit of over 1000 publicly available submissions to the recent Royal Commission into Family Violence, the CIJ identified 47 of these mentioning the interrelationship of gambling and family violence in a variety of ways, supporting and reinforcing from a practitioner perspective the findings emerging from recent peer-reviewed literature. For example, Whittlesea Community Connections (a family services provider) reported that 1 in 10 cases with a family violence component also featured problem gambling.⁹⁴

Particularly worrying was the suggestion that victims of family violence not only sought refuge from family violence in gaming venues of their own volition,⁹⁵ but that they had been *encouraged* to do so by some specialist services.⁹⁶ In its submission, VCOSS calls for recognition of the dangers of this practice, noting that ‘the long opening hours, solo nature of the activity and presence of security are reasons why pokies facilities and gaming venues might be considered appropriate safe spaces’.⁹⁷ Given what Part Two of this Report finds about the criminogenic nature of many gaming venues, the CIJ sees this as of significant concern.

Also concerning, one submission — the highly regarded Domestic Violence Resource Centre’s discussion paper *Just Say Goodbye: Parents who kill their children in the context of separation* — notes that one perpetrator type known as ‘civil reputable’ may ‘kill themselves and their families to avoid facing disgrace arising from gambling, embezzlement, financial mismanagement or bankruptcy’.⁹⁸

90 Gelles, cited in Houston, C., "How Feminist Theory Became (Criminal) Law: Tracing the Path to Mandatory Criminal Intervention in Domestic Violence Cases," *Michigan Journal of Gender & Law* 21 (2014).

91 Focus groups participant, Family Violence Services, September 2016.

92 Citing Rodney Vlasis, submission from Centre for Forensic Behavioural Science and Forensicare, "Understanding and responding to complex criminal behaviour resulting in family violence: submission to the Royal Commission on Family Violence," (2015).

93 Centre for Innovative Justice, (2015) Opportunities for early intervention: bringing perpetrators of family violence into view, RMIT University, Melbourne.

94 Whittlesea Community Connections, "Submission to the Royal Commission into Family Violence" (2015).

95 WIRE, cited in Victorian Primary Care Partnerships, "Submission to the Royal Commission into Family Violence" (2015). 33.

96 Victorian Council of Social Service, "Royal Commission into Family Violence: VCOSS Submission" (2015). 72.

97 Ibid.

98 Domestic Violence Resource Centre Victoria, "Submission to the Royal Commission into Family Violence" (2015). 12.

More broadly, the CIJ's audit of submissions to the Royal Commission into Family Violence indicates that many specialist family violence services see gambling services as a setting in which there is a 'strong case for building capacity for 'upstream' intervention'.⁹⁹ Many submissions recommended integration between the associated sectors (i.e. family violence and problem gambling); professional development in both sectors to reduce gaps in respective knowledge; harm minimisation measures due to EGMs; research on the use of gambling as a safe place for victims; and the inclusion of gambling as a risk factor in the pending revision of the state's family violence risk assessment and management framework.

Clearly, family violence victimisation — just like other forms of vulnerability — can be a prelude to problem gambling. What is less well understood, however, is that gambling can not only co-exist or contribute to the abuse, but be an *instrumental part* of it when gambling is a feature of the perpetrator's behaviour. This can take the form of economic abuse — using a woman's pay or Centrelink funds to resource a gambling habit; taking a bank loan in a woman's name, potentially on the premise that it is for a family holiday, and then gambling it all away; or simply in the fact that gambling defines the environment of fear in the family's home, depending on whether the perpetrator has won or lost.¹⁰⁰

As the *Stepping Stones* report by the Women's Legal Service explains, this form of abuse can not only keep women trapped in contexts of family violence, but also undermine their recovery post-separation.¹⁰¹ In fact, through driving their partners into debt during the relationship; and then by gambling existing resources away post-separation, perpetrators can continue to exercise significant coercion and control. To this end, it may be that there is a correlation between a perpetrator's desire for control over his family members and his search for a feeling of control in a gaming environment — a correlation which may warrant future research.

Similarly, perpetration of economic abuse can also form a part of other forms of family violence — including elder abuse. In fact, project participants gave many accounts of individuals perpetrating economic abuse against their parents or extended family members in order to resource their addiction. This included adult children draining their parents' existing resources; or forcing their parents to act as guarantor for a mortgage, the payments for which were then foregone as a result of the gambling addiction. While further examples of this in the criminal justice sphere are explored in Part Two of this Report, the CIJ heard that, in the civil sphere, lawyers could help by pursuing the relevant financial institution for failing to conduct due diligence before agreeing to the loan.

Overall, the submissions to the Royal Commission identified in the CIJ's audit reflected a clear need for better identification and understanding of family violence within problem gambling service settings, and of course vice versa. To this end, the CIJ is aware that a number of specialist services, such as Berry Street Family Services and Relationships Australia (who provide Men's Behaviour Change Programs) are beginning to include gambling related questions in their risk assessments and intake, while a Department of Health and Human Services assessment tool also includes a question about gambling concerns.¹⁰²

Echoing the pattern emerging across this subject area, however, the existing strain on specialist family violence services mean that data from these assessments are not collected or collated. The CIJ therefore suggests that, though it highlighted financial and economic abuse comprehensively, the recent review of the CRAF may have missed a vital opportunity to give specific focus to the value of questions about gambling in its conclusions.¹⁰³ It is therefore hopeful that the pending release of the revised Multi-Agency Risk Assessment and Management Tool, or 'MARAM', will not have overlooked this opportunity as well.

99 Ibid, 20.

100 Focus group participant, Community Legal Centres, CIJ, September 2016.

101 Women's Legal Service Victoria, "Economic Abuse and Economic Recovery of Family Violence Victims — Royal Commission Into Family Violence," (2015).

102 Monash University, 'Final Report, Review of the Family Violence Risk Assessment and Risk Management Framework (CRAF), 23 September 2016.

103 Ibid.

Criminal activity

For the purposes of this Report, of course, 'criminal activity' is the most relevant category of gambling-related harm. This includes the harm that this criminal activity causes to the victim, as well as to the offender themselves.

As Part Three of this Report explores, the harm caused to those from whom a significant amount of money has been embezzled, for example, has certainly been viewed very seriously by the courts and has drawn more attention than the harm caused to the offender's immediate family or wider community. In fact — despite the Institute of Public Affairs suggesting that this kind of 'white collar' crime was essentially 'victimless'¹⁰⁴ — breach of an employer's trust is seen by the courts to be one of the most significant parts of an offender's culpability.

While large corporations may have insurance against this kind of theft, recent research suggests that many are reluctant to report the theft for fear of adverse publicity or other reputational damage.¹⁰⁵ Small businesses or sole employers, meanwhile, are likely to be left quite devastated by the theft of the substantial amount of money which is often involved in these cases. To this end, the CIJ heard that an employer's reaction, as well as their potential compassion for a longstanding employee, can have a significant impact on whether the criminal activity is reported, as well as what other attempts to repair the harm are taken. Potential for developments in this regard are discussed in Part Four.

In terms of the harm caused by criminal activity to the individual offender themselves, however, it is potentially a conceptual leap to distinguish what was for a time seen as a *symptom* of gambling disorder, and see it as a harm instead. Certainly, as discussed above, for some years the DSM 4 listed 'illegal acts' as a criterion for *diagnosing* problem gambling. With its removal from the 2013 edition, this prompted significant debate about whether gambling-related crime should be seen as a symptom or harm.¹⁰⁶

Regardless of how criminal activity is seen within diagnostic contexts, the broader work of the CIJ demonstrates clearly that contact with the criminal justice system is a significant and often enduring harm. Whether as a victim who may be further traumatised by the criminal prosecution process,¹⁰⁷ or one of the significant number of people in Victoria's prisons with a mental illness or Acquired Brain Injury,¹⁰⁸ contact with the criminal justice system can entrench pre-existing vulnerability. In fact, the vast majority of people who interact with the criminal justice system are already highly vulnerable for a range of reasons — as a result of Aboriginal and Torres Strait Islander status; of disability; of mental illness; of previous family violence victimisation or childhood sexual abuse; of low educational attainment; or of intergenerational unemployment and poverty.

In other words, no matter what brings individuals to court, an arrest can escalate risk of harm to the offender or to others; while incarceration separates people from housing and employment; temporarily from medication and other treatment while new regimes are imposed; and of course from children. Pre-existing trauma and mental illness are also frequently compounded by the custodial environment.

Meanwhile, just as problem gambling by parents can increase the likelihood of problem gambling in their children (see 'Intergenerational harm', above), the incarceration of parents can also increase the chance that their children will come into contact with the criminal justice system later in life.¹⁰⁹

104 Chris Merritt, 'Jump in prison numbers cost \$3.8 billion a year', 2 December 2016, The Australian.

105 Warfield & Associates, *Gambling-Motivated Fraud in Australia 2011–2016*, August 2016, Sydney, Australia.

106 Granero, R. et al., 'Subtypes of Pathological Gambling with Concurrent Illegal Behaviors,' *Journal of Gambling Studies* 31, no. 4 (2015); Granero, R. et al., 'Contribution of illegal acts to pathological gambling diagnosis: DSM-5 implications,' *Journal of Addictive Diseases* 33, no. 1 (2014); Grant, J. and Potenza, M., 'Commentary: Illegal Behavior and Pathological Gambling,' *The Journal of the American Academy of Psychiatry and the Law* 35, no. 3 (2007).

107 Centre for Innovative Justice, *Innovative Responses to Sexual Offending: pathways to better outcomes for victims, offenders and the community*, May 2014, RMIT University, Melbourne.

108 Centre for Innovative Justice, *Enabling Justice* project. At <https://www.rmit.edu.au/about/our-education/academic-schools/graduate-school-of-business-and-law/research/centre-for-innovative-justice/what-we-do/enabling-justice-abi/>

109 Centre for Innovative Justice, *Opportunities for early intervention: bringing perpetrators of family violence into view*, March 2015, RMIT University, Melbourne. Submission to Royal Commission, Mental Health Legal Centre, Inside Access & Centre for Innovative Justice, May 2015. At [http://www.lawreform.vic.gov.au/sites/default/files/Submission_CP_36_Centre_for_Innovative_Justice_30-10-15.pdf](http://www.rcfv.com.au/getattachment/8E5F49BB-1D8C-4893-B6EC-F39B4C3F0B79/Mental-Health-Legal-Centre-Inc;-Inside-Access;-Centre-for-Innovative-Justice- See also Submission to Victorian Law Reform Commission <i>Inquiry into the Role of Victims of Crime in the Criminal Trial Process</i> At <a href=)

If this is not sufficient harm, there is no more criminogenic environment than prison. In other words, incarceration not only causes individuals a range of further harm, it also makes them more likely to offend again. For first time offenders, in particular, prison represents ‘no better school for further offending’,¹¹⁰ while contact with other offenders can introduce individuals who may be in custody for property theft to contacts which can lead them to drug trafficking or other more serious crime.

For recidivist offenders, meanwhile — many of whom may have been in and out of institutions all their life due to profound disadvantage — the cycle in and out of prison erodes an individual’s hope that they may ever live a ‘normal’ life in the community.

This means that contact with the criminal justice system (which, as Parts Two and Three will explain, frequently leads to incarceration when gambling related offences are involved) should be seen as a double whammy in the taxonomy of gambling harms. Not only does incarceration compound the existing harms which gamblers may already be experiencing, but it increases the likelihood of those offenders causing further harm to others down the track — hardly the purpose for which the community would expect it was designed.

Echoing this conception of compounded harm, perhaps one of the most interesting developments concerning the subject of gambling-related harm are emerging from an ARGC project entitled *Gambling in Suburban Australia*. This work suggests that gambling addiction is having a much bigger impact — that is, causing much more significant harm, from a subjective perspective — on families in Melbourne’s more disadvantaged suburbs, than it is in wealthier areas.¹¹¹

This conclusion and associated concerns are found in a number of the submissions to the Royal Commission that were the subject of the CIJ’s audit.¹¹² These submissions argued that those populations which were already the most vulnerable in Victoria were experiencing further harm by greater exposure to gambling opportunities. The City of Greater Dandenong, for example — located in the region with one of the state’s highest family violence callout rates — has the second highest number of EGMs per capita in Victoria.¹¹³

Though the AGRC was yet to publish this project’s complete findings at the time of writing, a media release reports that:

“...socioeconomic disadvantage [...] magnifies the harm from gambling. For example, one gambler in the east said losses meant their family had to go without repairing the dishwasher for six months, while several gamblers in the west said gambling losses meant they literally could not afford food for their children.”¹¹⁴

While this in many ways seems self-evident, it does remind us to guard against measuring harm with purely objective yardsticks. In other words, we need to remember that — if a person is vulnerable for a range of other reasons — they may be more likely than another person to develop a gambling problem, while that problem is also likely to cause them more harm.

It is clear that vulnerability — whether through pre-existing trauma, depression or anxiety; through family violence victimisation; through substance abuse; or socio-economic disadvantage to name a few — can contribute to and compound gambling harm. As Part Two of this Report explores, this includes tipping people onto, or keeping them on, the wrong side of the law. Added to the layers of harm already experienced, this contact with the criminal justice system then compounds this pre-existing vulnerability. Whatever pathway brings people between gambling and offending, therefore — whether it be the linear pathway or others discussed later in this Report — this suggests that contact with the criminal justice system is a form of gambling harm which requires more policy attention than it currently receives.

110 Consultation with Judge Mark Farrell, Amhurst Gambling Treatment Court.

111 <https://aifs.gov.au/media-releases/tale-two-suburbs-gambling-suburban-australia>

112 For example, see Hobson Bay City Council, “Submission Royal Commission into Family Violence,” (2015).

113 ‘Gambling & the City of Greater Dandenong’, at <http://www.greaterdandenong.com>

114 AIFS, “Tale of two suburbs: Gambling in suburban Australia” (7/7/2016) <https://aifs.gov.au/media-releases/tale-two-suburbs-gambling-suburban-australia>

Part Two – Contact with the criminal justice system as a form of gambling harm: prevalence and pathways

Prevalence – what figures do we have?

An initial challenge for this project was the fact that there is little data regarding the total number of problem gamblers who have contact with the Victorian justice system. This is despite recommendations from research initiated by the Department of Justice and Regulation in 2008 (ultimately published by the VRGF in 2013 and referred to already throughout this current report), which recommended that data collection occur right across the spectrum of the system.

In the absence of official data collection, academic prevalence studies can provide indicative estimates. Some relatively recent published local estimates indicate that:

- 33.5% of 173 respondents – or 1 in 3 – Victorian prisoners were classified as problem gamblers based on gambling behaviour in the 12 months preceding incarceration;¹¹⁵
- Of 105 South Australian prisoners, 52% of prisoners had ‘lifetime prevalence’ – that is, they had experienced problem gambling at some point prior to assessment;¹¹⁶
- 43.5% out of 100 offenders in a South Australian community support program were classified as problem gamblers;¹¹⁷
- Five earlier problem gambling studies in offender populations in Australia report prevalence rates ranging between 12 and 51 per cent.¹¹⁸

Of course, prevalence studies use inconsistent approaches, making it hard to draw solid conclusions and potentially also influencing research, data collection and self-reporting. In fact, the definition of gambling-related offending appears to be highly subjective, with some analysis assuming a direct nexus while others take broader approaches. One study examining cases heard by local and district courts in NSW between 1995 and 1999 offers a definition of gambling-related offending which has been consistently referred to in literature since.¹¹⁹ This classifies an offence as ‘gambling related’ if it was committed:

- as a consequence of;
- in order to support;
- as a significant result of; or
- significantly related to the defendant’s desire, need or compulsion to gamble.¹²⁰

115 Victorian Responsible Gambling Foundation, above note 28.

116 Paterson, A. and Garrett, L., ‘Report into the possible connection of problem gambling, drug usage and criminal activity among client of OARS SA’ (2010).

117 Riley, B. and Oakes, J., ‘Problem gambling among a group of male prisoners: Lifetime prevalence and association with incarceration,’ *Australian & New Zealand Journal of Criminology* 48, no. 1 (2014).

118 *Ibid.*, 75.

119 Neal, L. ‘An Analysis of the Courts’ Assessment of Problem Gambling in Sentencing.’ *Criminal Law Journal* 40, no. 2 (2016).

120 Crofts, P., ‘Gambling and criminal behaviour: an analysis of local and district court files,’ (2002).

This study also made the point, frequently noted in contemporary commentary,¹²¹ that it is likely that all research will 'grossly underestimate the incidence of gambling-related crime'.¹²² Either way, even on the narrow definition of the data currently collected, it does seem that gambling problems, as determined by PGSI score, appear more commonly in criminal justice settings than they do in the wider community. If even the lowest of the above statistical estimates are true, problem gambling is more common among offenders than it is among the general Australian adult population, which is estimated to be 0.7% of the adult population, as noted above.

Outside prevalence studies, a number of other studies point to the extent to which gambling is a feature of criminal matters. In fact, a Danish Population-Based Survey (based on data from the Danish Health and Morbidity Surveys in 2005 and 2010, linked at the individual level with data from the Danish National Criminal Register), found there was a strong association between problem gambling and 'being charged'.¹²³

Certainly, gambling is a regular feature in criminal courts across all Australian jurisdictions, a simple scan of Austlii case law databases indicating that NSW and Victorian superior courts hear the greatest number of matters which can be clearly identified as gambling-related. This is consistent with a regular national study conducted by Warfield & Associates, a forensic accountancy firm, which examines the specific connection of gambling to fraud committed across Australia. Key findings from the most recent edition of this study were drawn from 265 cases involving 267 offenders and included that:

- The total amount stolen was over \$104,143,790;
- Victoria had the highest number of frauds and the largest overall losses;
- EGMs were the most preferred form of gambling, particularly for female offenders;
- Male offenders stole nearly twice as much as female offenders overall (potentially related to the fact that men are still more likely to be employed in positions with access to significant resources);
- Only 19% of offenders had a prior criminal history;
- Government and Financial Services were the hardest hit in terms of frequency and amounts stolen;
- Depression was commonly reported amongst all offenders.

Given the significant limitations on this study — including that only publicly reported cases involving a conviction were included; as well as that, where gambling was not accepted as relevant by a court, the case was discounted from the study — the authors themselves suggest that this study reflects a significant underestimate of the prevalence of gambling-motivated fraud in Australia.¹²⁴

Meanwhile, a recent report of the Sentencing Advisory Council indicated that approximately a quarter of all prosecutions for cultivating a commercial quantity of narcotic plants were gambling related.¹²⁵ Three major drug offences were included in this study: cultivating a commercial quantity of narcotic plants (20%); trafficking in a drug of dependence in a commercial quantity (15%); and trafficking in a drug of dependence in a large commercial quantity (24%). The Council concludes that problem gambling — and perhaps financial difficulties — may constitute 'a pathway to offending, which is being exploited by principals/proprietors of cultivation operations in a targeted manner'.¹²⁶

These studies seem to fit within the narrower definition of gambling-related offending, with associated research confirming that 'problem gamblers who then offend' are more likely to commit property or drug related offences as the most direct avenue towards resourcing their addiction. To this end, a sample audit of all matters heard by one County Court judge sitting in the criminal list between 2010 and 2016 and provided to the CIJ indicated that 18 out of 220 cases — or 8% — involved gambling. Of these, offence type was evenly split between charges relating to cannabis cultivation and charges relating to employee theft.¹²⁷

121 See for example, Brading, R. and Rollason, J., "Gambling, counselling and treatment programs in NSW," *Judicial Officers' Bulletin* 28, no. 3 (2016). 27.

122 Crofts, above note 120.

123 Binde, P. "Preventing and Responding to Gambling-Related Harm and Crime in the Workplace." *Nordic Studies on Alcohol and Drugs* 33, no. 3 (2016): 247–65.

124 Warfield & Associates, *Gambling-Motivated Fraud in Australia: 2011–2016*, August 2016, Sydney.

125 Sentencing Advisory Council, *Major Drug Offences: Current Sentencing Practices*, 17 March 2015, Victoria.

126 *Ibid.*, 21.

127 Figures reported by Judge Gabrielle Cannon, County Court of Victoria, November 2016.

Studies in this context also suggest that problem gamblers who go on to offend are generally first time offenders. Anglicare Tasmania studied 42 cases in the Supreme Court of Tasmania and found 'half the cases involved defendants who had no prior convictions...in their determinations the judges stated that it was the defendants' gambling problems that had led them to commit these, their first offences'.¹²⁸

While these various prevalence or quantitative studies give us a picture of the extent to which problem gambling features in a certain kind of criminal matter, being primarily property or drug related charges, the CIJ wanted to know how much gambling was a feature in the lives of offenders more generally.

In the context of lower level offending, the CIJ heard from project participants that gambling problems were not seen as pressing issues or at least disclosed in initial instructions or assessments with clients. This statement was then somewhat contradicted by subsequent comments that gambling was frequently 'in the mix' of offenders' broader lives, suggesting that it was apparent to lawyers and Magistrate regardless of the charges being heard before the court.

To understand this contradiction in a bit more detail, the CIJ sought access to what limited data existed at the local or Magistrates' Court level, being data collected by the Courts Integrated Services Program (CISP). CISP is a program which works with offenders who have complex needs (such as homelessness and ABI, for example) and often very chaotic existences. The program involves detailed assessment upon intake, as well as ongoing case management with certain offenders over a period of some months.

Data for the 2015–2016 period was provided to the CIJ and, consistent with low levels of self-disclosure, 118 out of a total 3447 defendants referred to the CISP program were identified with gambling problems at the point of referral. However, a slightly larger proportion — 273 out of 1574 — were identified during the course of case management, with the court reporting that this was not surprising given that clients did not immediately identify gambling issues as their most pressing need at intake.¹²⁹

Data was not always recorded by the court under each field for each client, meaning that the data provided to the CIJ was incomplete. Within these limitations, however, it is notable that:

- 17.3% of clients who proceeded to case management disclosed gambling related problems in the context of fairly chaotic existences;
- the highest proportion of these clients identified as 'Australian'; 'ATSI' and Vietnamese; and
- only 52 had a history of prior incarceration.

It may be, therefore, that similar themes in relation to problem gambling are playing out even in the cohort of CISP clientele, suggesting that there may be significant value in further data collection at this type of point of interaction with the Magistrates' Court.

This sample represents a small number of individuals appearing before the court overall and therefore cannot be interpreted as a representation of the broader cohort of offenders. Given that the majority of gambling related offending as currently identified by the criminal justice system is related to significant property theft or drug offences, however, it may be notable that gambling is also a feature in the lives of some offenders who may not be in a position to commit these more serious kinds of offences.

Having glimpsed what limited data was collected about these more complex offenders, the CIJ sought access to data about people appearing in the 'bread and butter' criminal lists, being summary crime matters. To do this, the CIJ enlisted the help of Victoria Legal Aid, who agreed to administer surveys to clients at five different Magistrates' Court locations (being Melbourne, Frankston, Werribee, Sunshine & Heidelberg) over a period of four weeks towards the end of 2016.

128 Margie Law, 'Nothing Left to Lose: problem gambling and crime' Anglicare Tasmania Social Action and Research Centre, 2010.

129 Only a certain number of those referred to CISP proceed to the case management stage, reflecting the lower number in this second equation.

Given the surveys were completely voluntary and were provided to clients at a highly stressful time in their lives, the response of 226 surveys overall was considered by VLA and the CIJ alike to be significant. As indicated in the description of the methodology at the beginning of this report, the survey instruments can be found as an Appendix to this report (Appendix A).

Just as it is not possible to generalise findings about overall prevalence of gambling in the criminal justice system from the CISP data, nor is it possible to do so from the sample of VLA clients surveyed. However, it is significant that a consistent pattern emerged over the four-week period in which 9% of the total clients surveyed (21 out of 226) self-reported as gambling AND having gambling issues. Given that this is likely to be under-representative, this stable number of self-disclosures is important to acknowledge, as is the fact that many reported experiencing several problems with their gambling, the most predominant one being having to borrow money from family and friends.

Furthermore, of those who self-reported having gambling issues:

- 71% (N= 15) saw the lawyer for non-violent crimes (though 3 of these were for multiple infringements)
- 52% (N = 11) had sought help for their gambling issue
- 24% (N = 5) gambled more than once a day
- 76% (N = 16) were male (though 3 respondents did not specify gender)
- 24% (N = 5) had a disability (though 3 respondents did not specify)
- 48% (N = 10) were unemployed (though 3 respondents did not specify)
- 10% (N = 2) identified as Aboriginal (though 3 respondents did not specify)
- 38% (N = 8) were 22–34 years old (though 3 respondents did not specify).
- 33% (N = 7) said they were living with their parents (though 2 also ticked that they were living alone, suggesting transient arrangements)
- 33% (N = 7) said they were living alone (though 2 also ticked they were living with their parents, suggesting transient arrangements)
- 52% (N = 11) said that they were on a benefit.

Additional analysis of the figures indicates that a further four respondents indicated that they had experienced gambling issues but no longer gambled (N = 2) and two others that they had experienced problems as a result of their family members' gambling.

Meanwhile, a comparison with those who gambled but did not report having gambling issues (N = 49) indicate that a similar proportion of respondents were unemployed or on government benefits (being features that are common not just to problem gamblers, but rather to VLA clients in general).

However, a smaller proportion of the comparison group (being those who gambled but did not have gambling issues) were male (55%, as opposed to 71% though 8 people did not answer); a smaller proportion were living alone (10%, as opposed to 33% though 8 people did not answer); and a smaller proportion were living with parents (16% as opposed to 33% though 8 people did not answer). In other words, gamblers with a gambling problem were more than two times as likely to live with their parents and more than three times as likely to live alone. They were also more likely to be male.

Overall the figures from the CISP list and from the VLA snapshot survey indicate that gambling issues are a feature in the lives of people who are in contact with the criminal justice system for other reasons. This includes relatively low level offenders accessing Victoria Legal Aid duty lawyer services, as well as more complex offenders using the CISP case management service. What's more, if the VLA survey results are indicative, it is a feature of offenders' lives more often than it is of the general population, with 9% of the VLA duty lawyer clients self-reporting the presence of gambling issues, compared with 0.07% of the general population.

Though a relatively crude analysis limited by the parameters of existing data collection mechanisms, the fact that other studies indicate higher prevalence rates once participants are in prison suggests that the problem may still be remaining relatively ‘hidden’, perhaps until people are already entrenched in the criminal justice system and have less to lose through disclosure.

The question then becomes whether people who are in prison are reporting gambling problems at a higher rate because of having less to lose by doing so; because gambling problems are a feature of serious offenders’ lives more broadly than they are in the lives of other offenders; or even because the fact that gambling-related crime often attracts a custodial sentence (as Part Three will discuss) simply means that a higher proportion of gambling-related offenders are in custody.

Pathways between gambling and crime

Given the incomplete and somewhat contradictory nature of prevalence studies, it became necessary to adopt a more narrative approach to the project’s inquiry. As the CIJ’s research revealed, distinct and complex pathways connect gambling and offending, meaning that better awareness of these pathways may assist in tailoring and timing treatments and interventions for both behaviours. For example, research in New Zealand demonstrates that gambling causes criminal behaviour, but also that criminal behaviour and contact with the criminal justice system may lead to gambling.¹³⁰ That research proposes two possible categories of crime committing gamblers: those who have criminal tendencies prior to becoming problem gamblers as well as those who turn to crime to fund their gambling.

Along these pathways, research indicates that people who follow the latter pathway are more likely to commit property theft or drug related offences — given that they are entirely concerned with gaining proceeds to fund their addiction. Those who already have criminal tendencies and then become problem gamblers are more likely than the former category to have committed violent or a range of other types of offences.¹³¹

The CIJ suggests, however, that the pathways between gambling and offending are perhaps even more varied and complex than this analysis suggests.

¹³⁰ Gambling and Addictions Research Centre, *Problem Gambling – Formative Investigation Of The Links Between Gambling (Including Problem Gambling) And Crime In New Zealand*, ed. M. Bellringer, et al. (2009). 9.

¹³¹ Victorian Responsible Gambling Foundation, above note 26.

From gambling to offending – a criminal debut

As described above, the most obvious pathway — and the one most likely to be recognised by the wider community — is a linear trajectory. This starts with recreational gambling, through development of a gambling disorder or addiction, and finally to a spiral into offending to resource that addiction. As the Warfield report discussed above highlights, every now and then the community becomes aware of a story involving a ‘corporate high flyer’ who embezzles a significant amount of money from their company to pay for their expensive gambling habit. The recent High Court case of *Kavakas v Crown Casino Limited*¹³² highlighted the dim view that a court will take of this kind of alleged conduct. This issue is discussed later in this report.

A step away from these more sensationalist cases, however, a relatively common journey along this pathway is one trodden by more ordinary members of the community — ones who develop a gambling disorder, potentially driven by depression; previous childhood trauma; or experience of family violence — and who then start to ‘borrow’ money from their employer (or potentially from Centrelink) in order to secure that ‘big win’.¹³³ While evidence indicates that men are more likely to develop problem gambling,¹³⁴ and that, overall, are more likely to commit gambling-motivated fraud, project participants reported that many of those who take this pathway seem to be women employed in small business who may have oversight of relevant accounts.

☐☐ *My client genuinely believed she was going to pay it back — that she was due for a win and that she would put the accounts right as well as get rid of all her debt. Instead she’s embezzled \$1 million, the employer is seeking to freeze her assets, the husband’s left and the house is in hock...*¹³⁵

This pathway is characterised by shame, deceptive and potentially deluded behaviour which takes place over months or years, with the offender genuinely believing that ‘there is no other way out but to keep digging’.¹³⁶ In fact, the CIJ heard that a client’s detection and arrest were often the only ‘circuit breaker’ which could stop this downward spiral. Although the circuit breaker can sometimes come as a form of relief for the offender, the stigma associated with exposure can also often mean an increased risk of suicide, particularly for those who were already experiencing depression or previous trauma.¹³⁷

At the very least, arrest can trigger a complete collapse of the offender’s social and family structure.

☐☐ *A local woman was chased down the street by the media...she was accused of embezzling a significant amount from her employer to fund her gambling habit and it ended up here in court for a committal. No matter what happens, in such a small community, she and her family will never live that down.*¹³⁸

Lawyers working with problem gamblers reported that it was common for their clients to have suicidal thoughts, and recent literature supports this. For example, some researchers argue that management in workplaces must take suicide risk seriously when preventing and responding to gambling-related harm and crime, indicating that problem gamblers sometimes consider suicide to be a way of relieving their family of debt.¹³⁹ However, the CIJ heard that relief from the debt was not always realised.

☐☐ *We had a client... her husband suicided because of gambling debts, thinking that would free his family, but then they came after the family. The wife started gambling to try and pay it back.*¹⁴⁰

Given that it is uncommon for grieving family members or service providers to be aware of all the factors contributing to a person’s suicide, these self-reports are a significant contribution to evidence suggesting that gambling, certain types of crime and suicidal thoughts may be causally linked in some cases.¹⁴¹

132 *Kavakas v Crown Melbourne Limited* [2013] HCA 25 (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ). (No dissenting judges).

133 Of note, the CIJ heard that workers in the criminal justice sector workforce may be more vulnerable to this kind of pathway. Consultation with NSW Office of Liquor & Gaming, October 2016.

134 Billi et al, above note 32.

135 Consultation with Wesley Legal Mission, November 2016.

136 Consultation with Offender’s Aid and Rehabilitation Services, August 2016.

137 Binde, above note 121; Crofts, above note 120, p 94.

138 Interview with Magistrates’ Court of Victoria, La Trobe Valley, November 2016.

139 Binde, above note 121, p 261.

140 Interview with CISP Clinician, Sunshine Magistrates’ Court, October 2016.

141 Crofts, above note 120, notes that a self-assessment approach — asking gamblers whether gambling has contributed to an adverse event or not — can provide a good perspective on causality because it makes use of the knowledge of the respondents.

From offending to problem gambling

As some of the prison prevalence studies suggest — as well as the data collection from the CISP list and VLA duty lawyer services — the path between gambling and crime can also move in the opposite direction, with the onset of gambling disorder *following* contact with the criminal justice system. In this scenario, offenders fall into gambling behaviour after or concurrently with their commission of other offences.

These particular offenders are more inclined to have committed other kinds of offences, including violent or sexual offences, as mentioned above. Gambling problems then developed through anti-social or criminal networks become ‘part of the mix’ in an offender’s life, just one ingredient in the cocktail of chaos in which many offenders become entrenched.

To this end, a valuable finding of the 2013 VRGF report referred to earlier highlighted the way in which gambling venues and networks can be especially appealing to individuals who — as is the case with the majority of the population of any prison — have no pro-social networks; low educational attainment and employment; potential mental illness or Acquired Brain Injury; and a history of family dysfunction.

FF *I think most of the people who do crime have low... self-esteem... So when you win, you feel 'I can do something, I can achieve...plus it's a loneliness thing...it's the only place [you] can go where someone smiles... and says hello and gives [you] a coffee and listens to [your] bullshit, because they're paid to... More than anything, I reckon that is the main reason that people have problems on the machines.¹⁴²*

As well as the suggestion that children of problem gamblers are more likely to develop gambling problems themselves, the CIJ’s analysis of sentencing remarks in the County Court confirms this pathway to gambling-related *offending*. In particular, a history of being neglected as a child — including being left alone for long periods while parents gambled — was a feature of these cases, echoing the intergenerational harm identified in the taxonomy in Part One.

You were an only child... Your mother and father were heavy gamblers. You would often spend the evening at home on your own... because [they] went gambling. As you grew older, your parents would leave you alone for the entire weekend. You were exposed to gambling at a young age. Your parents took you to the “Pokies” when you were 14 years old. Your father owned greyhounds and you accompanied him to races... Having seen your parents gamble, you began gambling when you turned 18.¹⁴³

...you grew up in difficult circumstances, playing a parenting role to your younger brother and becoming responsible for a financially dependent mother addicted to gambling in a scenario where your father was largely absent and where overall you experienced parental neglect. [...] your history suggested you had suffered low mood for many years due to your family difficulties and the burden of protecting your mother's gambling problem and caring for your younger brother.¹⁴⁴

¹⁴² Victorian Responsible Gambling Foundation, above note 26, p 97.

¹⁴³ *DPP v Philistin* [2015] VCC 1535 (Lewitan J).

¹⁴⁴ *DPP v Cheng* [2014] VCC 1927 (Gaynor J).

In other words, people who are already offenders in other ways can be particularly attracted to gambling activities and venues because they provide them with a sense of belonging and achievement, of 'feeling like a winner' or 'like a big man',¹⁴⁵ as well as a sense of being treated with respect that they cannot experience elsewhere. More pragmatically, these venues are also often open for 24 hours a day and provide warmth and shelter for those who otherwise have none.

For those with a history of offending, of course, the appeal of a gambling activity or venue can then have additionally criminogenic consequences.¹⁴⁶

☐☐ *Some clients don't have the competency to manage a sudden influx of cash. One recently won \$90,000 gambling and blew it in 5 days. This included buying a fancy car, even though he didn't have a licence. Then he got done for driving without a licence! Because he had priors, the court wasn't too thrilled.*¹⁴⁷

*Clients in this group often need help to manage their finances. The best thing we can do for them sometimes is to get State Trustees to manage their money just so they don't lose their house.*¹⁴⁸

Compounding the appeal of gambling to existing offenders, however, research suggests that gambling is uniquely associated with general recidivism three years after release.¹⁴⁹ The CIJ heard from offender support organisations that prisoners themselves sometimes identified gambling as their biggest risk factor upon release.¹⁵⁰ The CIJ also heard that this is largely due to the debt that might await an offender post sentence or incarceration, including debt from a 'loan shark':

☐☐ *I had a client who had been up on drug offences and we got him clean. After his last court date he said 'it's good I'm off the [drugs], I'll have more money to spend on the horses and pay back my debts...'*¹⁵¹

*We can help them with all their other issues — at least in theory. We can treat their mental health problems; we can treat the drug and alcohol issues; we can even treat the gambling problem. But we can't help with the debt, especially when they won't tell us who it is they owe...*¹⁵²

*Drug dealers will usually forgive the debt when someone goes inside, but not the loan sharks. The sharks will keep coming after the family.*¹⁵³

145 Ibid.

146 The CIJ heard that the vicinity of gaming venues was a common place of illegal activity — such as drug trafficking in the carpark of local hotels. Focus group with Victoria Legal Aid, Sunshine, October 2016.

147 Focus group participant, Law Institute of Victoria, October 2016.

148 Focus group participant Law Institute of Victoria, October 2016.

149 Lloyd, C. D., Chadwick, N., and Serin, R. C., "Associations between gambling, substance misuse and recidivism among Canadian offenders: a multifaceted exploration of poor impulse control traits and behaviours," *International Gambling Studies* 14, no. 2 (2014).

150 Focus group participant, Offender Support Organisations, September 2016.

151 Focus group with Victoria Legal Aid, Ringwood, October 2016.

152 Interview with CISP Clinician, Magistrates' Court of Victoria, Sunshine, October 2016.

153 Interview with Court Support Worker, Magistrates' Court of Victoria, Sunshine, October 2016.

Dual pathway

In addition to these two directions, several studies (and previous editions of the DSM, which classified problem gambling as an 'Impulse-Control Disorder Not Elsewhere Classified') suggest that impulsive personalities — those with poor premeditation; sensation seeking; poor perseverance; and reward sensitivity — may concurrently lead to the commission of crime *and* to the search for stimulation.¹⁵⁴

Certainly, problem gamblers who offend are thought to face a particularly severe subtype of impulse control disorder from a neurological perspective.¹⁵⁵ For example, this behaviour appears to be associated with 'elevated risk of suicidal ideation, financial problems, alcohol and drug use, and mental health treatment'.¹⁵⁶

Throughout the project, lawyers reported that some clients with drug addictions gambled to fund their addiction, because 'it was a better option than dealing'.¹⁵⁷ Similarly, providers who worked with offender populations also noted that clients had 'poor ways of regulating emotion and self-destructive impulses'.¹⁵⁸

Meanwhile, the CIJ also heard that lawyers in one region had seen a small but identifiable spate of offenders with co-existing child exploitation and gambling addictions. The practice of these particular offenders — who were almost always socially isolated — was compulsive and obsessive, with them often spending hours cataloguing and collating the child exploitation material, rather than necessarily viewing it. Online gambling addictions were then a companion to this reclusive and distorted behaviour.¹⁵⁹

Overall, research suggests that problem gamblers who *offend* — regardless of whether their offence is related to gambling, reported or ends in contact with the criminal justice system — may experience more severe symptoms of gambling *disorder*. This includes the neurological changes mentioned earlier, as well as the social problems that determine health and other life outcomes generally.

☐☐ ...I have worked out that I have an addictive nature and the best way for me to deal with my gambling problems is complete abstinence...¹⁶⁰

154 Preston, D. L. et al, 'Problem Gambling and Mental Health Comorbidity in Canadian Federal Offenders,' *Criminal Justice and Behavior* 39, no. 10 (2012). 1734; Magoon, M. E., "Juvenile Delinquency and Adolescent Gambling: Implications for the Juvenile Justice System," *Criminal Justice and Behavior* 32, no. 6 (2005); Meyer, G. and Stadler, M., "Criminal behaviour associated with pathological gambling," *Journal of Gambling Studies* 15, no. 1 (1999); Mishra et al, above note 1.

155 Ledgerwood, D & Petry, N, 'Subtyping pathological gamblers based on impulsivity, depression & anxiety', *Psychology & Addictive Behaviour* (2010) 24: 680.

156 *Ibid*, p 295.

157 Focus group participant, Victoria Legal Aid, Ringwood, October 2016.

158 Focus group participant, Community Support Organisations, September 2016.

159 Focus group participants Victoria Legal Aid, Morwell, November 2016.

160 Victorian Responsible Gambling Foundation, above note 26, p 98.

Convergence... and coercion

Perhaps the least well understood in the literature — but frequently identified in the focus group discussions — is what the CIJ calls the ‘convergence’ pathway. This is when gambling problems are compounded by other forms of vulnerability to increase gambling harm, including the likelihood of contact with the criminal justice system.

This includes, in the CIJ’s view, the scenario described above, in which individuals who are already offenders — potentially as a result of intergenerational poverty, or exposure to family violence or childhood sexual abuse — fall into gambling and then become even more vulnerable to offending. It also includes individuals from lower socio-economic backgrounds for whom gambling related losses or debt can have far greater impacts than it does on people with greater financial resources, as referred to in Part One. This can further include people with other forms of disadvantage, such as intellectual disability or ABI, which already make them vulnerable to poverty, but also potentially less likely to be able to regulate their gambling behaviour or to fully understand its consequences.

FF *Clients with ADHD or ABI, can be more easily drawn to — almost reassured by — the repetitive nature of EGMs.*¹⁶¹

*Sarah was a client referred for multiple counts of Dishonestly Take Property. She had a clinical presentation consistent with Borderline Personality Disorder, as well as Gambling Disorder...[and] Anxiety and Depression... She was unemployed and on the Disability Support Pension, spending a portion of that income on on-line slot machines. Sarah would at times shoplift consequent to her funds being gambled...*¹⁶²

The CIJ’s research, however, identified some further cohorts in the population who are not only particularly vulnerable to gambling harm as described in Part One, but also to falling into offending as a result of this harm. One of these cohorts is victims of family violence. As mentioned above in Part One, recent studies confirm a disproportionate level of family violence perpetration and victimisation amongst people with significant gambling problems.¹⁶³ However, the case study referred to above also suggests that gambling, family violence and offending can be in the mix together, with part of the wrap-around support the client received in this case being referral to a Domestic Violence service.¹⁶⁴ When this occurs, it is *essential* that services screen for and respond to the potential for family violence presentation, as this may well be underlying all the other issues which appear to be present in the offender’s life.

More specifically — and as described in Part One — victims of family violence often seek refuge or respite in gambling activities or venues. The CIJ heard that this was occurring in growth corridors where there were high levels of debt, isolation and financial hardship, as well as where there was sparse other social infrastructure.¹⁶⁵ Concerningly, as the CIJ’s audit of submissions to the Royal Commission suggests, victims have sometimes been encouraged by some services to seek refuge in EGM venues as ‘safe spaces’. Losses then incurred in these venues can entrench the fear and vulnerability of these victims. Terrified to disclose the loss, women in this cohort can then resort to theft in order to cover the household expenses.

161 Focus group participant, Law Institute of Victoria, October 2016.

162 Excerpts from case study provided to the CIJ by the Offender’s Aid and Rehabilitation Service (OARS), South Australia, September 2016.

163 Dowling, N., Suomi, A., Jackson, A., Lavis, T., Pattford, J., Cockman, S., ... Abbott, M. (2014). Problem Gambling and Intimate Partner Violence: A systematic review and Meta-Analysis. *Trauma, Violence, and Abuse*, p. 1–19.

164 Case study provided to the CIJ by the Offender’s Aid and Rehabilitation Service (OARS), South Australia, September 2016.

165 Focus group participant, Relationships Australia, September 2016.

☐☐ *One client spent her morning at the pokies and her afternoons at the local shopping centre, pinching purses out of people's handbags. She was terrified to go home until she'd recovered her losses...*¹⁶⁶

*A woman appeared before me accused of stealing groceries and other household items. It didn't make sense, she had a steady job and no priors, no apparent reason why she would need to do this. It emerged she had a serious gambling problem. However, counsel then asked to submit further evidence on the papers. It turned out she was also a victim of serious long term abuse. The husband was there in court at the time — apparently very supportive of his wife while she appeared on criminal charges — yet she was terrified of what she would face when she went home.*¹⁶⁷

Seeking refuge in a gaming venue is a concern for women because of their exposure to significant financial loss and the additional vulnerability and direct pathway to offending which can result. It's also a concern because of the potential for vulnerable women to be targeted by 'loan sharks' who will lend them money to recover losses at the venue and, when this only results in more significant losses, then coerce women into offending such as drug trafficking or crop sitting to repay this loan.¹⁶⁸

As discussed below, women can be vulnerable to this pathway whether or not they are victims of family violence. Where they are terrified beyond the usual measure to disclose their losses, however, they may be more likely to resort to debt to a loan shark and the dire consequences that follow.

Beyond this, there is further potential for victims of family violence to be propelled into offending as a form of gambling harm, even where they are not the gambler. This includes victims being coerced into offending by their partners to resource the *perpetrator's* gambling addiction or debt.

It also includes victims *assuming culpability for their partner's offending* because they are too afraid to do otherwise. In fact, as one of the CIJ's submissions to the Royal Commission into Family Violence explained, women experiencing family violence often assume culpability for their partner's offences. This submission featured a random audit of de-identified case files of the Mental Health Legal Centre's program Inside Access — which provides civil legal advice and support, as well as social work support, to women in maximum security prison. The audit suggested that this can include assumption of Centrelink debts, which the woman's partner has gambled away. The woman is then still liable for the debt post-release, leaving her with a 'double whammy' as a result of his offending.¹⁶⁹

This issue was further explored in focus group discussions for this project:

☐☐ *We had a client, affluent family, kids in private school, he was a bit of a corporate high flyer and she ran a small business from home while experiencing serious family violence from him. He started to use that cash flow to resource his gambling habit and then started [offending more broadly] and fell into serious debt. She took the rap for it — she was scared of him but also thought she couldn't support the kids alone. She went inside and that week the kids saw Rosie Batty on the TV and realised what they had been experiencing for so long...Only teenagers, they marched into the local police station and asked for help to get an IVO...*¹⁷⁰

This and other work by the CIJ suggests that there are women in Victoria's maximum security women's prison *solely because they are victims of family violence* — hardly the purpose for which the criminal justice system was designed.¹⁷¹ Where gambling harm is converging with this other devastating form of social harm, the CIJ suggests that there is not only an imperative for future research, as the VRGF and Australia's National Organisation for Women's Safety (ANROWS) have recently recognised, but for governments and policy makers to act.

166 Focus group participant VLA Regional Office, Ringwood, October 2016.

167 Interview with Magistrates' Court of Victoria, Dandenong, October 2016.

168 Le, R. and Gilding, M., "Gambling and drugs: The role of gambling among Vietnamese women incarcerated for drug crimes in Australia," *Australian & New Zealand Journal of Criminology* 49, no. 1 (2016).

169 Submission to Royal Commission, Mental Health Legal Centre, Inside Access & Centre for Innovative Justice, May 2015. At <http://www.rcfv.com.au/getattachment/8E5F49BB-1D8C-4893-B6EC-F39B4C3F0B79/Mental-Health-Legal-Centre-Inc;-Inside-Access;-Centre-for-Innovative-Justice->

170 Focus group participant, Mental Health Legal Centre, November 2016.

171 Mental Health Legal Centre, Inside Access, and Centre for Innovative Justice, "Submission to Family Violence Royal Commission," (2015).

Cultural vulnerabilities

In addition to vulnerability from certain forms of disadvantage, such as family violence, the CIJ's research indicates that certain cultural and linguistic communities are also especially vulnerable to gambling harm, including contact with the criminal justice system. Many communities experience disproportionate impacts, including the Vietnamese community — a theme that was echoed in interstate consultations.¹⁷²

When highlighting this vulnerability, of course, it is crucial not to make claims about propensity which might fuel cultural stereotypes. Certainly, the caution with which many stakeholders alluded to this subject indicates a reticence to stigmatise certain groups in the community, particularly when assumptions about CALD populations already abound in the criminal justice system.

☐☐ *An elderly Vietnamese client, who was basically homeless, carried a significant amount of cash sewed in her coat. It was her life savings and she kept it on her in case she had to leave the country quickly, as she done previously when coming to Australia — it was all recorded in a little book... She was picked up on an unrelated, minor charge. The police found the cash and book on her and, because she was Vietnamese, assumed she was running an illegal gambling racket. They took the cash from her and we spent months trying to get it back.*¹⁷³

While taking care not to perpetuate these assumptions, the CIJ also believes that it is crucial to highlight where certain groups in the community are experiencing additional and unnecessary harm — and accordingly may benefit from additional support.

Certainly, the CIJ's analysis of County Court cases since 2013 suggests that the Indo-Chinese population feature disproportionately in gambling-related offences appearing before Victorian courts. This was echoed in consultations.¹⁷⁴ The relevant charges generally relate to drug offending, with it then emerging that the offending was allegedly committed in order to resource a gambling addiction or pay back a debt.

☐☐ *...the pathological gambling habit of the prisoner... appears to have been longstanding, connected to the Vietnamese community in Victoria...and also allegedly, initiated from contacts made by her at the Crown Casino. I have already expressed on a number of occasions...my concerns about the Crown Casino...*¹⁷⁵

*You came to Australia in September of last year on a three month visa...you became involved in gambling and ended up with a \$10,000 debt. It was at that time that this venture was put to you as your only way out. This is a scenario which this court has heard on many occasions.*¹⁷⁶

A description of this pathway was echoed specifically in a recent qualitative study by researchers Roselyn Le and Michael Gilding,¹⁷⁷ who interviewed 35 Vietnamese women imprisoned in Melbourne for drug crimes (i.e. trafficking of heroin and cultivation of cannabis). Half of the women interviewed were motivated by debts incurred through casino gambling, and gambling networks had then forged their involvement in illicit drug markets. While the median maximum sentence for the women in the study was 19 months, some had been sentenced to as much as eight years.¹⁷⁸

172 Consultations with Office of Liquor and Gaming, NSW, November 2016; Consultations with Magistrates' Court of South Australia and Organisation for the Aid and Rehabilitation of Offenders, South Australia, August 2016.

173 Focus group discussion, Mental Health Legal Centre, November 2016.

174 Focus group discussions with Victoria Legal Aid, September — November 2016; Focus group discussions with Magistrates' Court of Victoria, October — November 2016.

175 *DPP v Thai* [2016] VCC 624 (McInerney J).

176 *DPP v Mai* [2013] VCC 1331 (Hannan J).

177 Le et al, above note 168.

178 *Ibid*, p 47.

While this disproportionate representation is a cause for concern alone, it is vital to consider how and why this might be impacting certain CALD communities more broadly. To this end, some studies have suggested that certain migrant communities — who may be already inclined to see gambling as a normalised social activity — may be more likely to increase involvement in that activity as a way of maintaining cultural networks upon arrival in a new place.¹⁷⁹ Conversely, other new arrivals, unaccustomed to the prevalence and ready availability of gambling activity now on tap in Victoria, may be more overwhelmed by it and unable to regulate their attraction to a new and exciting environment.¹⁸⁰

It is a mistake to suggest, however, that because one community may be more inclined to participate in gambling, this creates an inevitable path to offending. In short, gambling-related offending cannot be lazily explained as a 'cultural thing'. Rather, the CIJ suggests that the *convergence* of a range of factors make members of some communities more *vulnerable to contact with the criminal justice system* when gambling is also in the mix.

For some CALD groups, this may be around economics and education. For example, the CIJ heard that international students may be vulnerable to gambling problems because they often worked shift work, including in the hospitality context, and therefore sought recreation in venues open in the small hours of the morning.¹⁸¹ New arrivals from war torn regions in the Middle East and Horn of Africa, meanwhile, brought with them experience of past trauma and were emotionally vulnerable in other ways.¹⁸²

Certainly, the CIJ heard of the disproportionate impact that this ready availability of gambling activity had on Arabic speaking communities, whether newly arrived or more established. This is despite the fact that gambling did not necessarily play a substantial role in these cultures back home. Having often experienced significant trauma as a result of conflict in their home countries, many immigrants from Middle Eastern countries arrive already highly vulnerable — a factor which puts them at greater risk of gambling harm.

What's more, the CIJ heard of the additional vulnerability created by the contrast between the highly integrated social and family networks in Arabic speaking home countries and the profound isolation which many new arrivals experience when migrating to Australia. Often living in outer suburban areas with little access to public transport, working long hours and living a comparative distance from any friends and family, the CIJ was told that the density of gaming venues in these areas served as an attraction for Arabic communities who sought an accessible venue for social interaction. Many of these venues specifically cater for local populations in terms of atmosphere and food provided, making the appeal even greater.

Practitioners interviewed, meanwhile, indicated that various factors may be at play in particular communities. Prevented from entering professions or trades, potentially, for lack of evidence of qualifications, a significant number of migrants established small businesses upon arrival more than a generation ago.¹⁸³ With economic downturns, and the dominance of large commercial business chains, however, many small businesses are struggling, leading people to resort to desperate measures.

☐☐ *One client ran a small business, supporting her child and elderly mother. Business dropped as big chains took over. She fell to gambling to escape stress and get out of financial pressure. She ended up in debt to a loan shark and offended to pay it back. She's inside and mum and teenage son are working multiple jobs to get the family out of debt...They're terrified, and we can't help.*¹⁸⁴

179 Keen, B. et al., "Problem gambling and family violence in the Asian context: a review," *Asian Journal of Gambling Issues and Public Health* 5, no. 1 (2015).

180 Ibid.

181 Focus group participant, Financial Counselling Australia, CIJ, September 2016.

182 Interview with Gambler's Help Eastern, November 2016.

183 Interviews with Vietnamese interpreter and court staff, Sunshine Magistrates' Court, October 2016.

184 Interview with CISP Clinician, October 2016.

This last example — and many others that the CIJ heard — indicated the way in which gambling harm can extend to broader family members, with children, parents, siblings and extended family trying to limit, repay and simultaneously hide their relative's gambling debt, for fear of the stigma attached. Alternatively, the stigma attached to gambling in some communities can mean that the individual is isolated from other family and friends once the gambling is revealed.¹⁸⁵ To this end, the support offered by the culturally specific community organisations is crucial and the CIJ heard that it may be only after a relationship of trust is established through counselling on other issues that the gambling is revealed.

As if the stigma of gambling losses or debt was not enough, the CIJ also heard about the stigma associated with family violence victimisation and the consequent reluctance to disclose or seek help. As has been clearly acknowledged by the Royal Commission, women from CALD communities face significant additional barriers when experiencing, reporting or fleeing family violence.¹⁸⁶ These include where immigration status is uncertain and they risk the threat of losing their children or being deported.

These also include the systemic discrimination they may face from various parts of the system from which they are seeking help, or certain cultural imperatives which place the burden on women to hold the family structure together and to put family before self.¹⁸⁷ Disclosure of family violence can seem impossible in these circumstances — leaving women more vulnerable and entrenched in harm.

Similarly, the CIJ heard that help seeking behaviour for mental health problems more generally — problems which we know can lead people to seek solace and relief in gaming venues — is especially low in some CALD communities.¹⁸⁸ The intersection of mental health problems; family violence victimisation; CALD status and gambling harm is reflected in the sentencing remarks of County Court cases:

FF *I take into account your prior good record, your depression and loneliness which led to your gambling addiction, the spiraling of that gambling out of control to the extent that you became indebted to loan sharks, your vulnerability in being pressured to commit offences to repay the debt, your poor English, social isolation, depression and sole responsibility for two young daughters, the fact that you have ceased gambling, undertaken counselling and voluntary work, and the anguish you feel at the prospect of your...daughter being taken into State care if you are imprisoned.¹⁸⁹*

...you are isolated in the community by your lack of English language and education. Your life has been limited to the care of your children and your husband. Your husband's compromised mental health and alcoholism have resulted in violence being visited upon you by him.¹⁹⁰

Conversely, practitioners told the CIJ that work counseling and educating perpetrators of family violence from CALD backgrounds was at least supported by a legal framework:

FF *We can say: family violence is against the law. Whatever you may have thought was acceptable in the back country is not acceptable here. What can you say about gambling, though, when there's a venue on every corner? All we can do is educate about the risks.¹⁹¹*

For all these reasons and more, the CIJ considers it essential that further research be conducted *with* CALD community agencies about the impacts of problem gambling on the specific populations they serve, and the various barriers which prevent individuals from seeking or receiving help.

185 Interview with Victorian Arabic Social Services, September 2017.

186 Royal Commission into Family Violence, "Summary and recommendations," (2016). 34.

187 Submission of Southern Melbourne Integrated Family Violence Partnership to Royal Commission, May 2015.

188 Interview with Australian Women's Vietnamese Association, October 2016.

189 *DPP v Nguyen* [2016] VCC 43 (Davis J).

190 *DPP v Truong* [2014] VCC 2028 (Carmody J).

191 Interview with Victorian Arabic Social Services, September 2017.

Gambling harm to Aboriginal and Torres Strait Islander communities

No sector of the Australian population is more vulnerable to contact with the criminal justice system than Aboriginal and Torres Strait Islander communities. Disproportionate arrest, prosecution and incarceration rates experienced by these communities mean that any study of contact with the criminal justice system must consider how its particular subject is impacting on Indigenous populations.

That said, it is not known how prevalent gambling problems are in Aboriginal communities. Relevant studies have significant limitations but suggest a 13.5% prevalence rate, with a significant proportion of gambling activity thought to relate to card games — although this too is shifting.¹⁹²

■ ■ *Where Indigenous clients live in more remote communities, they don't have access to EGMs. They have to come a long way into town to access them, so cards are more likely...*¹⁹³

Certainly, the majority of the limited research focuses on gambling in remote communities, arguably ignoring the diversity of gambling experience amongst Indigenous communities more generally. This existing research, however, does suggest that card games are more prevalent in many more remote Indigenous communities around Australia and often not viewed as gambling per se.¹⁹⁴

Contradictory views are then expressed about whether or not this activity is significantly harmful, with indications that the money exchanged usually stays in the community; raises funds for 'big ticket items' such as fridges; passes time and has a primarily social function.¹⁹⁵

Other commentators, however, express concern that money is actually leaving communities; and that card games are contributing to children being left alone and neglected for considerable periods of time.¹⁹⁶ One particular study identified statistically significant associations between poor child health outcomes and reported gambling problems in households in remote Indigenous communities.¹⁹⁷ This study involved interviews with 229 Indigenous participants and 79 non-Indigenous gambling help counsellors, gaming venue managers and others who reported child neglect and violence.¹⁹⁸

It is vital not to stereotype perhaps the most stigmatised community in Australia by making unsubstantiated assertions about gambling, just as it is crucial not to draw unassailable conclusions from projects which do not involve Indigenous communities at the helm. In particular, it is vital to avoid western constructions of 'Aboriginal gambling'.¹⁹⁹

That said, when we know that gambling harm is felt particularly acutely by populations who are already disadvantaged, it is reasonable to assume that this same harm is disproportionately impacting Indigenous Australians, regardless of prevalence rates and regardless of geographic location.

192 Stevens & Young, cited in Hing, N. et al., "Risk factors for problem gambling among indigenous Australians: an empirical study," *Journal of Gambling Studies* 30, no. 2 (2014), 389.

193 Focus group participant, Victoria Legal Aid, Morwell, November 2016.

194 However, the CIJ also heard of an alarming increase in the number of EGMs being 'shipped' to remote communities.

195 Stevens, M. and Young, M., 'Betting on the evidence: reported gambling problems among the Indigenous population of the Northern Territory,' *Australia and New Zealand Journal of Public Health* 33, no. 6 (2009), 557.

196 Ibid. See also Gordon, A., 'Aboriginal Communities & Gambling,' in *Many Ways to Help conference 2016* (Melbourne).

197 This was after adjustment for other covariates of poor child health.

198 Ibid.

199 Ibid, p 565.

Clearly, more detailed work needs to be conducted. Given that a significant proportion of Victoria's Indigenous population lives in urban areas, including in areas of socio-economic disadvantage, it is vital to understand how the prevalence of gaming venues interacts with *other* factors to propel Koori Victorians into contact with the justice system. Though gambling does not appear to be the most pressing issue, it is then picked up in case management processes, such as that offered in the Courts Integrated Services Program as described above.²⁰⁰ Where a broader analysis of gambling harm is then applied, the CIJ heard that the impact of an individual's gambling debt can have more wide-reaching consequences in Aboriginal communities, with the broader kinship networks assuming responsibility for the debt.²⁰¹

Meanwhile, for many ATSI clients of specialist family violence services, many other more pressing issues — such as the fact that their partner or former partner has taken the children; or that the children may be removed by child protection once their partner's violence becomes known — mean that gambling problems are rarely raised.²⁰² Given the current demands on Aboriginal controlled community organisations, the lack of resources and the need for research to be community-led, the CIJ therefore suggests that this is another vital area for future consultations and detailed research 'and welcomes the recent call from the VRGF for research in this area'.

What this convergence analysis suggests is that, like the analysis of gambling harm at the end of Part One of this report, multiple forms of vulnerability and gambling problems are a potent mix when it comes to propelling people into contact with the criminal justice system.



Given the further harm that contact with the criminal justice system can then cause to people with these various forms of pre-existing vulnerability, or anyone for that matter, the question then becomes: is the criminal justice system responding in the most constructive way that it can?

200 Focus group discussion with Victorian Aboriginal Legal Service, January 2017.

201 Focus group discussion, Victorian Aboriginal Legal Service, January 2017.

202 Interview with Aboriginal Family Violence Prevention & Legal Service, December 2016.

Part Three – When gambling related offending hits the courts

The role of precedent

So what happens when someone following one of these myriad different paths between gambling and crime hits the criminal justice system? Given the complexities identified in the first two Parts of this report, it might be reasonable to expect that, as many broader stakeholders expected, that gambling ‘would just be a factor in mitigation of sentencing’ or that an otherwise therapeutic approach might be applied.

The CIJ discovered, however, that the reality is somewhat different. In fact, case law reveals that Victorian courts rarely see gambling addiction as a sufficient reason to reduce or mitigate sentence. This is for a variety of reasons, which will be explored throughout this section of the Report.

Given the importance of legal precedent, the CIJ’s research went straight to analysis of case law in the superior courts. This started with case law from the Supreme Court since the introduction of EGMs and launch of the Casino in the early 1990s, which reveals a reluctance to open the floodgates to what the court anticipated would be a new influx of offending. As Tadjell J in *R v Cavallin* cautioned:

“It would be optimistic...to say that the courts will not see more and more cases of criminal activity which, to some extent, is associated with, or even a direct product of, poker machine gambling. Some of it, no doubt, will be the result of a pathological and, therefore, an obsessively addictive urge...It is, however, ...important that the public does not assume that a crime which is to some extent generated by a gambling addiction, even if it is pathological, will, on that account, necessarily be immune from punishment by imprisonment”.²⁰³

In the years which followed, decisions continued to reinforce this sense of caution, with the court urging that it would be an ‘unusual’²⁰⁴ or ‘rare case indeed where an offender can properly call for mitigation of penalty on the ground the crime was committed to feed a gambling addiction’.²⁰⁵

“...the concept that an appropriate sentence... should be moderated by the prisoner’s gambling addiction is not one which should loom large in the exercise of the Judge’s discretion.”²⁰⁶

Indeed, only in ‘unusual’ cases was the court inclined to take gambling problems into account. In one of these exceptions, a woman who had been the primary carer for her ill mother; who led a lonely life; and who had been introduced to poker machines by her former partner, had an appeal on sentence by the DPP dismissed when the court viewed her whole background as ‘constituting a degree of mitigation’.²⁰⁷ To this end, the court noted that previous decisions had not said that gambling addiction could never be taken into account as part of the relevant circumstances as a mitigating factor.

203 *R v Cavallin*, Unreported, Victorian Court of Criminal Appeal, 24 July 1996 (Full court: Tadjell, Ormiston and Phillips JJ. No dissenting judges).

204 *R v Pascoe* [1998] VSCA 287 (Winneke P). (Full court: Winneke P, Brooking and Charles JJ. No dissenting judges).

205 *R v Petrovic* [1998] VSCA 95 (Charles J). (Full court: Tadjell, Ormiston and Charles JJ. No dissenting judges).

206 *R v Luong, Nguyen & Cao* [2005] VSCA 94 (Winneke P). (Full court: Winneke P, Charles and Chernov JJ. No dissenting judges).

207 *DPP v Raddino* [2002] VSCA 66 (Chernov J) (Full judges: Phillips CJ, Charles and Chernov JJ) (No dissenting judges). Conversely, in a subsequent case citing this decision, the Court appeared to give no consideration to the specific facts of the case, instead making a general statement that gambling would not usually be taken into account. In some cases, gambling addiction was not relied on by counsel as a factor in mitigation, meaning that the court did not hear relevant argument.

In a series of decisions in the late 2000s, developments took a new turn. On the one hand, the *Verdins*²⁰⁸ decision laid new ground for courts to consider mitigation more generally, stating more clearly than before that mental impairment was relevant to sentencing in a range of ways, including to:

- reduce the offender's moral culpability (but not his or her legal responsibility) for the offence — this could affect the weight given to just punishment and denunciation as purposes of sentencing;
- influence the type of sentence that could be imposed and the conditions in which the sentence could be served;
- reduce the weight given to deterrence as a purpose of sentencing — this would depend on the nature and severity of the mental impairment and how this impairment affected the mental capacity of the offender at the time of his or her offending and at the time of sentencing;
- increase the hardship experienced by an offender in prison if he or she suffered from mental impairment at the time of sentencing;
- justify a less severe sentence where there was a serious risk that imprisonment could have a significant adverse effect on the offender's mental health.

This meant that lawyers for offenders with gambling addictions might potentially be able to argue that the addiction was a mental impairment that was therefore relevant to sentence. It seemed, however, that the highest court in Victoria had other ideas:

☐☐ *...just as Verdins explains that the absence of a label for the condition does not preclude the operation of the principle, so the ability to attach a label to the condition will not necessarily mean that the principle will apply. A diagnostic label is only the beginning, and not the end of such an enquiry. It is not the classification of the condition which matters but 'what the evidence shows about the nature, extent and effect of the mental impairment' at the relevant time. The focus must be on how the particular condition affected mental functioning of the offender in the circumstances.'*²⁰⁹

If we were left in any doubt, the decision of *R v Grossi* (reported in 2008), put the matter arguably to rest.²¹⁰ In this case, Justice Redlich in the Court of Appeal explained that there was no tension between the Verdins principle and previous authorities which had dealt with gambling addiction. He also explained that gambling does not generally warrant a reduction in the offender's moral culpability nor moderate the sentencing objective of general deterrence, for the following reasons (emphasis added):

208 *R v Verdins* (2007) 16 VR 269 (Maxwell P, Buchanan and Vincent JJ).

209 *R v Do* [2007] VSCA 308 (Redlich J) (Full court: Ashley, Redlich and Curtain JJ) (No dissenting judges).

210 *R v Grossi* [2008] VSCA 51 (Redlich J) (Full court: Vincent, Neave and Redlich JJ).

[T]he presence of a gambling addiction should not, on that ground alone, result in any appreciable moderation of the sentence. There are a number of reasons why that will be so.

Firstly, **in most cases**, the nature and severity of the symptoms of the disorder, considered in conjunction with the type and circumstances of the offending will not warrant a reduction in moral culpability or any moderation of general deterrence.

Second, it will **frequently** be the case that crimes associated with gambling addiction will have been repeated and extended over a protracted period. The long term chase to recoup losses is characteristic of those with such a disorder.

Third, in cases involving dishonesty, the crimes will **commonly** be sophisticated, devious, and the result of careful planning.

Fourth, the gravity of such offences, if there is a breach of trust or confidence, will commonly attract an increased penalty making such offences more appropriate vehicles for general deterrence.

Fifth, when offences of this nature are committed over extended periods, the prominent hypothesis will be that the offender has had a degree of choice which they have continued to exercise as to how they finance their addiction. This has **often** provided a reason for a general reluctance to temper the weight given to general deterrence or to reduce moral culpability because an offender has found it difficult to control their gambling obsession.

Finally, and perhaps most importantly, the nexus of the addiction to the crime will **often** be unsubstantiated. The disorder will not **generally** be directly connected to the commission of the crime, the addiction providing only a motive and explanation for its commission. Hence, by contrast to a mental condition that impairs an offender's judgment at the time of the offence, such addiction will **generally** be viewed as only indirectly responsible for the offending conduct.

This case has subsequently set the tone in the higher courts of Victoria and has been reinforced in a number of ways, including with a court determining that *Grossi*, which involved multiple offences, could also apply to a single impulsive criminal episode.²¹¹ The above statement is also said to provide the 'most expansive explanation [...] from an Australian court of appeal'²¹² and, as well as being based on a review of case law up to that point, has been subsequently endorsed in the Tasmanian, Victorian and Western Australian Courts of Appeal and the ACT Supreme Court. It has also been applied to Commonwealth criminal law.^{213 214}

211 *R v Cusack* [2009] VSCA 207 (Redlich J) (Full court: Nettle, Redlich and Lasry J) (No dissenting judges); *DPP v Scassaoli* [2012] VCC 816 (Cannon J);

212 Neal, above note 119, p 81.

213 *Ibid.*

214 The NSW and South Australian Courts of Appeal have justified not reducing the moral culpability of the offender on the basis that the offender had a choice to not offend. *Ibid.*

Some of its underlying emphasis has arguably been echoed in a civil context in the High Court:²¹⁵

In *Kakavas v Crown Melbourne Limited*, the plaintiff — who claimed a severe gambling addiction — suffered losses totaling \$20.5 million and sued Crown to recover these losses. The plaintiff's original claim was based on negligence; misleading and deceptive conduct; restitution; breach of statutory duty; and unconscionable conduct. However, the trial judge struck out the negligence claim following an earlier authority that a casino operator does not owe a duty of care to protect a problem gambler from financial loss just because the Casino knows the gambler has a problem.

On appeal to the High Court, the plaintiff argued unconscionable conduct, arguing that the Court should have regard to what he claimed was Crown's exploitation of his 'special disadvantage' 'when he was actually at the gaming table, that being the time when his pathological urge to gamble adversely affected his ability to make rational decisions...'

The court rejected that the plaintiff's pathological gambling was a special disadvantage which made him susceptible to exploitation. The court also found that the plaintiff 'was able to make rational decisions to refrain from gambling. He was certainly able to choose to refrain from gambling with Crown'.

The CIJ can obviously draw no conclusion about the merits of any particular decision, given it was not privy to all the evidence before the relevant court. More broadly, however, it is worth highlighting the way in which 'choice' continues to be a feature of a court's decision making matrix — including in certain Victorian decisions in which courts have noted that:

*Just as with other forms of addiction, his gambling may be viewed as indirectly responsible for the offending conduct, but the **decision to offend** was not the consequence of a disorder which impaired his judgment as to either the nature of seriousness of the conduct he was contemplating. The nexus of the addiction to the crime remained unsubstantiated, providing only motive and explanation for its commission. The evidence fell well short of it being shown that this addiction was a disorder which could reduce moral culpability'.²¹⁶ (our emphasis)*

In some cases, of course, the requirement that there be a 'nexus' of the addiction to the offending seems to have become a little confused, one sentencing judge reported as stating:

*...I've had difficulties in connecting some of the thefts and perhaps your extravagant behaviour with in any way relating to your pathological gambling. **Your offending behaviour was often well away from gambling venues...***²¹⁷

Nevertheless, as with prior to the *Grossi* decision, some exceptions continue to have been made. These have echoed the tendency of the court to take the offender's wider circumstances — which included the addiction — into account. One such decision involved a young woman who had been diagnosed with obsessive compulsive disorder; anxiety and depression; had undergone risky neurosurgery following detection of a brain tumour; and who had developed a gambling addiction as a way of coping with all of this hardship. In this case, the court found a clear link between the young woman's depression; trauma; gambling addiction; and offending.²¹⁸

²¹⁵ *Kakavas v Crown Melbourne Limited* [2013] HCA 25.

²¹⁶ *R v Cusack* [2009] VSCA 207.

²¹⁷ Cited in *R v Harris* [2009] VSCA 189 (sentencing judge referred to Barnett J).

²¹⁸ *Department of Public Prosecutions (Cth) v Gollic* [2014] VSCA 355 (Joint judgment by: Neave, Whelan and Beach JJ) (No dissenting judges). See also *Chuan Wei Chan v R* [2014] VSCA 301 (Joint judgment by: Redlich and Almond JJ).

Other forms of addiction

Taking a step back, it is worth considering how superior courts treat other forms of addiction, such as drug and alcohol addiction. In the CIJ's brief analysis of recent case law some strong similarities — but important distinctions — could be found which offer some clues about how the courts view addiction in general. For example, the crucial question in relation to gambling addiction appears to be whether the offender was mentally impaired by the addiction *at the time of contemplating or committing the offence*. However, case law regarding drug and alcohol addiction suggests that the court tends to look at whether the decision to take the substance in the first place was freely made, and whether an offender knew when taking drugs for the first time that it might cause him or her to be addicted and to commit crimes.

Examples of relevant case law include *R v Nagy*, in which the court stated that:

☐☐ *The law does not preclude a court... from regarding it as an important factor that [the offender] and his de facto wife were heroin addicts and that the crimes were committed with a view to obtaining heroin and money to enable their addiction to be satisfied...*²¹⁹

More pointedly, in *R v McKee*, the court found that:

☐☐ *...a sentencing judge may have regard to the circumstances which led to an addiction that caused the commission of the offence and to whether the addiction has continued or is being treated in deciding upon a sentence appropriately tailored to the personal circumstances of the offender*.²²⁰

In this particular case, the offender's drug use started when the offender was a child and also a victim of abuse. The offender went on to develop a long, drug-related, history of offending, with the judge further stating that:

☐☐ *The extent to which a decision to experiment with drugs is freely made, in my view, bears upon the moral culpability of the offender who commits a crime as a consequence of addiction to drugs*.²²¹

These cases were relied on in the decision of *R v Lacey*, reported in 2007, when the Court of Appeal stated that 'there is clear and binding authority that, in Victoria, drug addiction may constitute a significant mitigation factor'.²²² A short time later, however, the court appeared to be moving towards a different position. In *R v Koumis*, a heroin trafficking case, the court cited the (at the time) recent *Grossi* decision and stated that:

☐☐ *The general reluctance of courts to take drug addiction into account rests in part, at least, upon the view that the decision to begin to use drugs was voluntary and the commission of crimes to feed an addiction was a likely consequence of that choice.*

*...A number of general propositions may be stated about the relevance of addiction to the question of moral culpability and whether it should be viewed as a mitigating circumstance for the purpose of sentence. Drug addiction provides no justification...Generally speaking, addiction and any consequential impairment of judgment will not have any significant mitigatory effect upon... sentencing considerations.*²²³

219 *R v Nagy* [1992] 1 VR 637 (McGarvie J) (Full court: Crockett, McGarvie and JD Phillips JJ) (No dissenting judges).

220 *R v McKee and Brooks* [2003] VSCA 16 (Buchanan J) (Full court: Buchanan, Vincent and Eames JJ) (No dissenting judges).

221 *R v McKee and Brooks* [2003] VSCA 16.

222 *R v Lacey* [2007] VSCA 196 (Joint judgment by: Vincent, Redlich and Habersberger JJ).

223 *R v Koumis* (2008) 18 VR 434 (Joint judgment: Redlich, Kellam and Osborn JJ).

Reported in the same year, and just on the back of the *Verdins* decision, the court in *DPP v Arvanitidis* explained that:

☐☐ *To lose the benefit of ...Verdins, it was not necessary that the respondent have foreknowledge that the psychotic symptoms would cause him to behave in the precise manner in which he offended or make him generally dangerous or violent. If the respondent was aware that by taking the drug his judgement would be so affected that he would behave irrationally or that it would affect his ability to exercise control, his self-induced mental state would not constitute a mitigating circumstances. It was for the respondent to establish on the balance of probabilities that he did not know that the drug would have such effects. This he failed to do.*²²⁴

Similar ‘foreknowledge’ has been viewed as essential in subsequent cases, with the court finding that an addiction ‘...will only constitute a mitigating factor in the rare circumstance where it is established that the offender did not have any foreknowledge of the mental state that would be induced by the taking of drugs’.²²⁵

Interestingly, this ‘foreknowledge’ seems to come into play even more heavily in cases involving alcohol dependence. To this extent, courts considered it likely that offenders would be well aware of the effects that alcohol would have on them, in part because of prior experience. In a case involving a range of serious driving offences, the defendant suffered from alcoholism and depression. The court acknowledged that this stemmed from sexual abuse as a child, with the defendant having started drinking at only 8 years old. Referring to the *McKee* decision above, the court noted that:

☐☐ *There are...important statements of principle, emphasising as they do the duty of the sentencing court to pay careful attention to the personal circumstances of the offender and to the potential significance of deprivation, abuse or disadvantage in early life as explaining the offending or — as is the present case — as explaining the addiction.*

The court went on to say, however, that, despite this:

☐☐ *Neither her depression nor her alcohol dependence — nor the sexual abuse from which they stemmed — was causative of her offending, in the sense discussed in Verdins. She had no need to drive while drunk, unlike the appellants in McKee who could **at least explain their offending on the basis of their physical craving for heroin**...she would have been well aware, with increasing intoxication during the day, that her judgment was becoming clouded and her capacity for decision making impaired.*²²⁶ (our emphasis)

More recently, however, the court took a slightly different approach, though considering *Verdins* only in relation to the defendant’s diagnosed personality disorder.

☐☐ *Generally, the fact that such alcohol dependence arose out of a troubled childhood will not be sufficient for the court to consider intoxication as a factor in mitigation of culpability. However, in this instance, because of the very young age at which you started drinking, the direct role of your father in introducing you to alcohol and the fact that both your parents abused alcohol in the family home until you were 15, I treat this as a circumstance in mitigation...In summary, I accept that your upbringing and resultant personality disorder and alcohol dependence were, in part, causative of your committing the offence. I have therefore taken this into account in favour in determining your moral culpability for your crime.*²²⁷

224 *DPP v Arvanitidis* [2008] VSCA 189 (Redlich J) (Full judges: Buchanan, Nettle and Redlich JJ) (No dissenting judges).

225 *Johnston v R* [2013] VSCA 362 (Redlich J) (Full judges: Redlich, Priest and Robson JJ) (No dissenting judges).

226 *R v Audino* [2007] VSCA 318 (Maxwell J) (Full judges: Maxwell, Ashley and Neave JJ) (No dissenting judges).

227 *R v Steve Ray Cook* [2015] VSC 406 (Elliott J).

Discussion

So what does all of this tell us? Again, the CIJ makes no comment about individual court decisions. That said, the pattern of these cases does hint at a number of factors for consideration.

The first is a detectable element of reluctance to 'open the floodgates' in the wake of the *Verdins* decision. The CIJ heard that, unsurprisingly, lawyers for offenders who had gambling and other addictions were all, at least initially, keen to try their clients' luck at this new sentencing terrain. However, this terrain was, at least in relation to gambling, quickly shut down by the *Grossi* decision.

Conversely, however, these decisions suggest a struggle by the courts to grapple with the realities and manifestation of a different kind of addiction and its relationship to choice. On the one hand, courts seem to consider that offenders who are alcohol dependent ought to have known, *from prior experience*, how they would be affected. It was at the point of repeating the behaviour, apparently, that they exercised the element of choice.

Offenders with a drug addiction, on the other hand, apparently exercised the 'choice' when they *first* began to use drugs. In fact, slightly illogically this choice was seen to have been significantly affected by the physical effect of the substance on the offender (i.e. the effect which occurred *after* the drug was taken) — with the defendant more in control of the physical effects of alcohol, for example; than of the 'physical craving for heroin' — the drug addict locked in the grip of the substance from thereon.

The question of choice to gambling addicts, however, was not necessarily in relation to their decision to gamble (although it was in *Kavakas*) but in their decision to *offend* — the addiction to gamble being seen as largely separate from the offender's apparent free will to commit a crime. Notably, the exceptions to all these cases — whether relating to gambling, drug or alcohol addiction — seem to have been when an offender's mental health is seriously impaired by other, separate factors, or when an offender's life circumstances reflect significant hardship and the whole picture can then be taken into account.

In other words, it is the *substance* that is seen to have had a significant effect. Curiously, this does not seem to hold as much water when alcohol is involved — potentially because alcohol dependence (and/or the avoidance of one) is a more understandable phenomenon to most of the population.

What it does suggest, however, is that there may be inconsistent and underdeveloped engagement with the concepts and science of addiction in the legal context. Certainly, according to academic and grey literature, the issue of gambling addiction in sentencing remains confusing.²²⁸ In particular, a recent critique by academic Luke Neal who suggests that the reasons in the *Grossi* decision are based on an unrealistic conception of the voluntariness of the offender's choice to offend.²²⁹ Accordingly, Neal calls for a greater engagement with the available neuroscience, as well as evidence around co-morbid diagnosis, to argue for mitigation in certain cases of gambling-related crime.

228 Allen Consulting Group, "Responding to gambling-related crime: Sentencing options and improving data collection in courts and prisons," (2011), 19.
229 Neal, above note 119.

A steady stream of cases

Given this pattern of case law in Victoria's most superior court, the CIJ decided it was worth asking how gambling-related offences have been dealt with in recent years in the jurisdiction that hears perhaps the greatest number of matters which are said to be *directly* related to gambling addiction. Certainly, County Court judges told the CIJ that they heard a steady stream of matters relating either to property theft or drug offences which could be traced back to gambling debt.²³⁰

To complement consultations, and to trace the impact of the *Grossi* decision, as mentioned above the CIJ conducted an analysis of sentencing remarks of over 100 cases in the County Court since *Grossi*; the VRGF 2013 report and the release of the latest edition of the DSM. The analysis found a growing irritation on the part of the court about the steady stream of gambling-related offending that it was seeing.²³¹

“ Yet again the Court is called upon to deal with the consequences of the ubiquitous availability of gambling outlets in our society. Yet again it is required to balance the community interest in reclamation of those who fall prey to the temporary allure of the spin or jingle jangle of the poker machine against the need to punish those who steal other's property to facilitate that ephemeral pleasure, and to deter others who are in a position to breach the trust of others to their own benefit.²³²

The community continues to attend and promote gambling at these awful venues that produce this sort of tragedy. In this case there does not seem to be any dispute from either side, that the gambling addiction to the machines, was almost the total recipient of all the money involved in this case, which is getting up towards half a million dollars. It is marvellous to hear how they then contribute to the community, with small amount.²³³

...the prisoner told the psychologist that the gambling debts were the reason why she ultimately became involved in this criminality of loan sharks who had apparently lent her money to gamble, therefore leading to the incentive to commit crime to pay it back...in 2011, long before the offences took place, Ms Thai had indeed self-excluded from the Casino. One ponders to think how one so easily removes oneself from such self-exclusion, and is accepted back by the Casino.²³⁴

I think I have said enough about the Casino in the last two weeks.²³⁵

To this end, those judges participating in the project acknowledged that gambling addiction could be an ‘ameliorating’ factor, if not a mitigating one, and that the Court was ‘not always alive to the potential of a therapeutic option’. That said, the parameters imposed by *Grossi* and associated case law left little room for flexibility, with judges indicating that — like Magistrates and lawyers — they had not seen the issue raised as much in recent years and had not seen it featuring as often in psychologist’s reports.

“ As I say, these are never easy sentences. No one likes sentencing a person who has been subject to an addiction, however, the aggravating factors, the amount and the breach of trust is such that I agree totally with the comments made by the Chief Judge. There is no option...that a period of immediate imprisonment must be imposed...²³⁶

230 Focus group discussion, County Court of Victoria, November 2016.

231 The County Court now publishes 60% of its cases, making the sample audited by the CIJ a fairly substantial representation.

232 *DPP v Seamons* [2013] VCC 1951 (Murphy J).

233 *DPP v Dwyer* [2015] VCC 554 (McInerney J).

234 *DPP v Thai* [2016] VCC 624 (McInerney J).

235 *DPP v Ut Nguyen* [2015] VCC 1908 (McInerney J).

236 *DPP v Dwyer* [2015] VCC 554 (McInerney J).

Some of the remarks (as with others featured earlier in this report) provide further confirmation of emerging themes. This includes the linear pathway from addiction to property theft:

FF *Within 12 months you were gambling daily on poker machines and Tatts Lotto. In order to support this level of gambling, you borrowed heavily from friends and family. You came under increasing pressure to repay your debts. In these circumstances, you decided to steal from your employer to enable your creditors to be paid and... to continue your gambling.*²³⁷

It also includes, however, remarks that reflect the additional recidivism risk that gambling can present:

FF *As to your prospects of rehabilitation, you will have to address your gambling addiction. It may be that you will be able to commence that process whilst serving your sentence, but unless you do it successfully either during the course of your sentence or afterwards, perhaps during the period when you are on parole, then you are vulnerable, it seems to me, to committing further offences of this kind. It could become a blight on the rest of your life unless you deal with it... It will be difficult for you to live other than an isolated existence.*²³⁸

The pathway from gambling debt to drug offending (noting the role of networks, loan sharks, and gambling venues) was also observed:

FF *...you accumulated gambling debts... and it seems as a means of repaying that debt you were offered money to look after his crop in Shepparton... You say the house was set up when you arrived, and you remained there until your arrest.*²³⁹

*You agreed to be a 'crop sitter' because you had accumulated a gambling debt and needed money to pay it off. You were paid \$5,000 at the beginning and were to receive a further \$5,000 at the completion of your period of service.*²⁴⁰

As an additional form of vulnerability, the sentencing remarks point to pathways which can be the 'result of a cumulative contributing effect of premorbid anxiety and/or depression, poor coping skills and negative family experience'.²⁴¹ In other words, people with mental health issues and poor coping skills — possibly co-occurring with but just as likely the result of — a difficult family background or childhood trauma, are more likely to find themselves at the intersection of gambling and crime.

FF *You said you sought out the poker machines for the numbing experience of using them. You used the money [you gained from the offending behaviour] for your gambling.*²⁴²

*I also accepted into evidence a report from a clinical psychologist... who confirms that you suffer from a gambling addiction caused by depression.*²⁴³

Despite this acceptance of the harmful effects of gambling, the remarks nonetheless reflect a judicial approach to sentencing consistent with the discussion above. More specifically, the sentencing judges typically endorse Redlich's general point that gambling addiction is not a mitigating factor.

237 *DPP v Appadoo* [2015] VCC 227 (Grant J).

238 *DPP v Shiel* [2016] VCC 1218 (Maidment J).

239 *DPP v Pham* [2016] VCC 1117 (Mullaly J).

240 *R v Bui* [2016] VCC 37 (Punshon J).

241 Neal, above note 119, p 86.

242 *DPP v Arnall* [2016] VCC 640 (Mullaly J).

243 *DPP v Chapman* [2016] VCC 231 (Lacava J).

☐☐ *Addiction to gambling, as such, is not a mitigatory matter. It may well explain what you did with the money that you took from Medicare and it might be that you took solace from your financial issues and mental health issues and financial pressure through gambling, but that is the extent of the way in which I could factor in your gambling addiction.*²⁴⁴

*In such regard, the prosecution relied on R v Grossi [2008] VSCA 51 [56] where the reasons of Redlich JA are detailed. In that paragraph His Honour refers to five reasons which are relevant here and, in my view, apply totally to the facts in this case and support not only the proposition put to me by the prosecution but the conclusion I make, that while the gambling addiction is explanatory of this criminality, such is not mitigatory.*²⁴⁵

*Although I take into account your gambling addiction in a general way and in respect of its contribution to your offending, I do not regard it as something which you can call in aid as mitigatory or as attracting Verdins principles, for the reasons set out by His Honour Redlich JA...*²⁴⁶

In particular, a number of cases signal the further considerations which sentencing judges are likely to take into account, including whether the proceeds of the crime had been directly used to fund further gambling or pay back gambling debts; or whether they were instead used to fund a 'lavish lifestyle' or for an offender's personal gain.

What's more, while approximately half the cases analysed involved an offender with no prior convictions, this did not necessarily work in the offender's favour:

☐☐ *...[the prosecution] agreed that you had no prior convictions, but submitted that is often the case with white collar offenders. Such offenders often do not have prior convictions: they are people of good character and have good prospects of rehabilitation. He submitted it is often those characteristics which allow offenders access to the position of trust which they have abused, and in such cases these mitigatory factors must be given less weight than the factor of general deterrence.*²⁴⁷

Even where psychologist reports appeared to give significant credence to the existence of an addiction — making clear reference to diagnosis under the DSM 5 and even suggesting a clear nexus of this addiction to the offending — this was not always viewed as an excuse.²⁴⁸

Sentencing remarks even included a lack of sympathy, in some cases, for the plight of a recent arrival. Certainly, lawyers participating in the project suspected that courts may be becoming somewhat skeptical about the frequency with which the 'loan shark story' was appearing before them.²⁴⁹

☐☐ *...you had the privilege of coming to Australia to study. Many others do not enjoy such a privilege but are treated as criminals, locked in detention for doing nothing more than trying to find refuge and a better life. Within a number of months you were no longer studying and then you turned to this offending. I must say that this appears to be a familiar pattern with a number of drug offenders nowadays — coming in from overseas, abandoning studies and committing drug offences... In any event, drug and gambling addiction do not lessen your moral culpability — it's just that your moral culpability may be seen as even higher if you were offending for sheer profit.*²⁵⁰

244 *DPP v Dewhurst* [2016] VCC 1187 (Cannon J).

245 *DPP v Thai* [2016] VCC 624 (McInerney J).

246 *DPP v Kelly* [2014] VCC 1983 (Cannon J).

247 *DPP v Matthews* [2016] VCC 1261 (Lawson J).

248 *DPP v Ut Nguyen* [2015] VCC 1908 (McInerney J). See also *Anh Tuan Nguyen v R* [2017] VSCA 10, and *DPP v Little* [2016] VCC 1687, though in this latter case the psychologist conceded that, while the offender had a gambling addiction, the condition was not such as to have obscured the offender's intent to commit the offences.

249 Focus group discussions, Victoria Legal Aid, Sunshine, October 2016 and Morwell, November 2016.

250 *DPP v Tiong* [2016] VCC 833 (Cannon J).

In three cases, however, the sentencing judges appear to attribute reduced moral culpability — or more weight to rehabilitation than might otherwise be anticipated — because a defendant’s gambling converged with other factors in that offender’s life, such as mental health issues and social circumstances which may then give rise to a gambling disorder.

There have been a number of cases which have come before the appellate courts in Australia where the degree to which gambling addiction amounts to a mitigating factor in cases such as this has been the subject of debate. The balance of authority suggests that it is rarely the case that gambling addiction alone would amount to a mitigating circumstance. However it is put that **when combined with the other mental impairments and the other physical issues spoken of by [the assessing psychologist] all of those factors operate to reduce your moral culpability.** [...] It seems to me sensible to conclude that your gambling habit, gambling addiction if you like, does give a substantial reason for your engaging in this conduct. In my opinion it does not substantially, if at all, mitigate the offending in itself, but it seems to me that when you link in the mental impairments about which I have spoken then the picture is one of a person who at the time of the offending was at a very low ebb and your capacity to control your impulses was significantly reduced.²⁵¹

I accept the matters put on your behalf in mitigation. This is a very unusual case. The offending is a serious example of armed robbery, committed against someone you knew, and who trusted you, and who had helped you financially in the past. It was committed for financial gain; albeit to satisfy a gambling debt in circumstances where you were being pressured to repay the debt, and to offend in order to do so. **You are a person without prior convictions, relatively youthful, isolated in Australia with no family, caring on your own for your two youngest daughters in spite of having little English and no employment. You have pleaded guilty and shown remorse for your conduct, which occurred in the context of a gambling addiction brought on by the isolation and depression you felt after your marriage broke up, and you have ceased gambling, commenced counselling and taken full advantage of the CISP program you have undertaken.** If imprisoned your middle daughter will be taken into the care of the State because there is no one available to care for her. I accept that you currently suffer from a mental disorder requiring treatment both by way of medication and counselling with a Vietnamese speaking psychologist, and that a sentence of imprisonment will weigh more heavily on you than on a person in normal health. I am also satisfied that there is a serious risk that imprisonment will have a significant adverse effect on your mental health.²⁵²

The fundamental issue before me is whether some imprisonment is required in the circumstances of dishonest appropriation of property from an employer and a supplier to the value of \$149,000 over two years, in order to gamble **by a now remorseful man of previous good character, who went through the difficulty of declaring that he was gay while married with a young child.** I have given this matter much anxious consideration and, with the guidance of the Court of Appeal in Bolton, I am of the view that in the end the gravity of the offending and the need for denunciation and deterrence would not be so undermined if the punishment was a community corrections order alone without any imprisonment.²⁵³ Given this analysis, the question then becomes whether the VRGF’s 2013 assertion that ‘the courts are beginning to soften their sentencing approach in cases involving gambling issues, by adopting a broader consideration of an offender’s mental state’²⁵⁴ is in fact the reality. Certainly, the finding that only three out of a sample of over 100 cases accept any mitigation suggests that the softening is far from widespread.

251 *DPP v Buckley* [2014] VCC 1870 (Maidment J).

252 *DPP v Nguyen* [2016] VCC 43 (Davis J).

253 *DPP v Arnall* [2016] VCC 640 (Mullaly J) It is useful to note that, in this latter case, the psychologist’s report very clearly stated the defendant had a Major Depressive Disorder and Gambling Disorder and that, in the psychologist’s opinion, there was ‘**a nexus between [the] gambling disorder and [the] offence behaviour.**’

254 Victorian Responsible Gambling Foundation, above note 26, p 138.

Understandably, the County Court's approach echoes the pattern of Supreme Court case law both prior to and post the *Grossi* decision, in that courts are more willing to accept mitigation in relation to sentence for serious offences when other — potentially more sympathetic — factors are in play.

Often in the mix

Despite the comments from County Court judges (both in consultations and in the analysis of sentencing remarks) that gambling related offending features regularly in the matters that they see, the CIJ heard repeatedly from Magistrates that they 'do not see gambling issues as much as we used to'.

The CIJ suggests that this may be the result of a number of different factors.

The first is that those matters which clearly feature gambling as a factor contributing to offending are usually matters involving more serious offending — either in relation to the amount of money embezzled or stolen, or the seriousness of various drug offences. This means that these matters will be heard in the County Court jurisdiction. While committals for these matters are still heard in the Magistrates' Court, a consolidation of all committal hearings in the Melbourne Magistrates' Court a few years ago means that many of these matters will simply not be coming to the attention of suburban or regional courts.

The other reason, as suggested by lawyers participating in focus group discussions, is that the *Grossi* decision has impacted on the likelihood that lawyers will even *ask* their clients about gambling, let alone raise it before a court. Certainly, many lawyers indicated that they were reluctant to raise the matter on behalf of their clients, due to what was perceived as a lack of sympathy from some judicial officers.

FF *Depends who you get — it's a bit of a judicial lottery. Some, it's a sure bet the client's going inside.*²⁵⁵

*Most... are sympathetic but a few believe that severe punishment will act as a deterrent.*²⁵⁶

*One Magistrate says, 'I start from the position of jail and you have to talk me back.'*²⁵⁷

*My client had no priors, severe depression and anxiety, long history of domestic abuse — but she stole [over \$10,000] from her employer and the Magistrate put her inside... [the court] only saw the gambling, the breach of trust...*²⁵⁸

²⁵⁵ Focus group participant, Victoria Legal Aid, Ringwood, October 2016.

²⁵⁶ Consultation with Wesley Mission Legal Service, November 2016.

²⁵⁷ Focus group participant, Victoria Legal Aid, Ringwood, 2016.

²⁵⁸ Focus group participant, VLA Regional Office, Geelong, October 2016.

Even specialist gambling lawyers, such as those at Wesley Mission Legal Service, said they ‘rarely raised [their] clients’ gambling in court’, preferring to rely on other matters, such as mental illness or family breakdown. While it is unlikely that *clients* are not raising their gambling because of case law, could it be that lawyers are not even considering whether it could still be one of the arguments they should make on behalf of their clients; and therefore not seeking relevant evidence (such as psychologists’ reports) to lead?

■ ■ *It used to be a question we ask. Now we don’t ask as we don’t expect it to make a difference.*²⁵⁹

Lawyers also confirmed that they do not usually ask about gambling issues with clients, unless there is an obvious reason to suspect it is relevant. In some cases, lawyers acknowledged that it was not in the interests of their client to disclose involvement in any more serious offending than what they admitted to:

■ ■ *If we’re looking at bank statements for whatever reason and there’s multiple large withdrawals from a hotel venue, then we know we might need to ask a few more questions.*²⁶⁰

*If a client’s instructions are that he was coerced by a loan shark into trafficking a certain amount of drugs, they are the instructions I need to work with...*²⁶¹

As suggested above, some lawyers overtly reflected on the impact that the *Grossi* decision has had on the instructions that they seek from their clients.²⁶² What was striking about discussions with the Magistrates’ Court, however, was that specific reference to the *Grossi* decision was not necessarily made, with discussion instead focusing around more general principles, including the ‘objective seriousness’ of the offending which, in some Magistrates’ views, involved an element of choice.

This was echoed in the comparison offered in one consultation between someone in the grip of a gambling addiction and the grip of a drug addiction — in other words, the distinction between the moral culpability of someone who embezzles a 7-Eleven being likely to be seen as greater than that of ‘an ice addict who holds up [that same] 7-Eleven with a kitchen knife’.²⁶³

In this way, the apparent distinction between a gambling disorder or addiction, and another form of addiction, seemed to work against the gambling-related offender. As discussed in Part One of this Report, just as clinical responses to, and diagnosis of, gambling disorder were slower to develop than responses to drug addiction, the legal system has not yet grappled with the emerging neuroscience which offers valuable explanations of the depths to which a gambling addiction can take someone.

Just as relevantly, the fact that an individual appearing on gambling-related theft charges may seem, in every other respect, to have their lives together — to be reasonably well dressed; to have a house; a family; a car and possibly still a job — is something that courts cannot necessarily compute. This is because the vast majority of individuals who courts see are experiencing multiple forms of disadvantage, with mental illness; ice addiction; ABI; unemployment; low educational attainment; and generalised or family violence all in the mix with a significant number of offenders that the Magistrates’ Court sees.

This makes it more likely that the moral culpability of someone who otherwise appears in control — and who may seem to have chosen to offend over a long period of time — will seem higher in comparison with the culpability of someone who is otherwise incapable of making constructive or positive choices. For this reason, some gambling related offenders are likely to receive a custodial sentence despite this seeming relatively harsh in the circumstances, or despite this being their first offence.

259 Focus group participant, Law Institute of Victoria, October 2016.

260 Focus group participant, Victoria Legal Aid, Sunshine, October 2016.

261 Focus group participant, Victoria Legal Aid, Sunshine, October 2016.

262 Focus group participant, Victoria Legal Aid, Morwell, November 2016.

263 Interview with, Magistrates’ Court of Victoria, Geelong, October 2016.

Outside the scenario of offending as a direct result of gambling problems, lawyers reported that clients rarely encountered sympathy for their gambling in other contexts. For example, in the Special Circumstances List at the Magistrates' Court (which deals with applications for special consideration in relation to the payments of fines and infringements on the basis of disadvantage), lawyers said it was not a good idea to raise the issue of gambling, even where a gambling disorder is preventing a client from paying their fines. Currently, problem gambling is not listed in the eligibility criteria.

☐☐ *The court will think 'if he's got enough money to gamble, he's got enough money to pay his fines'.²⁶⁴*

That said, most participating Magistrates could relate stories about parties who had appeared, either on property theft charges related to gambling, or on unrelated offences where gambling was 'in the mix'.

☐☐ *I had one recently, a young adult living at home on a CCO related to drug offences. There was a long history of other offending and family violence. The man had then used his father's credit card to fund his gambling addiction and Dad had finally reported him for theft. When you think about how desperate a parent has to get before they'll do that, you have to wonder how much else that situation is happening...²⁶⁵*

Similarly, Magistrates also suggested that gambling problems were a 'hidden' issue, and that due to stigma they weren't being raised.

☐☐ *A first time offender — who otherwise appears to have her life together — would probably prefer to stand up in court and say "I have a narcissistic personality disorder, Your Honour, than admit to a gambling problem...'²⁶⁶*

The CIJ also heard that the Children's Court did not often hear matters involving gambling problems, potentially because families appearing in this jurisdiction were in such crisis that gambling would not likely be seen as the most pressing issue by the families themselves. They did relay, however, anecdotal suggestions that gambling was in the backdrop of a number of cases involving child neglect, with children more likely to be left alone at home, rather than in the car at gaming venues, as might previously have been the case.

264 Focus group participant, Community Legal Centres, September 2016.

265 Interview, Magistrates' Court of Victoria, Dandenong, October 2016.

266 Focus group participant, Children's Court of Victoria, October 2016.

Part Four – Opportunities for positive interventions

Contact with the criminal justice system — entrenching or preventing further harm?

It would seem that the various pathways which lead between gambling and contact with the criminal justice system seem to have custodial consequences more than might be originally expected.

Sending a first-time offender to prison, however — and therefore disconnecting them from family; potentially from housing; from relevant medication; and from any hope of ongoing employment — can potentially only entrench the harm the gambling problems have already caused. What's more, any individual driven to gambling by mental illness or by family violence victimisation will likely have that harm compounded by an experience of incarceration, particularly one which is likely to be relatively long.

“ The first 12 months are enough of a shock, but after that they really start to deteriorate — any rehabilitative potential is off the table...²⁶⁷

Meanwhile, individuals previously not exposed to anti-social networks will likely be schooled in other forms of offending — useful skills upon release to no housing or employment.

“ Sending them to jail just makes them better criminals — gamblers are targeted as drug mules because they don't look suspicious — this means that offenders who were previously shoplifting to fund their addiction have now met drug offenders and find a quicker way to make more cash...²⁶⁸

Just as importantly, for people with prior convictions — including those who may have spent their life cycling in and out of institutions — further incarceration reinforces and entrenches their identity as offenders, making it less and less likely that they will be able to establish any life beyond crime.

Focus group discussions revealed, however, that this trajectory to incarceration was not inevitable, depending on whether an individual's contact with the criminal justice system functioned as a positive, rather than a negative intervention. Given the emphasis of the CIJ's project, this Part of the Report will explore opportunities for these positive interventions by lawyers and by courts. Opportunities in other parts of the criminal justice system will then be briefly discussed.

²⁶⁷ Interview with Gambler's Help, Loddon Campaspe, October 2016.

²⁶⁸ Consultation with Wesley Mission Legal Services, November 2016.

Legal practitioners

Starting with the first interaction that people in contact with the criminal justice system usually have — at least ideally — legal practitioners can serve as a positive intervention in a variety of ways. As emerged in Part Three, of course, these opportunities cannot be seized unless lawyers become aware of their clients' gambling problems in the first place. Even where gambling is the direct cause of the offending, however, lawyers reported that clients were reluctant to disclose, such was the stigma surrounding gambling.

Lawyers told the CIJ, therefore, that they needed assistance about how to ask about gambling issues in a sensitive way — including whether they suspected that gambling was a backdrop to the matter at hand, but perhaps not a direct cause.

Obviously, certain groups of lawyers were more likely to see certain pathways between gambling and offending than others. VLA lawyers, whose clients must be eligible for public legal assistance, were more likely to see clients for whom gambling was a secondary issue to other forms of offending; or who had alternatively drained all their resources on a gambling addiction.

Many lawyers indicated that they were often unsure about where to refer clients if they did disclose or when they presented with gambling as a direct cause of offending. Knowledge of Gambler's Help and other services varied quite widely, with this project offering the opportunity to increase legal practitioners' awareness about what might be available.

Of those lawyers who were aware of services, many indicated that getting a client into counselling or treatment prior to an appearance in court was often helpful to their case.

☐☐ *...the prosecution were gunning for [the client] but we got her into treatment and the court saw the potential for rehabilitation. She might have gone to prison but she got a CCO.²⁶⁹*

*One client had a relative who had accumulated a huge gambling debt. Out of desperation to help, this client had the bright idea that **she** would try her luck gambling to see if a big win could solve all their problems. When she lost instead, she tried to make off with someone else's winnings and got caught! She didn't have a gambling problem, but acting for her was a chance to refer her relative into treatment as well. The court was sympathetic and she got a [good behaviour] bond.²⁷⁰*

Further, the CIJ's consultation with Wesley Mission Legal Service — a publicly funded service dedicated to providing legal assistance with gambling-related matters in NSW — confirmed the value of connecting clients with treatment and 'wrap-around' service provision. Co-located with financial counselling and gambling counselling services, the director of the organisation indicated that their lawyers prefer to see clients who are already connected with these other services.

☐☐ *Clients with severe gambling problems often just want to fix their legal problem. They've been gambling for years and have tipped over onto the wrong side of the law. Unless they get their gambling and other issues sorted out, such as childhood trauma, they will just come back through the door later on.²⁷¹*

269 Focus group participant, Victoria Legal Aid, Geelong, October 2016.

270 Focus group participant, Law Institute of Victoria, October 2016.

271 Consultation with Wesley Mission Legal Service, September 2016.

Accordingly, the CIJ sees contact with legal practitioners as a relatively early opportunity for intervention with clients who have gambling problems, or for whom gambling may increase risk of recidivism post-release. This means that, just as lawyers should be alive to the opportunity to identify and make informed referrals in relation to family violence, lawyers can also be alive to the chance to refer their clients to other forms of support which may prevent further offending or other problems down the track.

Equally, lawyers can be alive to some of the more practical measures which might assist their clients — such as helping them to ‘self-exclude’ from gaming venues, or disposing of their smart phone in favour of a less ‘app-friendly’ model. That said, the CIJ heard that practical measures such as self-exclusion are not always successful, particularly in relation to local gaming venues.

■ ■ *We’ve had two clients in the last month who have lost over \$10,000 at venues from which they had self-excluded. It’s amazing how when you self-exclude you can no longer claim any winnings, but you can certainly be liable for your losses.*²⁷²

To assist lawyers and others in the legal profession in New South Wales, the Office of Liquor & Gaming in NSW has produced an information kit specifically for professionals in the criminal justice sector.²⁷³ Providing information about risk factors and consequences of problem gambling; as well as referral links and potential opportunities for intervention, the CIJ heard that the legal profession in NSW has been very receptive to the provision of this targeted and valuable information.

Given the door which has been opened to engagement by the CIJ’s project, the CIJ strongly recommends that, perhaps in consultation with the Office of Liquor & Gaming in NSW, the VRGF support the development of equivalent material in Victoria. Lawyers may use this information to assist in the earlier provision of support services. As noted, social and community services are not consistently asking about these behaviours, and some gamblers are grateful when a professional ‘finally’ asks them about their gambling behaviour. As noted by Judge Cheryl Moss, ‘a family lawyer does not need to be an expert when he or she encounters a problem gambling issue. The lawyer just needs to know where to go for information’.²⁷⁴

At the very least, the VLA results referred to in Part Two suggest that lawyers are in a position to generate a larger data set concerning the intersection of gambling harm and crime. Perhaps more importantly, these results indicate that including questions about gambling problems and harms related to this behaviour in a client’s initial assessment is an opportunity that is currently being missed.²⁷⁵

■ ■ *...it’s the lawyers who have to ask, that’s where we can make a difference...*²⁷⁶

272 Focus group participant, Community Legal Centres, September 2016.

273 Office of Liquor & Gaming NSW, *Gambling Help – Justice & Corrections Project*, October 2016. Provided to the CIJ by the Office of Liquor & Gaming.

274 Moss, C., "Symposium: Problem Gambling & The Law, Part II: Shuffling the Deck: The Role of the Courts in Problem Gambling Cases," *UNLV Gaming Law Journal* 6 (2016).

275 Ibid. See also National Centre for Responsible Gambling, "Gambling and Health in the Justice System: A Research-based Guide about Gambling Disorders for Judges, Parole Officers, Attorneys and Other Professionals Involved in the Justice System," (2015). http://ncrg.org/sites/default/files/uploads/docs/ncrgguide_judicial2015final.pdf

276 Consultation, Magistrates’ Court of Victoria, Melbourne, October 2016.

Magistrates' Court

Where a matter reaches the Magistrates' Court, there are also positive interventions available in this context. A substantial body of evidence demonstrates the value of therapeutic jurisprudence — using a person's contact with a court as a positive intervention, harnessing the authority of that court to encourage an offender to take responsibility for their offending and to participate in relevant rehabilitation.²⁷⁷

While this is commonly understood in the context of specific 'problem-solving' or 'solution-focused' courts, a therapeutic jurisprudential approach can also involve creative deployment of options already available to a court. The CIJ heard that these include:

- Options pre-trial, including a more effective use of bail provisions, such as contact with a Gambler's Help or other appropriate service as a condition of bail;
- Options post-trial and pre-sentence, such as a more effective use of the power for deferral of sentence. The CIJ heard that this included Magistrates requesting that VLA seek a psychologist's report for their client, overcoming the challenge that many lawyers reported in terms of resourcing psychologist's reports at an early stage in proceedings;
- Options at sentence, such as the inclusion of a relevant referral for eligibility assessment in a Community Corrections Order.

Most Magistrates participating indicated that they had imposed CCOs with conditions of this kind on occasion. While Community Corrections officers conduct the relevant assessment for referral, Magistrates indicated that they need to be confident that this referral is to a rigorous and evidence-based service. Like awareness amongst lawyers, awareness of relevant services amongst the judiciary varied significantly. The CIJ was consequently pleased that, as this report went to publication, the Magistrates' Court had included a briefing on Gambler's Help services and clinical approaches on the program of an upcoming professional development day.

Beyond better use of existing options, however, are more proactive approaches from the courts — ones which formally allow gambling to be the trigger for connection with a therapeutic response. For example, the Magistrates' Court of South Australia recently introduced a Problem Gambling stream into its Treatment Intervention Program. Rather than distinct specialist lists, the South Australian court currently has one specialist list through which court users with a range of issues (apart from family violence, which does have a dedicated court) are referred for treatment and ongoing monitoring by the court. While the majority of these matters involve drug addiction and offending, the court has also created a pathway by which individuals can be referred for eligibility assessment and then proceed to treatment through a specialist clinic, the Statewide Therapy Clinic described in Part One of this Report.

As this earlier description reveals, this particular treatment service is relatively intensive when compared with other less formal approaches, and was chosen as the appropriate referral pathway by the court and the Office for Problem Gambling, South Australia, which funded the necessary infrastructure. As was suggested earlier, the apparently rigorous nature of this program — including a biofeedback monitor which measures heart-rate — may have made it more likely to attract government-funded support.

The promise of this model, however, does not only rely on the form of treatment to which offenders are referred. Rather, it also relies on the established value of solution-focused approaches, leveraging an offender's participation through a guilty plea while the person is on supervised bail under the *Bail Act*. The promise also stems from the fact that offenders are brought back before the court on a regular basis to report on their progress, and this progress and completion informs their ultimate sentence. To this extent it is a straightforward, solution-focused approach with, in the CIJ's view, substantial potential.

In consultations in South Australia, however, the CIJ heard of various challenges which the introduction of this program had encountered. The first was that sentencing options in South Australia still only allowed sentences to be deferred for a maximum of 12 months, meaning that treatment and judicial monitoring were confined to that period.

²⁷⁷ Richardson E, Spencer P and Wexler D, 'The International Framework for Court Excellence and therapeutic jurisprudence: creating excellent court and enhancing wellbeing'. *Journal of Judicial Administration* 25 (2016) 68.



Perhaps more importantly, CIJ also heard that, on the whole, referrals to the list were still low — meaning that defendants were not raising the issue; lawyers were not asking about it; and other Magistrates across the jurisdiction were not necessarily making referrals. Those involved in the intervention stream suggested that this may be in equal parts due to hesitation about the value of therapeutic approaches; and a level of skepticism about the status of gambling as a ‘proper’ disorder or addiction.

Certainly, this skepticism was not limited to one jurisdiction. Judge Mark Farrell — who established the world’s first problem gambling court, the Amherst Gambling Treatment Court, in New York state in 2000 — reported that, fifteen years on, he still encountered reluctance in some quarters to treat gambling problems as little more than an offender’s moral failing.

Though a handful of problem-gambling referral pathways now exist in US criminal justice systems²⁷⁸ — thanks in no small part to Judge Farrell’s nationwide advocacy for the issue — they remain the exception, with interest from the profession not necessarily translating into implementation, and ‘prosecutors all over the world continuing to see gambling as a character flaw’.²⁷⁹

²⁷⁸ Nevada Voluntary Treatment program is run through drug court caseload, but without a special court structure. Offenders must agree to pay for treatment or be assigned to a state or federally funded program. The Stateside Gambling Treatment Program in Louisiana diverts first or second time offenders into diversion and treatment. Meanwhile, there have recently been calls for a dedicated gambling court to be added to new drug court in Auckland and Waitakere. <http://www.radionz.co.nz/news/national/296343/calls-to-use-casino-money-to-fund-gambling-addicts-court>

²⁷⁹ Consultation with Judge Mark Farrell (retired), November 2016.

The Amherst Gambling Treatment Court was created in 2000 when Judge Farrell encountered a spate of gambling addicts in an already established drug court jurisdiction and decided to investigate further. The court was established by identifying potential outpatient facilities and referral pathways, and building up specialist knowledge to support clients and providers and court staff through cross-sectoral training.

Running successfully since that time, the court's operation is non-adversarial and contract based — in that the offender agrees to a set of sanctions and rewards under the strict oversight of a judicial officer whose aim is to bring 'toughness, compassion and open-mindedness'²⁸⁰ to the proceedings. Judge Farrell explains that the application of a therapeutic approach to a gambling context requires understanding the unique and comparable aspects of the addiction — including understanding the 'carnage' that gambling can cause.

It also includes a level of flexibility in order to cope with the challenge of identification. After all, given that there is no blood or urine test available for gambling addiction, the court must rely on defendant admissions and collateral information. The Judge also notes that co-occurring issues, such as drug and alcohol addiction (which he reported occurred in 80–90% of cases) can mask or complicate diagnosis, while other issues such as mental illness (equally prevalent); trauma (including in veterans — of note, Amherst New York also has a Veterans Treatment Court); domestic violence and, in a particular cohort of cases, young defendants, pose additional challenges.²⁸¹ This is familiar to the problem gambling and offending context in Australia, as are the kinds of offences which Judge Farrell reports appear before him.²⁸²

Judge Farrell also reported that, crucial to the effectiveness of the court, was the swiftness with which offenders were arraigned, initially assessed and returned before the court (within 48 hours to one week) and the comprehensive process of ongoing assessment, treatment and monitoring.

Similarly, the treatment program was comparably comprehensive — with an initial prevention/education program concerning family abuse over four weeks to three months; followed by a variable term of treatment from a minimum of one year up to three years for problem or pathological gamblers, which included an intensive group component.²⁸³ Also of note, participants are re-assessed every three months, and mandatory screening includes for drug and alcohol use; domestic violence; mental health as well as gambling. There have been no reports of gambling relapse or new arrests among the program's 24 graduates.²⁸⁴

280 Judge Farrell, M 'A "Struggle" for Progress & Therapeutic Innovation in the Criminal Justice System: Origins, Implementation & Challenges' (2016) *Massachusetts Conference on Gambling Problems* (Norwood, MA). At <http://www.masscompulsivegambling.org/mcg16presentations>

281 Ibid and Consultation with Judge Mark Farrell (retired), November 2016.

282 These include, amongst other things, a range of property theft, embezzlement, theft from family, child neglect and drug and alcohol offences.

283 These options obviously stand in contrast with the options available in the South Australian Problem Gambling Treatment List.

284 Moss, above note 273, 152.

Although this Amherst Gambling Treatment Court represents the ‘gold standard’ in solution-focused approaches — one that, the CIJ heard, nevertheless requires constant advocacy, future legislative support and greater judicial uptake — it is also one that obviously requires substantial investment.

The CIJ nevertheless suggests that, until prevalence rates are more effectively established in Victoria (and indeed Australia) through adequate data collection, there may be opportunities to introduce a dedicated stream, rather than a fully blown court, related to problem gambling — potentially in the existing Drug Court jurisdiction. Given the frequent co-existence of drug abuse and gambling harm, this potentially offers a path to trial a therapeutic gambling intervention by virtue of the existing infrastructure.

More broadly, there are other ways in which contact with the Magistrates’ Court can function as a positive intervention before an individual even gets into the courtroom. This includes through the various opportunities for contact with trained personnel who can identify gambling problems and make appropriate referrals.

Obviously, this includes where Gambler’s Help counsellors are available on site. This is the case at the Neighbourhood Justice Centre in Collingwood, for example, and the CIJ understands that as this report went to publication the NJC and VRGF were in discussions about how to support a more integrated service provision response on site. It also occurs once a month at the County Court circuit in Bendigo; while the CIJ similarly heard that Gamblers’ Help East co-located a worker one day a week at Ringwood Magistrates’ Court, with individuals able to be referred regardless of the matters which had brought them to court.²⁸⁵

In particular, even where offenders were not specifically asked by other services about their gambling, visible signage and the moment of crisis brought about by attendance at court meant that offenders often disclosed of their own volition anyway. Where individuals were referred, this worker would stay with them for as long as they were at court. Having experienced non-judgmental support, offenders were then more likely to seek ongoing help. Of note, the CIJ also heard that offenders may still be unlikely to disclose to services who were offering a form of financial support, such as food vouchers, as they did not think they were like to receive food vouchers if they revealed that they had a gambling problem.²⁸⁶

All other service providers present at court have an opportunity to screen and refer for problem gambling. This obviously includes those services more commonly present at court, such as drug and alcohol (as referred to above); mental health; specialist family violence; as well as, of course — and as demonstrated by the VLA survey referred to above — legal practitioners.

It also includes Court Network — a service providing support to court users from trained volunteers who help them navigate the court process. The CIJ was told that Court Network volunteers do not currently hear about gambling problems with any frequency, as they do not conduct any form of in depth intake.²⁸⁷ That said, training which Court Network volunteers have recently received regarding family violence indicates a willingness to provide more nuanced support and intervention — including to avoid collusion in the abuse — which could be extended to facilitating identification of and referrals for gambling issues.

²⁸⁵ Interview with Gambler’s Help East, November 2016.

²⁸⁶ Interview with Gambler’s Help East, November 2016.

²⁸⁷ Interview with Court Network, October 2016.

In other jurisdictions, a range of other options exist. This includes through the Defendant Health Liaison Service in the Tasmanian Magistrates' Court, to which family violence defendants are bailed to address any factors contributing to the violence such as mental health, substance abuse and homelessness. Unlike many equivalent services, intake for this service also includes questions about gambling.

Interestingly, the DHLS reported that, although offenders in this cohort regularly report gambling, it rarely appears to be a problem for them. Rather, most offenders indicated that they only gamble a set amount every fortnight when they receive their pay or Centrelink benefits.²⁸⁸ More broadly, the DHLS reports that connection with this service is often the first time that offenders have been asked — not only about their offending behaviour — but about their life circumstances overall, circumstances which often include early childhood trauma or exposure to family violence.²⁸⁹

Outside the criminal justice system — but arguably close to it, given the consequence of breaches — is more effective use of Intervention Order conditions. Notably, in South Australia the imposition of conditions relating to treatment for problem gambling; self-exclusion from gambling venues; or prohibitions on contacting family members for the purpose of demanding money for gambling activities are possible through legislative provision. In practice, however, this is reported as not occurring very frequently.²⁹⁰

Similarly, Magistrates in Victoria noted that they were hesitant to impose conditions on a civil order which could not necessarily be enforced. Some Magistrates suggested that, in the interim, the imposition of a condition relating to self-exclusion from a gaming venue was a more useful tool. In this scenario, a victim of violence could report a breach of the self-exclusion condition (i.e. that he had attended a venue) rather than wait until the point of any future physical violence. To this end, however, it is worth remembering the reservations about the effectiveness of self-exclusion measures expressed by lawyers, referred to above.

Overall, however, appearance in the Magistrates' Court jurisdiction should be about harnessing that moment of crisis that someone is experiencing upon their attendance at court. Where it their first time and they are ashamed and embarrassed, potentially plummeting in terms of mental health, that is the time to scoop them up — to prevent self-harm; to start to address mental health; to start to address drug and alcohol issues; and of course to address gambling. This is valuable even where gambling is not the main causal factor — an opportunity to prevent it becoming the cause of their *recidivism* down the track.

Where an offender is a regular attendee at court, meanwhile, it is an opportunity which is just as crucial to break the cycle of offending in which they may be caught — to connect them with services that they may never have previously encountered and to help them to imagine a life, not only beyond crime, but all the factors which contribute to it.

288 Phone interview with Defendant Health Liaison Service, Tasmanian Magistrates' Court, October 2016.

289 Centre for Innovative Justice, *Opportunities for early intervention: bringing perpetrators of family violence into view*, (2015), RMIT University.

290 *Problem-Gambling Family Violence Protection Orders Act (2004)*, SA, discussed in Australian Law Reform Commission 'Protection Orders and the Criminal Law; *Family Violence: A National Law Response* (2010, 464).

County and Supreme Courts

Clearly, the *Grossi* decision has had a big impact. Its influence was acknowledged by service providers, members of the judiciary and the legal profession alike — many of them noting that the less frequent appearance of gambling-related offending in the clients who sought their help or appeared before them dated back to shortly after the decision was handed down.

While the *Grossi* decision is certainly authoritative statement, it is by no means applicable without exception. In fact, the qualifying language highlighted by the CIJ in the statement of reasons above indicates that Justice Redlich himself did not seek to ‘close the door’ on the possibility of mitigation all together. It may be, therefore, that more work needs to be done in terms of the law’s understanding of this complex issue.

To this end, the CIJ decided to go straight to the source. In consultation in 2016, His Honour Justice Redlich agreed that the door was not completely closed — that the weight which should be attached to a gambling addiction will ultimately vary according to the circumstances. That said, no firm or detailed evidence about the effects of a gambling addiction on an offenders’ mental state had been led to date in his court, with the current ‘science remain[ing] unconvincing from a sentencing perspective’.²⁹¹

His Honour was open, however, to broader evidence about emerging neuroscience, and eager to see how an argument might be mounted — potentially in a test case — about the effects of a gambling addiction on an offender’s behaviour in the context of the clinical evidence. In fact, the CIJ was encouraged by His Honour’s interest in facilitating future opportunities for engagement between the clinical and legal spheres and recommends that the VRGF support this possibility as soon as is achievable.

In particular, given that the latest DSM 5 classification, released in 2013 — as well as the bulk of the neuroscience described so far in this Report — has emerged since the *Grossi* decision was handed down in 2008, the CIJ suggests that the issue is well due for another examination. That said, the CIJ would caution that courts will still be keen, as His Honour confirmed, to guard against any claims about addiction and disorder, when behaviour may actually be motivated by greed. Similarly, as almost all stakeholders observed, reform or reconsideration in this area would only go so far ‘while gambling is so heavily promoted’.

Like Justice Redlich, members of the County Court participating in the project expressed significant interest in hearing more about emerging neuroscience, similarly curious about hearing how this might play out in a suitable ‘test case’. Given that psychologists’ reports have already been presented which argue that the relevant offender has a clear addiction which creates a nexus with the offending, the CIJ wonders whether it might take a test case in the Supreme Court instead to interrogate the intersection of current clinical and legal considerations.

What increased engagement between the legal and clinical spheres may create in the meantime, however, are more opportunities for the County Court to be ‘alive to the potential of a therapeutic option’.²⁹²

²⁹¹ Consultation with Justice Robert Redlich, September 2016.

²⁹² Focus group participant, County Court of Victoria, October 2016.

Police

Beyond the legal profession and the courts as the main focus of this project, other parts of the criminal justice system also present opportunities for better identification and positive intervention. For example, Australian and international police currently lack adequate data collection systems to respond to or inquire about the gambling behaviours of people they have arrested. In fact, police are not required to question an arrestee about their motivation for crime, which means that the information which is available — let alone acted upon — about problem gambling is only available on a piecemeal basis.²⁹³ Likewise, a person's gambling problem may or may not be revealed and documented as part of a police interview, with police only likely to ask if they have a particular suspicion.

Despite these limitations, the CIJ reiterates the potential usefulness of Victoria Police as both a source of gambling-related data, as well as an early detection and referral point, though publicly available data since the VRGF 2013 report's publication suggests that, between October 2014 — June 2015, of 14, 215 referrals across 12 referral streams, Victoria Police referred 58 people to gambling services.²⁹⁴ A further opportunity may exist through the Criminal Justice Diversion program where the offence is sufficiently low level.

In the context of discussing gamblers' contact with the police, of course, it is vital to keep in mind that gambling-related arrest is associated with suicidal ideation and attempted suicide. Coronial statistics in the VRGF's 2013 report suggest that suicide may be 'an act of impulsive desperation, instigated by the deceased's exposure for gambling-related crime, or their awareness that such exposure was imminent.'²⁹⁵ Although not the subject of specific recommendations in this Report, for the reason above the CIJ cautions that questions related to gambling upon arrest be approached with care and supported with appropriate referrals.

293 Victorian Responsible Gambling Foundation, above note 26, p 39.

294 http://www.aic.gov.au/media_library/conferences/201-wsw/wsw_2015_presentations/Demarte.pdf

295 Victorian Responsible Gambling Foundation, above note 26, 55.

Corrections and Adult Parole Board

Since the VRGF published its report in 2013, the Victorian correctional system has undergone a suite of changes that potentially expand the number of opportunities for screening and addressing problem gambling needs pre-release. There is little information, however, either in the academic or grey literature, to evaluate the impacts of that change.

To this end, the CIJ heard from participants that, while imposing a relevant condition on CCOs may be relatively straightforward, this system relied on the assessment and oversight of Corrections Victoria staff who were not necessarily fully trained in this regard and may prioritise other referrals — such as to drug and alcohol services — instead. The CIJ therefore welcomes the fact that the VRGF is in discussions with Corrections Victoria about how to improve assessment and referral pathways.

How gambling activities are regulated within custodial environments, however, is a further relevant matter. Certainly, while prison gambling regulations are explored and debated in the international literature, they are surprisingly under-discussed in Australia.

In this context the question, put simply, is whether gambling should be allowed as a leisure activity within prison, or whether it should continue to be regulated and possibly subject to discipline within prison walls. Certainly, different commentators present compelling arguments for and against gambling regulation in American prisons. On one hand, some argue that gambling is seen as a valued pastime for prisoners and that permitting casual gambling may emphasise prisoners' feelings of fairness, and their successful management in prison environments.²⁹⁶

On the other hand, given the demonstrated high prevalence of that country's problem gambling in prisoner populations, others argue that prisoners who may be 'in remission' from gambling, or not experiencing the symptoms at the time of their incarceration, may be vulnerable to 'relapse' when exposed to that activity in prison.²⁹⁷ In fact, incarceration itself may exacerbate gambling disorders.²⁹⁸

At the time of its publication in 2013, the VRGF reported an absence of gambling-specific programs in prison and a range of barriers to identifying the gambling problems (and harms) in the Victorian prisoner population. In addition, it reported that a majority of prisoners who *had* accessed some form of gambling treatment in prison did not consider it useful for addressing their gambling issues.

■ ■ *It's always to do with drugs and alcohol — that's all they're really interested in. They're saying, [the prison] "We're doing that" [in relation to problem gambling]. There's things up there [pamphlets on notice board] for programs that haven't been run for 10 years, but it looks good for the visitors.*²⁹⁹

Some years on from the VRGF report, the CIJ heard that eligible offenders were still not always being referred for gambling treatment.³⁰⁰ Nevertheless, the CIJ also heard of further specialist service developments, including a twelve-session psycho-educational and therapeutic program provided in gamblers' help service delivery in the context of Tarrengower Prison.³⁰¹

The CIJ also heard of a training session now available to court and prison personnel, as well as to police, which specifically concerns the intersection of gambling and the criminal justice system. This session, currently delivered by Anglicare, touches on the public health approach to problem gambling; any likely comorbidities; the DSM-V criteria; and the prevalence of problematic gambling in particular communities.

More broadly, the CIJ heard that sentencing planning needs to factor in referrals to relevant services from the point of remand, as well as the point of entry into custody. Again, although not the subject of specific recommendations, the CIJ encourages the ongoing development of these approaches and the provision of more flexible support to prison populations.

296 Williams, D 'Response to the commentaries by Marotta, Plecas and Turner', *Journal of Gambling Issues* 28 (2013).

297 Riley, B and Oakes, D 'Problem gambling among a group of male prisoners: Lifetime prevalence and association with incarceration', *Australian & New Zealand Journal of Criminology* 48, no 1 (2014), 78.

298 *Ibid*, p 79

299 Victorian Responsible Gambling Foundation, above note 26, p 106.

300 Focus group participant, Community Support Organisations, September 2016.

301 Halloran, M, 'Final evaluation report: the making meaning psychoeducation and therapeutic program at Tarrengower prison, provided to the CIJ by Anglicare, 3 November 2016.

Post-release and community-based support

Gambler's Help service providers interviewed for the 2013 VRGF report identified community based offender support programs as an effective avenue for supporting a person to desist from further gambling behaviour.

☐☐ *If we have clients who are post-release and...have other referral needs, we really just respond to that in terms of scoping out what services are available, as you would with any other client, and sometimes that needs to be tailored to the fact that they are a post-release person. VACRO [Victorian Association for the Care and Resettlement of Offenders] is a good organisation to be linked with for that...³⁰²*

Some years on, the potential for more effective support for a 'post release person' remains untapped, while the value of linking an offender to a community-based support organisation remains very much alive. To this end, lawyers suggested that it was to this case management support that offenders often turned:

☐☐ *...people might not go to treatment, but they always go to the ACSO [offender support] appointment.³⁰³*

Certainly, one of the strengths of the problem-solving model in South Australia is the ongoing case management by the Offenders Aid and Rehabilitation Service (OARS). The CIJ heard that OARS walk 'side by side' with clients from the moment of referral to their dedicated Gambling Support Service, with case management support often involving the service working with the entire family.

☐☐ *Annie was a woman in her 30s with an Intellectual Disability. Her brother is her primary carer, as well as the carer for their mother, who has terminal cancer. Annie was referred to OARS Gambling Support Services because OARS are case managing her brother while he is on Home Detention.*

Annie began playing pokies at age 20 with her mother (who also has history of problem gambling) and was losing around \$200 per fortnight. Annie had displayed anger when told that she could not go to a gaming venue and often just wandered into venues alone...to stare at the machines. Primarily motivated by excitement, Annie also wanted to find a way of contributing to the family. Annie was experiencing grief due to the death of her father who was previously her primary carer; anxiety, depression and hoarding behaviours; boredom through lack of meaningful activity; lack of structure and consistency in the family home.

OARS has therefore been working with her whole family — hooking Annie into Disability SA (DSA), referring her brother to respite and liaising with Annie's day centre provider. This has included giving her jobs around the house so that she feels she is contributing; as well as structure around meal time and bed time, including playing board games. OARS also worked with the family to limit Annie's gambling to \$20 per fortnight and help her with her hoarding issues. Although Annie is the primary client, this work with her family has been key to addressing her problems.³⁰⁴

302 Victorian Responsible Gambling Foundation, above note 28, p 131.

303 Focus group participant, Law Institute of Victoria, October 2016.

304 Case study provided to the CIJ by Offenders' Aid and Rehabilitation Service, September 2016.



Of further interest to the CIJ was the option for victim-offender mediation also offered to clients who are case managed by OARS. Given the 'breach of trust' and harm caused to victims exposed to the consequences of gambling problems – whether employers or family – the CIJ suggests that this is certainly a context ripe for exploration and development of restorative justice options.

This is because restorative justice approaches are about repairing the harm of an offence by providing a setting in which this harm can be discussed and acknowledged, as well as involving those most directly impacted by the commission of the offence in the development of solutions. Given the shame and stigma associated with gambling-related offending discussed throughout this Report – including the shame of employers concerned with reputational damage – as well as the increased risk of suicidal tendencies from offenders upon arrest, the opportunity to deliver an apology and develop an appropriate restitution plan in a facilitated environment is certainly something worth exploring.

The CIJ is currently supporting the development of restorative justice options in a range of other contexts. It is therefore well placed to assist with any restorative justice developments in relation to gambling and crime.

Conclusion – counting the cost

Given that the limited research available suggests that contact with the criminal justice system can compound the vulnerability already experienced by problem gamblers, we need to do everything possible to turn this around – using contact with the criminal justice system, whether formal or informal, as a positive intervention which mitigates this harm. Unless we start to find more constructive options – unless we properly acknowledge the extent of gambling harm – it will continue to impact future generations.

To return to the cost-benefit analysis discussed at the outset of this Report, the Victorian Competition and Efficiency Commission estimated that the cost of problem gambling on the Victorian justice system was about \$26 million in 2010–11.³⁰⁵ These costs were distributed across the justice system at the time as follows:

- \$1.7 million on the police
- \$1.5 million on the courts
- \$23.1 million on corrections

Given that opportunities to gamble are growing – including by exposing the next generation through increased advertising and online opportunities – we must start to find ways for this cost to be stemmed. As the VRGF 2013 report suggests:

☐☐ *...without an effective process for early identification and treatment, a proportion of offenders whose gambling is directly related to their offending, will go on to commit a substantial level of preventable, gambling-related crime.*³⁰⁶

More recently, a US academic noted that:

☐☐ *If you can lower costs by getting people out of jail and into treatment, and if you can get rid of or treat the underlying mental health problem, you are getting both clinical and...economic benefits.*³⁰⁷

To be effective, this early intervention and treatment which seems so essential *must* bring existing spheres of knowledge together. This means, in particular, bringing legal understanding and clinical understandings together – including judicial officers; counsellors; lawyers; and service providers of all kinds sharing their different perspectives.

Just as importantly, it means understanding how clinical, legal and social determinants are brought together in the stories of individual gamblers. For, as this Report has attempted to suggest – and despite the excitement associated with emerging neuroscience – the pathways between gambling and offending cannot just be explained through a single model.

Rather, a more sensible conclusion is that social determinants and neurological changes *converge* – indirectly or directly; either detrimentally or protectively; and either acutely or progressively – over the course of a gambler's life to determine contact with the criminal justice system.³⁰⁸

305 Victorian Competition & Efficiency Commission, "Counting the Cost: Inquiry into the Costs of Problem Gambling," (2012). 71.

306 Victorian Responsible Gambling Foundation, above note 26.

307 Professor Stacey Torvino, 'Calls to use casino money to fund gambling addicts' court'. At <http://www.radionz.co.nz/news/national/296343/calls-to-use-casino-money-to-fund-gambling-addicts-court>

308 Adapted from the definition of health's social determinants in Galea, S. and Vlahov, D., 'Social Determinants and the Health of Drug Users: Socioeconomic Status, Homelessness, and Incarceration,' *Public Health Reports* 117, no. 1 (2002): S136.



More broadly, what we know about the factors which bring people into contact with the criminal justice system more generally — including low educational attainment; trauma in childhood; mental illness and social isolation — are also some of the factors which make people more likely to develop a gambling problem and, ultimately, an addiction reinforced by neurological changes. Where these factors converge — in a potent cocktail of vulnerability and gambling — the resulting harm is likely to be all the more acute.

Bringing this understanding together is not about excusing all those with gambling problems from criminal behaviour, nor about suggesting that all those who offend in connection with gambling have an addiction. Certainly, it is unwise to categorise all forms of problem gambling as medical conditions and also unwise to discount greed as a primary motivation. Commentators rightly caution that ‘judges need to understand the phenomenon and facilitate treatment without exempting responsibility in ambiguous cases’.³⁰⁹

As other legal scholars and criminal lawyers have urged, however, increased involvement of forensic care mental health professionals in the realm of legal decision-making is essential because ‘gambling addicts gamble the way an alcoholic drinks or a heroin addict shoots up — not impulsively, but in an all-consuming, life-controlling and even life-threatening way. They are very ill, not impulsive’.³¹⁰

As a member of the *Three Sides of the Coin* performance group explained about the grip of their own addiction, the downwards spiral means that ‘we build our own prison’. If this is the case — if a gambling addict has already sentenced themselves to perpetual isolation — then perhaps intersection with the criminal justice system should offer a more relevant, inclusive and constructive approach.

309 Folino, J. O., and Abait, P. E. "Pathological Gambling and Criminality." *Current Opinion in Psychiatry* 22, no. 5 (Sep 2009): 481.

310 Ellis et al, 'Making the Case for Sentencing Relief', *Criminal Justice* 30, no. 3 (2015).

Recommendations

Data collection and identification

1. That the Law Institute of Victoria, Victoria Legal Aid, and Federation of Community Legal Centres collaborate to establish standardised data collection approaches in relation to prevalence of problem gambling and any offending related to that gambling. This data should ideally include demographic information as well as information about co-morbidities.
2. That Courts Services Victoria establish standardised data collection approaches in relation to prevalence of problem gambling and any offending related to that gambling across all jurisdictions.
3. That the VRGF work with the family violence sector, including agencies providing existing expertise on the intersection of family violence and gambling, on developing appropriate questions in relation to family violence for Gambler's Help providers.
4. That Government consider, in its development of the new family violence Risk Assessment and Management Framework, the inclusion of specific questions in relation to gambling.

Training and information

5. That the VRGF develop an information and training package specific to the justice sector, potentially in consultation with the Office of Liquor & Gaming in NSW, for delivery in a range of settings.

In particular, the VRGF should work in consultation with the Judicial College of Victoria as well as all relevant court jurisdictions; Corrections Victoria; Victoria Police; Victoria Legal Aid; Court Network; the Law Institute of Victoria and the Victorian Bar on developing this package.

This should also be developed in consultation with local RAJAC and other Indigenous bodies, as well as CALD specific organisations.

6. That, in particular, the VRGF support and facilitate a series of initial seminars which give members of the judiciary and legal profession access to clinical and neuroscientific knowledge from the field.
7. That the VRGF support and facilitate the delivery of criminal justice sector and family violence training to Gambler's Help professionals, as well as in relevant LifeSkills training, within a period of 12 months.
8. That the VRGF establish pathways so that Gambler's Help providers can have access to regular information about the emerging needs of their client base.
9. That the VRGF support and facilitate the delivery of relevant training on gambling problems and harm to organisations providing post-release support for offenders in the community.

Extending definitions and current programs

10. That Government consider extending the definition of 'special circumstances' in the Fines and Infringements List to include gambling harm and gambling addiction.
11. That Government consider extending the availability of diversion schemes for people with identifiable gambling harm or addiction.
12. That the Magistrates' Court of Victoria issues a Practice Note which indicates that problem gambling or addiction can be a factor relevant to deferral of sentence.
13. That, in any further expansion of the Courts Integrated Services Program (CISP), the Magistrates' Court of Victoria; Courts Services Victoria; and Government take into consideration potential need on the basis of levels of problem gambling and EGM numbers per capita.
14. That the Magistrates' Court establish a working group to consider a pilot expansion of the Drug Court list to include a specific gambling intervention stream. This intervention stream should refer eligible participants to a specific treatment model.

Co-location

15. That the VRGF support and fund, where necessary, the co-location of Gambler's Help services at all headquarter Magistrates' Courts, concurrent with the expansion of Specialist Family Violence Courts in these locations. This co-location should involve the availability of a Gambler's Help counsellor at each court location on at least one day a week; visible signage about the service; and monthly meetings between service providers to encourage the exchange of developments in current practice.
16. That the VRGF, in consultation with Victoria Legal Aid, facilitate the co-location of Gambler's Help counsellors in all VLA regional offices for at least one day a week.
17. That the VRGF, in consultation with the Federation of CLCs, facilitate the co-location of Gambler's Help counsellors in relevant Community Legal Centres which service cohorts of clients in particular need (including those in areas with over-representation of EGMs per capita of population).

Treatment and increasingly diverse responses

18. That the VRGF develop a considered model and referral pathway so that eligible participants may be referred from the criminal justice system. Information about the content of this program should be made available to all potential referring agencies.
19. That the VRGF support the development and delivery of restorative justice approaches relevant to be used in contexts of gambling harm, such as but not limited to victim-offender mediation (with particular application to the employment context).

Appendix A – Survey instruments administered by Victoria Legal Aid

Information Sheet

What is the project for?

The Centre for Innovative Justice at RMIT is collecting information about gambling and its contribution to criminal offending, so that it can understand how often problem gambling features in the criminal justice system of Victoria. The Centre has partnered with Victoria Legal Aid for this project to understand the connection better, in the hope of creating a better policy response towards problem gambling.

What does this research involve?

You are invited to take part in a short survey about your experiences with gambling. The survey consists of 6 questions about your gambling practices, followed by some small questions about you for statistical purposes. You will be asked for your consent to collect this information prior to beginning the survey. Your participation would be completely voluntary, and will not affect applications for legal assistance in any way.

What are the benefits and risks?

By participating in this project, you will help us increase our knowledge on how often gambling pushes people towards contact with the law. This data is intended to support a wider research project on the link between problem gambling and criminal offending. However, there is a risk of discomfort with these questions. If at any point you feel distressed or embarrassed by these questions, you can opt to not answer them or withdraw from the survey at any time.

Will my personal details be confidential?

To ensure that your individual details remain anonymous, we will not be collecting any personal identifying information. The data collected will only indicate how many people responded yes or no to each question and some basic information (for example, age, cultural background, etc.) of people who accessed our services over the research period. All data will be stored securely on password-protected files.

Contacts

If you have any questions or concerns about the study, please feel free to contact the research managers.

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If you would like help or have questions in regards to gambling problems, for you, a family member or a friend, please visit:

Gambling Help Online

<http://www.gamblinghelponline.org.au/>
24/7 Telephone Support: 1800 858 858

Survey

These questions will be asking about gambling practices and its contribution to criminal offending. Answer only the questions that you are comfortable with answering. This survey is anonymous, and will not affect applications for legal assistance in any way.

1. Do you ever gamble?

- Yes No (move to Question 3)

2. If so, how often?

- Occasionally Once a day
 More than once a week More than once a day

3. Has gambling ever become a problem or an issue for you?

- Yes No (move to Question 6)

4. If so, has it ever:

- Stopped you from paying for food, bills, or other things you need?
 Meant you had to borrow money from friends or family?
 Meant you wanted to hide your gambling from other people?
 Other _____
-
-

5. Have you sought any help for it?

- Yes No

6. Generally, what type of problem are you seeing the duty lawyer for today?

- Fines/Infringements Theft/crimes of dishonesty/burglary
 Traffic/Driving offences Drug offences
 Assault (including threat to assault/violent offences) Family violence (including breaches of FVIOs)
 Other _____
-
-

SOME QUESTIONS ABOUT YOU

Your answers will be used for statistical purposes only. Answer only the questions that you are comfortable with answering.

What is your gender?

- Male Not applicable
 Female Other: _____

Age

- 21 and under 35 to 44 45 to 54
 22 to 34 55 to 64 65 and over

Country of birth:

Are you of Aboriginal or Torres Strait Islander descent?

- No Torres Strait Islander
 Aboriginal Aboriginal and Torres Strait Islander

Do you speak a language other than English at home?

- No Yes Which language(s)? _____

Do you have a disability (e.g. physical, intellectual)?

- No Yes What kind? _____

What is your employment status?

- Not employed Casual
 Full time Self employed
 Part time

What are your usual living arrangements?

- Living with parents Couple with no children
 Living alone Couple with children at home
 Sharing with others Couple with children not at home
 Single parent No fixed address
 Not applicable

Are you on a benefit?

- No Disability Support
 Newstart Parenting
 Age Pension Other: _____

Appendix B – Participants from the following bodies or organisations were involved in this project:

Judiciary – Victoria

- Supreme Court of Victoria
- County Court of Victoria
- Children’s Court of Victoria
- Magistrates’ Court of Victoria

Judiciary – interstate and international

- Magistrates Court of South Australia
- Judge Mark Farrell, (Retired), Amherst Gambling Treatment Court, United States

Statutory

- Sentencing Advisory Council
- Adult Parole Board, Victoria
- Office of Liquor and Gaming, New South Wales

Court staff

- CISP Clinicians
- Applicant and Respondent Practitioner Co-ordinator
- Court Intervention stream co-ordinator South Australian Magistrates’ Court
- Co-ordinator, Defendant Health Liaison Service, Magistrates’ Court of Tasmania
- Vietnamese interpreter, Sunshine Magistrates’ Court
- Court Network

Legal Profession (over 60 individuals)

- Law Institute of Victoria private practitioners
- Victoria Legal Aid: Sunshine
Ringwood
Morwell/Bairnsdale
Geelong
- Federation of Community Legal Centres
- Moonee Valley Community Legal Centre
- Women’s Legal Service
- Mental Health Legal Centre
- Springvale/Monash Legal Service
- Wesley Mission Legal Service (NSW)
- Victorian Aboriginal Legal Service (VALS)
- Aboriginal Family Violence Prevention & Legal Service (AFVPLS)

Service providers/community based organisations

- Australian Vietnamese Women’s Association
- Financial Counselling Australia
- Australian Community Support Organisation (ACSO)
- Victorian Association for the Care & Resettlement of Offenders (VACRO)
- Offender’s Aid and Rehabilitation Service (South Australia)
- First Step (Drug & Alcohol Service)
- Link Health (Drug & Alcohol Service)/Three Sides of the Coin Project
- Odyssey House, Richmond, (Drug & Alcohol/Financial Counselling)
- Kildonan UnitingCare
- Good Shepherd Australia & New Zealand
- Salvation Army
- Gambler’s Help – Eastern
- Gambler’s Help – Loddon Mallee
- Women’s Health in the North (WHIN)
- Berry Street
- Safe Steps
- Relationships Australia
- Domestic Violence Victoria
- No to Violence/Men’s Referral Service
- Neighbourhood Justice Centre, Financial Counselling service
- Victorian Arabic Social Services.



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The Centre for Innovative Justice researches, translates, advocates and applies innovative/alternative ways to improve the justice system, locally, nationally and internationally, with a particular focus on appropriate/non-adversarial dispute resolution, therapeutic jurisprudence and restorative justice.

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Unstacking the odds: Towards positive interventions at the intersection of gambling and crime

Issues Paper

Centre for Innovative Justice

September 2020



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Preface

The intersection of gambling and criminal justice system contact is increasingly being recognised as a significant social and legal challenge.¹ At both the practitioner and policy level, however, the complexities of this intersection are still not well understood.

In purely medical terms, of course, gambling addiction has been recognised as a ‘disorder’ in various iterations by the Diagnostic and Statistical Manual of Mental Disorders. Specifically, the fifth and most recent edition of this manual (‘DSM-5’) described gambling disorder as ‘a non-substance behavioural addiction characterised by repeated patterns of excessive gambling expenditure’.² Accordingly, this characterisation of ‘gambling disorder’ moved away from conventional community perceptions of problem gambling as an individual’s moral failing and instead recognised it as a clinically diagnosed condition requiring treatment and focused attention.³

Beyond assessments which focus on an individual’s pathology, however, the broader concept of ‘gambling harm’ views the impacts of gambling through a public health lens, including its impacts on families and communities with which an individual gambler is connected.⁴ Construed this way, gambling harm is seen as linked to other co-occurring issues, such as mental health, substance abuse, family violence and, unsurprisingly, socio-economic disadvantage.⁵

Within this expanded concept, the complex connection between gambling and offending has begun to be tracked, with studies suggesting a higher prevalence of gambling amongst prison populations, for example, when compared with the wider community.⁶ Many of these studies, as well as relevant case law, were explored in a 2017 report by the Centre for Innovative Justice (‘the CIJ’), *Compulsion, Convergence or Crime? Contact with the criminal justice system as a form of gambling harm*.⁷ This report concluded that the gambling was a ‘sleepier issue’ and often ‘in the mix’ in the lives of offenders to an extent which had previously not been understood.

The purpose of this Issues Paper is to build on the CIJ’s report by highlighting relevant literature and case law which has emerged since this 2017 work was conducted. Just as importantly, it also seeks to highlight benefits associated with a pilot program conducted by the CIJ since the 2017 report’s release which, with the assistance of the Inside Access program at the Mental Health Legal Centre (MHLIC), delivered financial counselling services to women in Dame Phyllis Frost Centre (DPFC) maximum security women’s prison from August 2019 to June 2020.⁸

¹ Campbell, E. (2017) *Compulsion, convergence or crime? Criminal justice system contact as a form of gambling harm*, Centre for Innovative Justice, RMIT University, Melbourne. At <https://cij.org.au/cms/wp-content/uploads/2018/08/gambling-harm-report.pdf>; Perrone, S., Jansons, D. and Morrison, L. (2013) *Problem Gambling and the Criminal Justice System*, Victorian Responsible Gambling Foundation, Melbourne. <<https://responsiblegambling.vic.gov.au/documents/131/Problem-Gambling-Criminal-Justice.pdf>>; Ramanauskas, S., (2020) *Crime and Problem Gambling – A Research Landscape* Commission on Crime and Problem Gambling <<https://howardleague.org/wp-content/uploads/2020/05/Crime-and-problem-gambling-research-landscape.pdf>>.

² American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders V* (5th edition, 2013).

³ *Ibid.*

⁴ Browne, M., Langham, E., Rawat, V., Greer, N., Li, E., Rose, J., Rockloff, M., Donaldson, P., Thorne, H., Goodwin, B., Bryden, G. and Best, T. (2016), *Assessing gambling-related harm in Victoria: a public health perspective* Victorian Responsible Gambling Foundation, Melbourne.

⁵ April, L and Weinstock, J (2018) ‘The Relationship Between Gambling Severity and Risk of Criminal Recidivism’ 63(4) *Journal of Forensic Science* 1201.

⁶ Adolphe, A., Khatib, L., van Folde, C., Gainsbury, S., and Blaszyzyski, A. (2018) ‘Crime and Gambling Disorders: Systematic Review’ 35 *Journal of Gambling Studies* 395 [397].

⁷ Campbell, above n 1.

⁸ Centre for Innovative Justice (2020) *Financial Counselling, gambling harm and criminal justice system contact: Lessons from the Centre for Innovative Justice’s Financial Counselling pilot – the benefits of integrated practice*. Webinar at <https://www.youtube.com/watch?v=CUGKTBmKOjY&list=PL8uYOKwoXWA-Y4F3mhAa79WmSMYO1MCUk&index=2&t=12s>

The CIJ's pilot program was funded by the Victorian Responsible Gambling Foundation and demonstrated strong demand for financial counselling services amongst women at DPFC. In particular, it indicated that around 39% of women who sought financial counselling assistance had also experienced some form of gambling harm, with 72% of this sub-group then identifying gambling as having contributed directly to, or being a primary driver of, their offending.

Where gambling was identified, some of the program's clients then accepted referrals to relevant Gambler's Help treatment services, either in DPFC or in the community where they were close to release. This pilot was therefore an example of the way in which earlier identification of gambling harm and associated debt can function as a positive intervention within the context of criminal justice settings. The benefits of the pilot were then acknowledged when MHLC's Inside Access program engaged a financial counsellor as part of its core, multidisciplinary team.

In addition to building on the CIJ's recent work, perhaps more urgently the timing of this Issues Paper coincides with unprecedented economic uncertainty,⁹ the financial downturn triggered by the COVID-19 pandemic already reporting to have had an impact on gambling activity in Australia. Certainly the closure of venues is reported to have resulted in substantial savings from reduced Electronic Gaming Machine (EGM) use.¹⁰ Preliminary findings from an ongoing study by the University of Sydney also indicate that, for the majority of participants surveyed for the study, gambling was occurring less frequently as a result of lack of access to venues. However, the same study also indicated that people at moderate risk of gambling harms were more likely to report increased frequency in gambling activity, while higher problem-gambling severity was associated with increased expenditure.¹¹

Further, while an Australian Institute of Criminology's (AIC) study of online gambling between March and April 2020 showed a decline in overall prevalence, it similarly showed increased spending by those who did engage in this activity.¹² This increased spending on online gambling was associated with being male and being under the age of 40. Living as a couple with children was also found to be associated with increased likelihood of spending on online gambling during April 2020, indicating that online gambling occurred during a period where families were required to stay at home.¹³ Even more concerning are early media reports of people choosing to access superannuation funds early and then spending these funds on gambling,¹⁴ although this is not necessarily reflected in wider surveys of people's spending activities during this period.¹⁵

⁹ Karp, P., 'Australia likely to experience largest economic downturn since the Great Depression', *The Guardian*, 21 April 2020 <<https://www.theguardian.com/australia-news/2020/apr/21/about-800000-australians-lost-their-job-in-the-first-three-weeks-of-coronavirus-restrictions>>.

¹⁰ Alliance for Gambling Reform, 'The \$1.5 billion Covid-19 Silver Lining', 5 May 2020 <https://www.pokiesplayyou.org.au/the_1_5_billion_covid_19_silver_lining>.

¹¹ Gainsbury, S., Blaszczynski, A., (2020) *The impact of the COVID-19 shutdown on gambling in Australia: Preliminary results from the Wave 1 cross-sectional survey*, University of Sydney. <https://www.sydney.edu.au/content/dam/corporate/documents/brain-and-mind-centre/usyd-covid-gambling-research-report-aug-2020.pdf>

¹² Brown, R. and Hickman, A. (2020) 'Changes in online Gambling during Covid-19 Pandemic: April Update' (Statistical Bulletin no.25, Canberra) Australian Institute of Criminology: p.2 - 3.

¹³ Ibid, p. 2 - 3

¹⁴ Roddan, M., 'Early Access Super gambled away online', *Australian Financial Review* (20 May 2020) <<https://www.afr.com/companies/financial-services/early-access-super-gambled-away-online-20200520-p54us7>>. Ryan, P, *Superannuation withdrawals spent on gambling, alcohol, takeaway food; report* ABC News online, (1 June 2020). <https://www.abc.net.au/news/2020-06-01/superannuation-withdrawals-spent-on-gambling-alcohol-takeaway/12306710>

¹⁵ Australian Bureau of Statistics, *Household impacts of COVID-19 survey* Insights into the prevalence and nature of impacts from COVID-19 on households in Australia.

Nevertheless, shifting patterns in behaviour, combined with the impacts of the COVID-19 on the economy, suggest that harm from gambling activity may increase in the months and years ahead. In fact, while certain patterns of gambling activity may have emerged during the short-term during 'lockdown' periods, the real test will be whether increased socio-economic disadvantage arising from the economic impacts of the pandemic will contribute to more widespread and acute gambling harm, including through co-occurrence with other harms, such as mental health issues and family violence. In the CIJ's view, this means that positive interventions at the intersection of gambling and offending may require more urgent attention than ever before.

A note on terminology

In accordance with the VRGF's approach, the CIJ uses the term 'gambling harm' to refer to the complex and wide-ranging impacts which gambling can have on an individual, their family and community. The term 'problem gambler' refers to a clinical condition (gambling disorder) while gambling harm is a broader concept. Given that many studies in this area use the terminology of 'problem gamblers' where this relates to a diagnosis, the CIJ uses the latter term where applicable.

1 Introduction

In 2017, the Centre of Innovative Justice ('the CIJ') released *Compulsion, convergence or crime? Criminal justice system contact as a form of gambling harm*.¹⁶ Funded by the Victorian Responsible Gambling Foundation ('the VRGF'), the research involved a comprehensive literature review; analysis of raw data from relevant agencies; review of sentencing remarks from 100 cases in the Victorian Supreme and County Courts; snapshot data collection in relation to clients of Victoria Legal Aid duty lawyers in five Magistrates' Court locations; and multiple focus groups and targeted consultations.¹⁷

The research had three distinct objectives. First, it sought to improve understanding of the intersection between gambling and offending. Second, it aimed to build a clearer picture of the way in which the justice system responds to this intersection. Third, it offered solutions for how the justice system could respond more effectively in the future. Overall, the CIJ's 2017 report found that gambling - and gambling-related harm - played a much more significant role in the lives of offenders than was being recognised across the criminal justice system at the time.

This finding was perhaps not surprising, as previous studies had similarly found that the presence of gambling problems is often overshadowed by the presence of other co-occurring issues, such as mental illness, acquired brain injury, family violence, childhood trauma, drug and alcohol abuse and homelessness.¹⁸ As a result, gambling harm and even behaviour which may be diagnosed as an addiction, could be overlooked when gamblers come into contact with criminal justice settings.¹⁹ In this way, the CIJ found that gambling may be functioning as a 'sleeper' issue - or as an issue which was often 'in the mix' in the lives of many offenders, yet was going unacknowledged.

In addition to this lack of visibility at a therapeutic level, the CIJ also found that Australian legal discourses had been slow to assimilate evolving medical discourses regarding gambling addiction. As a result, court responses to gambling harm across both criminal and civil spheres had been variable and, in some ways, contradictory. Combined, the CIJ found that this lack of legal acknowledgement about the connection between gambling and crime, as well as the slow identification of gambling within offender populations, had resulted in, amongst other things, a disinclination towards therapeutic approaches by courts; low levels of referrals to Gambler's Help treatment services; as well as a failure to recognise that contact with the criminal justice system can itself generate greater risks of gambling when people are released from custody.²⁰

A few years on from the CIJ's 2017 work, the situation has not significantly improved in terms of recognition across the legal system, while the economy has dramatically deteriorated in a very short period of time. This Issues Paper therefore seeks to update the CIJ's work and draw attention once again to an issue which may be 'in the mix' of those who may be likely to come before Victoria's criminal jurisdictions in the months and years ahead.

¹⁶ Campbell, above n 1.

¹⁷ Ibid p. 8.

¹⁸ Ibid p. 4; Miller, H (2014) *Background Paper – Complex Lives: Co-Occurring Conditions of Problem gambling*, Victorian Responsible Gambling Foundation, Melbourne. p.7 - 8. At <https://responsiblegambling.vic.gov.au/documents/24/complex-lives-co-occurring-conditions-of-problem-gambling.pdf>

¹⁹ Campbell, above n 1.

²⁰ Kinner, S. (2006) 'The Post Release Experience of Prisoners in Queensland', *Trends and issues in crime and criminal justice* no 325, Canberra Australian Institute of Criminology.

2 Prevalence of gambling

Once an activity associated with questionable morality, gambling has now become a mainstream leisure pursuit. In fact, the status of gambling has transformed over the last century, with commercial gambling growing into a multibillion-dollar industry on an international scale.²¹

Arguably a combination of consumer-led demand and increasing endorsement by the state,²² nowhere is the expansion of commercial gambling more evident than in Australia. For example, while on-course betting on dog and horse racing represented the only legal form of gambling in most states in the 1960s,²³ gambling is now legally institutionalised around the nation.

In particular, the proliferation of Electronic Gaming Machines (EGMs) in most states and territories in the 1990s transformed the gambling industry.²⁴ Three decades on from this process of process, Australia is now widely known for having the most EGMs per person of any country in the world, excluding the specific gambling hotspots of Monaco and Macau.²⁵

Australia also has the largest gambling losses per capita anywhere in the world.²⁶ Estimates suggest that the industry generates in excess of \$AU19 billion in losses annually,²⁷ with Australians losing 23 per cent more than Singapore, the second ranked country; and 60 per cent more than the fifth ranked USA. EGMs account for more than half the total losses for all gambling.²⁸

In terms of gambling behaviour, estimates from 2015 indicate that two out of every five Australians gamble in a typical month, amounting to an annual total expenditure of \$AU8.6 billion.²⁹ Most recently, the growth of internet gambling has driven particular concerns about its contribution to gambling and associated harm.³⁰

More specifically, between 2015 - 2016, Victorians spent \$AU5.79 billion on gambling, including \$AU5.02 billion on EGMs; \$AU494 million on race betting; and \$AU281 million on sports betting.³¹ Across the same year, Victorians lost \$AU2.5 billion to EGM gambling, an increase of 1.74 per cent on 2014 - 15.³² The question then becomes to what extent will these losses increase in the coming months and years in the wake of the COVID-19 shutdowns, as well as the longer term economic decline.

²¹ Banks, J. (2017) *Gambling, Crime and Society* (Palgrave Macmillan UK) p.1.

²² Markham, F. and Young, M. (2015) 'Big Gambling': The rise of the global industry-state gambling complex' 23(1) *Addiction Research and Theory* 1; Banks, above n 21.

²³ Banks, J., Waters J., Andersson C., and Olive, V. (2019) 'Prevalence of Gambling Disorder Among Prisoners: A Systematic Review' *International Journal of Offender Therapy and Comparative Criminology* <<https://doi.org/10.1177/0306624X19862430>>.

²⁴ Banks, above n 21 p. 9 -10.

²⁵ Markham, F. and Young, M. "15 Things you should know about Australia's Love affair with pokies" *The Conversation* (20 October 2015). <<https://theconversation.com/15-things-you-should-know-about-australias-love-affair-with-pokies-49230>>.

²⁶ Scott, J. and Heath, M, 'Australia's gambling addiction proving too lucrative to cure' *Australian Financial Review* (28 September 2016) <<https://www.afr.com/technology/australias-gambling-addiction-proving-too-lucrative-to-cure-20160928-grpygn>>.

²⁷ Productivity Commission, (2010) *Gambling: Inquiry, Report No. 50, Volume I*, Commonwealth of Australia, p 2. <<https://www.pc.gov.au/inquiries/completed/gambling-2010/report>>.

²⁸ Markham and Young, above n 22, p.2.

²⁹ Warren, D. and Yu, M. (2019) *LSAC Annual Statistical Report: Gambling Activity Among Teenagers and Their Parents*, Australian Institute of Family Studies, 69; 79 <<https://aifs.gov.au/publications/gambling-activity-among-teenagers-and-their-parents>>

³⁰ Hing, N., Russell, A. and Browne, M. (2017) 'Risk Factors for Gambling Problems on Online Electronic Gambling Machines, Race Betting and Sports Betting' 8 *Front Psychology* 779; 779-780.

³¹ Howe, P., Vargas-Saenz, A., Hulbert, C. and Boldero, J. (2019) 'Predictors of Gambling and Problem Gambling in Victoria, Australia' 14 (1) *PLoS ONE* <doi: 10.1371/journal.pone.0209277>.

³² Brown, H., (2016) *A Review of Gambling-Related Issues*, City of Greater Dandenong, p 4. At <https://d3n8a8pro7vhm.cloudfront.net/gx/pages/2218/attachments/original/1568710146/Gambling_Related_Issues_for_Local_Government_2018_50123_.pdf?1568710146>.

2.1 Changing gambling environment and evidence base

Recent studies of gambling prevalence signal the changing nature of gambling activity in Australia. For example, a 2020 NSW study involving a survey of over 10,000 adults suggests that, while gambling participation was on the decline overall, a higher proportion of those who engaged in gambling experienced some degree of gambling problems or harm.³³ Prevalence studies have also begun to identify gambling participation among specific cohorts as a concern. For example, recent studies suggest that sports betting has increased over the last two decades, with young men's participation growing as a particular cohort, the intangibility of money in this environment potentially leading to a greater inclination to take risks.³⁴

Another study examining gambling activity among teenagers and their parents found that one in six 16 to 17 year olds reported having gambled in the past year.³⁵ A study of gambling in Victorian secondary schools also indicates a small, but significant, minority of gambling among high school students.³⁶ This report found that 6 per cent of students had gambled in the past month, with 13 per cent of this cohort classified as 'problem gamblers'.³⁷ Gambling activity was also found to be linked to tobacco use, illicit drug use and mental health conditions. Further, this study indicated a strong relationship between gambling among young people and household gambling, finding that 18 per cent of participants said that someone in their household had gambled in the past month.³⁸

As indicated in this paper's Preface, early reports also indicate shifting patterns emerging in terms of gambling behaviour during COVID-19 restrictions. As noted above, this includes increases in expenditure on online gambling;³⁹ or increased expenditure on gambling activity by those with high problem gambling severity.⁴⁰ The question remains as to how these early shifts will translate into overall experience of gambling harm as the full economic impacts of the pandemic take hold.

Most relevantly to this Issues Paper, however, a limited number of studies already point to the high levels of gambling problems among populations of Australian prisons and, by implication, in the lives of people in contact with the criminal justice system.⁴¹ In particular, a 2018 study by Riley and colleagues found a high lifetime prevalence of problem gambling behaviours amongst men in custodial settings in South Australia.⁴²

³³ Browne, M., Rockloff, M., Hing, N., Russell, A., Murray Boyle, C. and Rawat, V. (2020) NSW Gambling Survey 2019, NSW Responsible Gambling Fund. <https://www.responsiblegambling.nsw.gov.au/data/assets/pdf_file/0007/280537/NSW-Gambling-Survey-2019-report-FINAL-AMENDED-Mar-2020.pdf>

³⁴ Jenkinson, R., de Lacy-Vawdon, C., Carroll, M. (2018), *Weighing up the odds: young men, sports and betting*, Victorian Responsible Gambling Foundation, Melbourne. p 10 <<https://responsiblegambling.vic.gov.au/resources/publications/weighing-up-the-odds-young-men-sports-and-betting-394/>>

³⁵ Warren and Yu, above n 29, p 79.

³⁶ Freund, M., Noble, N., Hill, D., White, V., Evans, T., Oldmeadow, C. and Sanson-Fisher, R. (2019) *The prevalence and correlates of gambling in secondary school students in Victoria, Australia, 2017*, Victorian Responsible Gambling Foundation, Melbourne. <<https://responsiblegambling.vic.gov.au/resources/publications/the-prevalence-and-correlates-of-gambling-in-secondary-school-students-in-victoria-australia-2017-680/>>

³⁷ Ibid, p 19.

³⁸ Ibid, p 2.

³⁹ Brown and Hickman, above n 12, p.2 - 3.

⁴⁰ Gainsbury et al, above n 11.

⁴¹ Riley B. and Oakes, J. (2014) 'Problem Gambling among a Group of Male Prisoners: Lifetime prevalence and Association with Incarceration' 48 (1) *Australian and New Zealand Journal of Criminology* <<https://doi.org/10.1177/0004865814538037>>.

⁴² Riley, B. Larsen, A., Battersby M. and Harvey, P. (2018) 'Problem Gambling Among Australian Male Prisoners: Lifetime Prevalence, Help-seeking association with Incarceration and Aboriginality' 62(11) *International Journal Offenders Therapy and Comparative Criminology*, 3447.

Survey results from this 2018 study also indicated that the majority of male prison populations, up to 84 per cent, would benefit from health promotion and earlier interventions concerning gambling. This included culturally appropriate evidence-based supports for Aboriginal and Torres Strait Islander people in prison who had experienced a higher level of problem gambling than non-Indigenous people in prison. Here we note the relative absence of peer-reviewed literature about the adaption of gambling treatment for Aboriginal and Torres Strait Islander people.⁴³

Research also suggests that, since the preponderance of EGMs, the number of women reporting problem gambling to relevant counselling services has significantly increased. For example, in 1999, women represented 10 per cent of clients attending problem gambling counselling services in Australia.⁴⁴ By 2010, however, this had increased to between 40 - 60 per cent. Around 90 per cent of these women identified EGMs as the main source of gambling issues.⁴⁵ Increases like these suggest that previous findings - which record a higher incidence of problem gambling amongst men - should be revisited, given that this disparity may have substantially reduced over the last two decades. An Australian study of 127 women in prison also found that 64 per cent exhibited lifetime prevalence of problem gambling. EGMs were reported as the most frequently used form of gambling.⁴⁶ This study similarly suggests that rates of gambling problems may be higher among female prison populations than their male counterparts.⁴⁷

In addition to tracking gambling activity amongst certain cohorts, recent studies have improved understanding about the nature and levels of *risk* inherent in these activities. For example, studies indicate that EGMs, the second most prevalent form of gambling, present the greatest concern, with participation predictive of highest risk.⁴⁸ Other forms, such as online gambling, also have strong associations with problem gambling, but appear to have much lower participation rates.⁴⁹

Understanding about the kinds of risk associated with different degrees of participation in, as well as types of, gambling activity, has also evolved. For example, while previous studies had identified risk as being associated with the more narrow 'problem gambling' band, more recent research found that the burden of 85 per cent of all gambling harm is carried by those participating in low and moderate gambling.⁵⁰ Importantly, this research also illustrated that current measurements of 'problem gambling' pose difficulties because they do not distinguish between different forms of gambling.⁵¹ As a result, accurate identification of the actual cause of gambling problems, as well as any associated demographic and behavioural factors, are difficult to determine with accuracy, in turn making it more difficult to help people to avoid further gambling harm.⁵²

⁴³ Ibid.

⁴⁴ Productivity Commission, above n 27.

⁴⁵ Ibid

⁴⁶ Riley, B., Larsen, A., Battersby, M. and Harvey, P. (2017) 'Problem Gambling and Female Prisoners Lifetime Prevalence' 17(3) *International Gambling Studies* 401.

⁴⁷ Ibid

⁴⁸ Hing et al, above n 30.

⁴⁹ Ibid

⁵⁰ Browne et al, above n 4. Problem gambling is the form expressed by the Problem Gambling Severity Index.

⁵¹ Ibid. This includes the Problem Gambling Severity Index, Diagnostic and Statistical Manual, and South Oaks Gambling Screening tools.

⁵² Ibid. See also Hing, N., Browne, M., Russell, AMT., Rockloff, M., Rawat, V., Nicholl, F. et al, 'Avoiding gambling harm: An evidence-based set of safe gambling practices for consumers, *PLoS ONE*:14 (10) e0224083 <https://doi.org/10.1371/journal.pone.0224083>

Combined, these more recent studies indicate that interventions should not simply be focused on people characterised as ‘problem gamblers’ and should instead widen their gaze to look at the broader impacts of gambling harm. This may be particularly the case if patterns and prevalence of gambling activity continue to shift in the wake of COVID-19, with the University of Sydney study referred to above suggesting that higher psychological distress and COVID-19 related financial difficulties were associated with increases in gambling expenditure.⁵³ With the majority of participants in this study expecting to return to their previous gambling activity and many fearful of the consequences as a result,⁵⁴ the potential is there for gambling harm to become even more widely felt across the Victorian community in the medium to longer term.

3 Gambling-related harms and co-morbidities

As a concept, the negative impacts of gambling, or ‘gambling harm’, has increasingly come to be recognised as a public health issue. In essence, a public health approach focusses on responding to an issue in the context of the health of populations, or sub-groups of populations, rather than focusing on individuals in isolation from their wider context.⁵⁵ This next section briefly highlights some of the ways in which this wider conceptualisation of gambling harm is shown to be associated with other co-occurring issues and vulnerabilities.

3.1 Entrenching disadvantage

Financial loss is clearly a major form of gambling harm. In particular, analysis of self-reported expenses on EGMs suggest that higher losses are associated with EGMs than with other gambling products and that, unsurprisingly, the longer gamblers spend on a machine, the more money they lose.⁵⁶ Most relevantly to criminal justice system contexts, however, international literature indicates that EGMs tend to be concentrated in socio-economically disadvantaged areas, where financial losses are, in turn, likely to have the greatest impact.⁵⁷

This aligns with Australian studies which point to a concentration of EGM venues in disadvantaged regions,⁵⁸ with the most disadvantaged communities more likely in turn to incur the highest gambling losses.⁵⁹ In 2015 – 2016, for example, gambling losses among EGMs situated in Greater Dandenong amounted to \$975.60 per adult, over six times higher than the corresponding rate of \$141.90 per adult in Boroondara.⁶⁰ In other words, communities living in some of the more socio-economically disadvantaged areas of Victoria appear to be experiencing much greater losses than those communities which are more likely to be able to *afford* these kinds of losses.

⁵³ Gainsbury et al, above n 11.

⁵⁴ Ibid

⁵⁵ Victorian Responsible Gambling Foundation, (2015) *Background Paper: Using A Public Health Approach in The Prevention of Gambling-Related Harm*, Victorian Responsible Gambling Foundation, Melbourne. At <https://responsiblegambling.vic.gov.au/documents/21/using-a-public-health-approach-in-the-prevention-of-gambling-related-harm.pdf>

⁵⁶ Rintoul A and Deblaquiere J (2019) *Gambling in Suburban Australia* (Research Report), Melbourne, Australian Institute of Family Studies) <<https://aifs.gov.au/agrc/publications/gambling-suburban-australia>>.

⁵⁷ Raisamo, S., Toikka, A., Selin, J. and Heiskanen, M. (2019) ‘The density of electronic gambling machines and the area-level socioeconomic status in Finland: a country with a legal monopoly on gambling and a decentralised system of EGMs’ 19 *BMC Public Health* 1198.

⁵⁸ Office of Gaming and Racing, Department of Justice. (2011) *Socioeconomic impacts of access to electronic gaming machines in Victoria: Effects on demand and communities*, Queensland University of Technology; Banks, above n 21.

⁵⁹ Brown, H. (2016) *A Review of Gambling-Related Issues For Local Government*, City of Greater Dandenong, p.4. At https://d3n8a8pro7vhmx.cloudfront.net/gx/pages/2218/attachments/original/1568710146/Gambling_Related_Issues_for_Local_Government_2018_50123_.pdf?1568710146

⁶⁰ Ibid.

If socio-economic disadvantage is then further entrenched – or expanded – in the wake of the recent pandemic, as is likely to occur, this signals that financial loss as a form of gambling harm is likely to compound this disadvantage. This may in turn increase the risk that people will come into contact with the criminal justice system as a result.

3.2 Mental Health

While financial loss is the most obvious form of gambling harm, a broader array of gambling-related harms is increasingly being documented across a range of studies. For example, evidence indicates that gambling problems and mental health issues frequently co-occur, with rates of problem gambling tending to be elevated in people with diagnosed mental health conditions.⁶¹

Evidence further suggests that people with mental health issues may be particularly vulnerable to developing gambling problems in the first place. One study indicates that, while 59 per cent of those accessing mental health services did not gamble at all, 6 per cent experienced problem gambling and spent a monthly average of \$439.79 on gambling. Another 8 per cent were classified as moderate risk gamblers, who may experience a moderate level of problems and spend an average monthly amount of \$123.84 on gambling. Low risk gamblers made up 7 per cent of those accessing mental health services and spent a monthly average of \$50.32.⁶²

Evidence also points to the compounding impact of gambling on mental health issues and psychosocial disability. Practitioners report that many people experiencing mental health problems gravitate towards gambling as a way of managing their symptoms.⁶³ Rather than assisting, however, gambling can instead exacerbate poor mental health, as well as produce other gambling harms, such as financial loss and strained family relationships, which then compound poor mental health outcomes further.⁶⁴

Research also indicates that, while 90 per cent of mental health clinicians agree about the need to identify if a client has gambling problems, screening of clients for gambling remains a challenge. For example, studies have found that 33 per cent of clinicians ‘rarely’ screen clients for problem gambling; 29 per cent ‘sometimes’; and 23 per cent ‘never’ – suggesting that people with mental health and gambling issues are missing out on opportunities for positive interventions.⁶⁵ Given the likely impacts of the COVID-19 pandemic on mental health across the community – both in terms of exacerbating existing issues and triggering new ones – the relationship between mental health and associated gambling harm will need to be increasingly monitored.

⁶¹ Lubman, D., Manning V., Dowling N., Rodda, S., Lee, S., Garde, E., Merkouris, S. and Volberg, R. (2017) *Problem Gambling in People Seeking Treatment for Mental Illness* Victorian Responsible Gambling Foundation, Melbourne, p 17.. At https://responsiblegambling.vic.gov.au/documents/61/research-report-problem-gambling-in-people-seeking-treatment-for-mental-illness_XkVmN62.pdf >

⁶² Ibid, p 157.

⁶³ Rintoul and Deblaquiere, above n 56.

⁶⁴ Ibid.

⁶⁵ Lubman et al, above n 61, p 17 - 19.

3.3 Family violence

Clearly, another issue which will also require significant attention in the wake of the pandemic is recognition of family violence as a form of gambling harm. Resources produced by Women's Health in the North indicate that family violence is three times more likely to occur in families in which there are gambling problems, compared with families without gambling problems.⁶⁶ In some cases, family violence can precede gambling, with practitioners reporting that victim-survivors may turn to gambling as an escape or respite mechanism, while perpetrators may use gambling as a way of furthering their control.⁶⁷ Gambling can also increase both the frequency and severity of family violence, with primary drivers such as gender inequality and violence-supportive attitudes combining with other factors such as alcohol abuse and gambling to contribute to an increase in coercive control from perpetrators.⁶⁸

A systematic review and meta-analysis of multiple studies by Dowling and colleagues found that 38.1 per cent of gamblers reported being victim-survivors of intimate partner violence and 36.5 per cent being perpetrators.⁶⁹ A study in 2016 also found a statistically significant correlation between EGM density and police-recorded family violence rates among postcodes.⁷⁰ Importantly, the CIJ's audit of submissions to the Royal Commission into Family Violence for its 2017 report highlighted that family violence services saw integration between the sectors as vital to improving client outcomes.⁷¹

Further studies will be important to examine any increases in the links between changing patterns of gambling during the COVID-19 lockdown, the ongoing impacts of economic downturns and increases in family violence. This is particularly the case when reports indicate that rates of family violence have increased since the onset of COVID-19 – not only in contexts where family violence was already present, but where it had not been present before.⁷² Combining with financial impacts such as unemployment, increased gambling activity may therefore be a further contributor to what researchers are terming 'the shadow pandemic' in the context of COVID-19.

4 Pathways between gambling and crime

The CIJ's 2017 report explored the myriad pathways between gambling and offending. The most commonly recognised pathway, of course, involves gamblers resorting to offending, such as theft or drug trafficking, in order to recoup financial losses from gambling activity. This road directly from gambling to crime suggests a '**linear pathway**' – one with which the community is more likely to be familiar, but for which courts appear to have relatively little sympathy, as discussed further below.

⁶⁶ Women's Health in the North and Women's Health East (2017) *Increasing the Odds for Safety and Respect: A gambling and family violence issues paper*, Thornbury, Women's Health in the North, p 15, citing Suomi, A., Jackson, A.C., Dowling N.A., Lavis, T., Patford, J., Thomas, S.A., Harvey, P., Abbott, M., Bellringer, M.E., Koziol-McLain, J. and Cockman, S. (2013) Problem gambling and family violence: Family member reports of prevalence, family impacts and family coping, *Asian Journal of Gambling Issues and Public Health* 3 (13), 1-15.

⁶⁷ Ibid p 15; Campbell, above n 1, p 31.

⁶⁸ Women's Health in the North and Women's Health East, above n 36; Campbell, above n 1, p 30.

⁶⁹ Dowling, N., Suomi, A., Jackson, A., Lavis, T., Patford, J. Cockman, S., Thomas, S., Bellringer, M., Kaziol-McLain, J., Battersy, M., Harvey, P. and Abbott, M. (2014) 'Problem Gambling and Intimate Partner Violence: A Systematic Review and Meta-Analysis' 17(1) *Trauma Violence Abuse* 43.

⁷⁰ Brown, n 59, p 21.

⁷¹ Campbell, above n 1, p 31

⁷² Pfitzner, N. Fitz-Gibbon, K. True, J. (2020) Responding to the 'shadow pandemic': practitioner views on the nature of and responses to violence against women in Victoria, Australia during the COVID-19 restrictions. Monash University. Report.

<https://doi.org/10.26180/5ed9d5198497c>

Beyond the linear pathway, the CIJ's research also highlighted '**dual pathways**' between gambling and contact with the justice system. The concept of a dual pathway derives from the CIJ's findings that, while gambling can lead to interaction with the justice system, concurrent gambling amongst those already in contact with the criminal justice system can in turn increase reoffending rates down the track.⁷³ Just as relevantly, the social isolation experienced by many people in contact with the criminal justice system may make the relative welcome of gaming venues appear especially inviting, in turn making them more vulnerable to experiencing gambling harm.⁷⁴

The CIJ's report also drew attention to the existence of '**convergence pathways**', where gambling problems are exacerbated by other factors, such as mental health issues, family violence or socio-economic disadvantage, and produce an increased likelihood of contact with the criminal justice system overall.⁷⁵ The CIJ also highlighted the need for more research into how gambling interacts with other factors which drive the disproportionate representation of Aboriginal and Torres Strait Islander communities in criminal justice systems.⁷⁶

Finally, the CIJ also identified studies the existence of '**coercive pathways**', involving intersections between family violence, gambling and crime. This can take the form of a gambler coercing their partner to participate in gambling, or using their partners' pay or Centrelink benefits to resource their own gambling, as noted above. It can also involve victim-survivors seeking respite from abuse in gambling venues and developing gambling problems as a result, as also noted above. Both these manifestations may lead victim-survivors of family violence into contact with the criminal justice system - either as a result of developing a gambling addiction themselves, or being left with the debt created by their partner's own gambling activity.

Beyond this, the relationship between particular communities, gambling and the criminal justice system is particularly complex and especially resistant to 'linear' explanations. For example, research by Le and Gilding identified a strong association between 'problem gambling', illicit drug markets (heroin and cannabis) and the experiences of women from Victoria's Vietnamese community. Drawing on a qualitative study with 35 Vietnamese women sentenced to custody as a result of drug related offences, this research found that more than half (18) entered the drug trade to address debts resulting from casino gambling.⁷⁷

Here we note that the authors of this study were careful not to suggest a cultural relationship between gambling and offending and more recent research regarding criminalised Vietnamese women has similarly questioned whether gambling behaviours are the primary cause of their offending. R-Coo Tran's analysis of "diasporic trauma and escape gambling", which involved interviews with Vietnamese community workers, highlighted complex and nuanced reasons for understanding the relationship between gambling and offending.⁷⁸

⁷³ Campbell, above n 1.

⁷⁴ Ibid; Rintoul and Deblaquiere, above n 56.

⁷⁵ Campbell, above n 1, p.49.

⁷⁶ Ibid.

⁷⁷ Le, R. and Gilding, M. (2014) 'Gambling and Drugs: The role of gambling among Vietnamese women incarcerated for drug crimes in Australia' 49 (1) *Australian and New Zealand Journal of Criminology* 134.

⁷⁸ Tran, R-Coo and Spivakovsky, C (2019) 'Criminalised Vietnamese Women, "Problem Gambling" and Experiential Rifts: Towards a Criminology of Diversity' *Theoretical Criminology* <<https://doi.org/10.1177/1362480619869925>>.

This recent study describes Vietnamese women attending casinos to escape family stress, relationship breakdown, and cultural gaps between them and their children. In this context, gambling becomes a “palliative refuge from stress and trauma,”⁷⁹ bound up with histories of trauma, including experiences of immigration.⁸⁰ This is a further and particularly nuanced conceptualisation of gambling as a consequence of other forms of harm, rather than as the driver of offending, or as a behavioural feature of specific communities.

5 Gambling and the justice system

5.1 Gambling and sentencing decisions

The CIJ’s 2017 report noted a disparity between the presence of gambling harm in the lives of many offenders and recognition of this by the legal system. The first way in which this disparity manifests is the absence of substantive legal argument, or evidence led by legal practitioners, about the role or impact of gambling in their client’s offending. The CIJ found that this was partially the result of clients’ reluctance to disclose gambling to their lawyers, as well as the result of lawyers’ reluctance to ask clients about gambling unless there were obvious reasons to do so.

Even where gambling activity has become part of legal arguments by legal advocates, the response from Australian courts across a number of areas of law has failed either to recognise gambling, or to do so in a constructive way. This appears to be the case regardless of the pathway travelled by people between gambling activity and the courts.⁸¹

More specifically, Victorian courts have rarely construed problem gambling as a sufficient reason to reduce or mitigate sentence. For example, in cases brought in the wake of the introduction of EGMs in the early 1990s, judges in the Victorian Supreme Court often expressed concerns about “opening the floodgates” to considerations of mitigation in relation to the emergence of gambling-related crime. Caution continued to be exercised in later years, with some decisions explicitly discounting problem gambling as a significant consideration in sentencing decisions.⁸²

While the acceptance of problem gambling as a factor in mitigation of sentencing was not entirely excluded, it appeared only as a rare exception in judicial decision-making. In the 2002 case of *DPP v Raddino*,⁸³ for example, the Victorian Court of Appeal found that the defendant’s background “constituted a degree of mitigation”. The background concerned a woman who had been the primary carer of her ill mother, who led a lonely life and who was introduced to pokies by her former partner – meaning that these other aspects of vulnerability appeared to attract the sympathy of the court, rather than the gambling activity itself.⁸⁴

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Campbell, above n 1, p 50 - 51.

⁸² Ibid.

⁸³ *Director of Public Prosecutions v Raddino* [2002] VSCA (8 May 2002)

⁸⁴ Campbell, above n 1, p 50 - 63.

The *Verdins* decision of 2007 created further potential for consideration of problem gambling, or gambling disorder. While this particular case did not consider gambling issues, the *Verdins* decision was significant in that it explicitly acknowledged that forms of mental impairment were relevant to sentencing. This could have meant that, when considered as a form of impairment, problem gambling could be relevant to future sentencing considerations - at least in theory.

Justice Redlich's decision in *R v Grossi* in 2008, however – in which the issue of the offender's problem gambling was very clearly raised - made it clear that the *Verdins* decision did not apply and that problem gambling did not generally warrant a reduction in the offender's moral culpability or temper the sentencing principle of deterrence. The *Grossi* decision has had a significant impact on subsequent case law and day to day court practice. As the CIJ heard in its 2017 research, whether intended or not, it led some criminal lawyers to abandon the possibility of raising their client's gambling problems in legal argument at all. This was in addition to reports from some lawyers practising in the Magistrates' Court that their reluctance to raise a client's gambling arose on the basis of a lack of predictability in judicial attitudes they had encountered – something many described as a “judicial lottery” - rather than specifically being mindful of the *Grossi* decision.⁸⁵

As part of the CIJ's 2017 work, the CIJ consulted with Justice Redlich about the implications of his 2008 decision. His Honour indicated that, while his influential statement in *Grossi*⁸⁶ did not close the possibility of raising problem gambling as a mitigating factor during sentencing, such outcomes were contingent on the particular facts of a case, as well as the status of scientific research on gambling disorder presented to the court. At the time of the CIJ's research, His Honour had found both to be wanting.⁸⁷

5.2 Gambling and civil contexts

Beyond the criminal context, the civil case of *Kavakas v Crown*, where the applicant Mr Kavakas raised a claim of unconscionable conduct against Crown Casino, the High Court's decision was influenced by similar factors. The most salient was the class of persons to which this gambler belonged, with Mr Kavakas being a “high roller” in the view of the court, which in turn noted:

Whatever a high roller's motivation may be, members of that class of gambler present themselves to the casino, and are welcomed by it in the ordinary course of business, as persons who can afford to lose and to lose heavily.⁸⁸

The court also added that there was no suggestion that the gambler played while intoxicated, or was an incompetent player, which led the court to rule against a finding of special disadvantage.

[The court] is not concerned here with a casino... preying upon a widowed pensioner who is invited to cash her pension cheque...and to gamble with the proceeds.⁸⁹

⁸⁵ Ibid.

⁸⁶ *R v Grossi* [2008] VSCA (2 April 2008)

⁸⁷ Campbell, above n 1, p.65; 80.

⁸⁸ *Kavakas v Crown* [2013] HCA (5 June 2013) [28]

⁸⁹ Ibid.

While the court seemed open to possibilities of greater flexibility in other cases, the court's emphasis on choice, as opposed to compulsion, suggested otherwise. For example, as noted in the judgement, Mr Kavakas had been diagnosed as a compulsive gambler and, although he sought treatment for gambling addiction, he went on to use his completion of the treatment as a way to negotiate his re-entry to the Casino. Ultimately, the court accepted evidence of these negotiations - including a proposal by Kavakas that he would self-exclude should he suffer a relapse - as proof of his capacity to undertake rational decision making.

The failure by Kavakas to disclose a relapse of his condition, and the fact that he attended events where he did *not* gamble, suggested control and autonomy, rather than compulsion, in the eyes of the court. The court also noted a lack of evidence showing a "continuously operating compulsion", which meant that his ability to self-exclude was intact, but had simply not been exercised.

The *Kavakas* case highlights further challenges in terms of courts employing the evolving science around gambling behaviour. For example, while the DSM-V describes pathological gambling as an "impulse control disorder", it does not distinguish between the inability to self-regulate and an *unwillingness* to self-regulate, or whether this unwillingness or inability manifests as part of any addiction. This distinction between inability and unwillingness, significant in terms of sentencing in criminal contexts,⁹⁰ proved to be just as significant in the civil context of the *Kavakas* decision.

Beyond *Kavakas*, the more recent 2018 Federal Court decision of *Guy v Crown Casino*⁹¹ suggests that other challenges may also impact on the integration of scientific understanding about gambling into legal considerations. A civil case brought against Crown Casino and Aristocrat Technologies for misleading and deceptive conduct⁹² and unconscionability, *Guy v Crown* demonstrates not only the difficulties of meeting legal tests, but the challenges inherent in drawing on expert evidence to incorporate clinical understanding of gambling addiction.

At the time that legal proceedings were on foot, Aristocrat Technologies was considered to be Australia's biggest EGMs manufacturer.⁹³ Unlike *Kavakas v Crown*,⁹⁴ however, which had involved a "high roller" gambler who lost millions of dollars, the applicant in *Guy*⁹⁵ was unemployed and receiving social security payments. Because the applicant's claim centred on arguments that EGMs were specifically designed to contribute to addiction, evidence about gambling addiction from lay and expert witnesses therefore formed a significant part of the applicant's case.⁹⁶ In particular, the applicant relied on three expert witnesses, one of whom was a registered psychologist who gave evidence in relation to gambling habituation or addiction, as well as the psychological impacts of playing EGMs.⁹⁷ Another gave evidence in relation to the psychological and psychosocial effects of problem gambling and treatment for individuals addicted to EGMs.

⁹⁰ Ramanaukas, above n 1.

⁹¹ *Guy v Crown Melbourne Limited (No 2)* [2018] FCA (2 February 2018).

⁹² *Competition and Consumer Act 2010* (Cth) sch 2 ('Australian Consumer Law'), S.18.

⁹³ Toscano, N, 'Former Gambling Addict Loses Landmark Poker Machine Case Against Crown, Aristocrat', 2 February 2018, *Sydney Morning Herald* (<<https://www.smh.com.au/business/companies/former-gambling-addict-loses-landmark-poker-machine-case-against-crown-aristocrat-20180202-p4yz9y.html>>).

⁹⁴ *Kavakas v Crown* [2013] HCA (5 June 2013).

⁹⁵ *Guy v Crown Melbourne Limited (No 2)* [2018] FCA (2 February 2018).

⁹⁶ *Ibid.*

⁹⁷ *Ibid* [23].

This evidence was used to argue that aspects of EGM design contributed, in a causal sense, to gambling addiction. Crown Casino and Aristocrat Technology also adduced opinion evidence from two expert witnesses. The court then proceeded to consider the following questions:

- to what extent is habituation consistent with ‘gambling disorder’ in the DSM-V;
- to what extent is ‘addiction’ consistent with DSM-V;
- to what extent is it possible to say that classic or operant conditioning or dopamine effect play a role in development of habituation, addiction or gambling disorder;
- to what extent is it possible to form conclusions as to the likelihood of a particular person becoming ‘habituated’;
- to what extent is it possible to identify what is or are the causes of a particular person becoming ‘habituated’ or ‘addicted’ or developing a ‘gambling disorder’ in respect of EGMs;
- to what extent is it possible to identify ‘design features’ of an EGM as a cause of a particular person becoming addicted or developing gambling disorder’;
- to what extent is it possible to say that one or more of the features of EGMs are a cause of any person becoming addicted; and, more importantly
- to what extent does a person who is ‘habituated’ or ‘addicted’ or is suffering from a ‘gambling disorder’ (a) perform voluntary acts when playing an EGM and (b) is able to make judgements as to her own best interests...⁹⁸

The presiding judge found that, while it was not necessary to come to a definitive view on these questions, she preferred the respondent’s experts to that of the applicant.⁹⁹ In particular, Her Honour Justice Mortimer found that the evidence of one particular expert witness failed to meet professional academic standards. Nevertheless, Her Honour found that the possibility of proving the relationship between EGM design and compulsive gambling was not closed – indicating that, had the applicant’s expert witnesses been found to be more persuasive, then the relationship between EGM design and gambling addiction may have been more likely to have been accepted.

*The fact that I have found the applicant has not proven her claim should not be seen to diminish the importance of the issues she raises...research into the possible relationship between the design and features of EGMs and the development of addiction to gambling, or the development of problematic attitudes and behaviour to gambling, is a new field, where some researchers...have identified justifications for further work exploring this relationship.*¹⁰⁰

⁹⁸ Ibid [274]

⁹⁹ Ibid [283]

¹⁰⁰ Ibid [302]

Guy therefore highlights the need for all parties to be conscious of the quality of expert evidence. A failure to do so may inadvertently foil opportunities to test the interaction of clinical and legal conceptualisations of gambling. These are opportunities which Justice Redlich suggested in consultations with the CIJ for its 2017 report were essential to seize and which may present themselves with more frequency in the wake of the current economic downturn.

5.3 Gambling programs and treatments inside prison

Beyond the courts, the availability of gambling services and support inside prisons also remains scarce. A 2013 Victorian Responsible Gambling Foundation report noted a range of barriers to identifying gambling harms amongst a prison's population – including that, instead of dedicated, specialist gambling services in correctional settings, service responses and support are weighted towards alcohol and drug use and mental health issues.¹⁰¹ Research in Canada similarly found a lack of system-wide services for gambling, identifying only two peer-reviewed published studies dedicated to evaluating treatment programs within custodial settings.¹⁰² Such findings indicate that, even where programs are operating, there is a lack of information and evaluation about their effectiveness. New research from Finland further notes that, while awareness of gambling problems may be generally well recognised among correctional staff, a lack of a systematic framework for identification of gambling problems hinders treatment, with staff frequently feeling ill-equipped with adequate training and information about gambling harm.¹⁰³

5.4 Help-seeking among gamblers inside and outside prisons

While studies of help-seeking behaviour among people with gambling problems have increased in recent years, to date research has tended to focus on the barriers to help-seeking, such as internal feelings of shame, stigma, fear and ambivalence. Research also suggests that gamblers tend to have a distorted sense of their capacity to manage their challenges on their own, with a 2014 study by Gainsbury and colleagues, which surveyed 730 Australian gamblers, finding that individuals tended to have low awareness about treatment options.¹⁰⁴ Other factors, such as reluctance to discuss gambling problems with doctors; a lack of available local services; and cost of treatment, also posed barriers to help-seeking.¹⁰⁵

Research into help-seeking behaviour among prison populations similarly indicates that most people in custody who have experienced gambling harm are unlikely to self-identify or actively seek help.¹⁰⁶ Some emerging research suggests, however, that help-seeking for gambling among women in prison, in particular, might be slightly higher than help-seeking in the general population. For example, Riley's 2017 study with women in prison found that one in five women with gambling problems had previously sought help for their problem.¹⁰⁷

¹⁰¹ Perrone et al, above n 1, p 106.

¹⁰² Turner, N., McAvoy, S., Ferentzy, P., Matheson, F., Myers, C., Jindani, F., Littman-Sharp, N. and Malat, J. (2017), 'Addressing the Issue of Problem Gambling in the Criminal Justice System: A series of Case Studies' 35 *Journal of Gambling Issues* 74.

¹⁰³ Castren, S., Lind, K., Jarvinen-Tassopoulos, J., Alho, H., and Salonen, A. (2019) 'How to Support Prison Workers' Perceived Readiness to Identify and Respond to Possible Gambling Problems: A Pilot Study from Two Finnish Prisons' 15 (4) *International Journal of Mental Health*, 316.

¹⁰⁴ Gainsbury, S., Hing, N. and Suhonen, N. (2014) 'Professional Help-seeking for Gambling Problems: Awareness, Barriers and Motivators for Treatment' 30 (2) *Journal of Gambling Studies* 503.

¹⁰⁵ Itapuisto, M. (2019) 'Problem Gambler Help-Seeker types: Barriers to Treatment and Help Seeking Processes' 35(3) *Journal of Gambling Studies* 1035.

¹⁰⁶ Banks et al, above n 21; Lahn, J. and Grabosky, P. (2003), *Gambling and clients of ACT' (Australian Capital Territory) Corrections: Final Report* (Canberra, Australia: Centre for Gambling Research, Australian National University)

¹⁰⁷ Riley et al, above n 47.

5.5 Prison and issues of financial debt

Beyond the capacity of people in custody to identify or disclose gambling harm – or to seek help for it – many people enter custody in significant debt, which then accumulates during the time they are incarcerated.¹⁰⁸ The nature of this debt varies, but financial counsellors – who are often a useful entry point not only for assistance with debt, but for identification of gambling harm - indicate that the most stressful debts experienced by those in custody are those owed to government agencies. This includes debts to Centrelink, housing departments, the Child Support Agency, the Tax Office and state agencies for fines and infringements.¹⁰⁹ Other studies have indicated that women going into prison with pre-existing debt had higher rates of recidivism post-release.¹¹⁰

A 2018 Financial Counselling Australia report identified numerous barriers prohibiting people in prison from addressing financial stress. This report found that a combination of low literacy and numeracy with high levels of trauma and mental health issues mean that many do not have the capacity to write letters to creditors; complete appropriate forms; or self-advocate, particularly when issues such as housing or reunification with children may be understandable priorities.¹¹¹ Given that identity documents are usually a first step to addressing debt, this poses a further challenge, given that people in custody generally do not have such documentation with them.¹¹² Further, many understandably assume that having access to cash is the only way to address debts, rather than through steps which could waive the debt or put the debt on hold. This has a stifling impact on motivation and self-advocacy around issues perceived as too hard to address.¹¹³

Financial counsellors also report that the stigma attached to financial stress and debt, including gambling-related debt, is often overwhelming and is particularly reported among Aboriginal and Torres Strait Islander populations.¹¹⁴ This was affirmed in a 2017 study by Ogloff and colleagues involving Aboriginal women in custody who set out the major factors and stressors impacting their own social economic wellbeing. Of the 12 factors identified, 20.3 per cent of participants indicated that gambling problems, in particular, contributed to general stressors over a 12-month period.¹¹⁵

Administrative processes also impede people gaining access to assistance. Financial counsellors must book appointments for in-person or phone meetings, with authorities then signed by clients to allow financial counsellors to advocate on their behalf to creditors.¹¹⁶ Where clients in custodial settings do not have paperwork from a creditor and cannot remember relevant account details, financial counsellors report difficulties negotiating favourable outcomes.¹¹⁷ When people in custody are moved around, sometimes at short notice, documents may also not follow efficiently, resulting in them not being able to meet creditor deadlines.¹¹⁸

¹⁰⁸ Financial Counselling Australia, (2018) *Double Punishment: How People in Prison Pay Twice* p 13
<<https://www.financialcounsellingaustralia.org.au/docs/double-punishment-how-people-in-prison-pay-twice-2018/>>

¹⁰⁹ Ibid.

¹¹⁰ Ibid; Trotter, C. and Flynn, C. (2016) 'Literature Review: Best Practice with Women Offenders' (Monash University Criminal Justice Research Consortium) <<https://research.monash.edu/en/publications/literature-review-best-practice-with-women-offenders>>.

¹¹¹ Financial Counselling Australia, above n 108.

¹¹² Minter, E, 'Debt Trap: People imprisoned for crime are being punished twice', *Sydney Morning Herald* (6 July 2018)
<<https://www.smh.com.au/national/debt-trap-people-imprisoned-for-crime-are-being-punished-twice-20180705-p4zplh.html>>.

¹¹³ Financial Counselling Australia, above n 108, p.18.

¹¹⁴ Ibid

¹¹⁵ Ogloff, J. R. P., Pfeifer, J. E., Shepherd, S. M., and Ciorciari, J. (2017) 'Assessing the Mental Health, Substance Abuse, Cognitive Functioning, and Social/Emotional Well-Being Needs of Aboriginal Prisoners in Australia' 23 (4) *Journal of Correctional Health Care*, 398.

¹¹⁶ Centre for Innovative Justice, above n 8.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

Overall, the general lack of awareness about financial counsellors can also frustrate their role in assisting people in prison with issues of broader debt. As Financial Counselling Australia reports, correctional staff and people in custody are often largely unaware of the work performed by financial counsellors and how their work could assist.¹¹⁹ With issues of debt unlikely to diminish in the economic downturn, it therefore becomes more important than ever for different components of the justice system to identify how and where positive interventions may be required.

6 Improving the Justice System's Response

Despite these multiple challenges across the criminal justice system – challenges which the updated review of the literature and case law conducted for this Issues Paper suggests persist – opportunities for positive intervention can still be seized.

6.1 Police

In its 2017 report, the CIJ highlighted the potential usefulness of addressing gambling problems at the point at which gamblers come into contact with police. Although police are not currently obliged to ask an alleged offender about the factors which may have contributed to an offence, greater inquiry or assessment may provide potential for data collection about gambling-related crime; early detection of gambling; and the possibility of referring gamblers to relevant services.

The risks which accompany any increased policing intervention, however, were also stressed in the CIJ's 2017 report. This is because, while contact between gamblers and police may theoretically provide opportunities for positive interventions, arrest for offending which is directly related to gambling is also often associated with suicidal ideation. This signals the need for an abundance of caution when asking police to inquire about gambling behaviour.

Since the CIJ's 2017 report was released, a community collaboration in the UK, including Cheshire Constabulary, implemented a pilot program which screened for problem gambling at the point of arrest.¹²⁰ The program's aim was to refer gamblers to relevant services, divert them from criminal justice settings and reduce recidivism.¹²¹ The screening process involved four questions drawn from the Gambling Aware Screening Tool General and allowed officers to consider whether referrals to a gambling counsellor would be of benefit.¹²² The tool was designed for non-specialised client-facing services to identify whether a person is affected by problematic gambling.¹²³

Key findings from the pilot indicated that 13 per cent of all people arrested and surveyed in Cheshire experienced problem gambling. These findings also suggested that 'problem gambling' levels in the population of people arrested were 13 times higher than that of the general population in England.¹²⁴ The pilot involved over 250 practitioners working in a range of agencies associated with the criminal justice system and incorporated screening of 760 people. Of those screened, however, only 29 elected to receive therapeutic intervention.¹²⁵

¹¹⁹ Financial Counselling Australia, above n 108, p 21.

¹²⁰ Platt, M., Faint, B., Reddy V and Kenward, M (2017) *Arresting Problem Gambling in the UK Criminal Justice System: Raising Awareness and Screening for Problem Gambling at the Point of Arrest* <<https://www.gamcare.org.uk/app/uploads/2017/11/HOWARD-LEAGUE-WINNER-CRIMINAL-JUSTICE-BROCHURE.pdf>>.

¹²¹ Ibid.

¹²² Centre for Justice Innovation (2018) *Gambling Screening Pilot* <<https://justiceinnovation.org/project/gambling-screening-pilot>>

¹²³ Ibid.

¹²⁴ Platt et al, above n 120.

¹²⁵ Ibid

While such findings suggest that screening could be adopted by police in partnership with other organisations in the Victorian context, its usefulness should therefore not be overestimated. As indicated in the above study, only a very small proportion of those screened opted to receive intervention. Further, any potential benefits of screening at the point of arrest should be carefully balanced with the potential risks of stigmatising certain cohorts in the community, particularly those who may already be over-policed or disproportionately criminalised.

6.2 Legal Practitioners

As highlighted in the CIJ's 2017 research, a crucial opportunity for the criminal justice system to function as a positive intervention lies in the hands of legal practitioners. This is because, where lawyers become aware of the role of a client's gambling in their offending, either as a direct or secondary cause, they will be in a better position to make appropriate referrals – to address the gambling, as well as its associated harms.

Similarly noted in the CIJ's report, however, some lawyers have greater levels of awareness of this intersection than others.¹²⁶ Providing information kits tailored for the criminal justice sector is therefore a further way to improve the intervention of the justice system with people experiencing gambling harm. As an example, the NSW Office of Liquor and Gambling developed targeted information for lawyers, including lists of referral links, as well as explanations about the relationship between gambling and contact with the justice system.¹²⁷

Opportunities for positive intervention may also lie in lawyers including gambling and related harms as part of initial client assessments, particularly given that connecting clients to counselling treatment prior to their court appearance may have a positive impact on the outcome of their case. Here we note that the CIJ is currently in discussions about the development of a program of this kind in public legal settings in Victoria. Consultations with Wesley Mission Legal Service in NSW - a service which provided specialised multidisciplinary support for people experiencing gambling harm - highlighted Wesley's preference for clients to be connected with appropriate therapeutic and financial counselling assistance prior to seeing a lawyer.¹²⁸

6.3 Therapeutic Jurisprudence

The willingness of lawyers to identify and raise their client's gambling activity will stay constrained, however, while courts continue to be reluctant to recognise gambling activity as having played a fundamental role in a person's contact with the law. This in turn means that avenues for positive intervention remain limited, despite the fact that, in 2006, the Australian Law Reform Commission called for links to rehabilitation programs for perpetrators of gambling-related crime.¹²⁹

Nevertheless, 2019 research published by Adolphe and colleagues suggests that indirect steps may have begun to be taken towards the adoption of rehabilitative responses. For example, in NSW, Section 44 of the *Crimes (Sentencing Procedure) Act 1999*¹³⁰ requires a court to set a non-parole period, unless there are sufficient reasons not to do so.

¹²⁶ Campbell, above n 1, p.50.

¹²⁷ Ibid, p 66.

¹²⁸ Ibid, p.65; 80.

¹²⁹ Australian Law Reform Commission (2006) *Same Crime, Same Time: Sentencing Federal Offenders*, Final Report, ALRC Report 103.

¹³⁰ *Crimes (Sentencing Procedure) Act 1999* (NSW) S.44.

Where a judge makes a finding of ‘special circumstances’, however, this allows the court to reduce the minimum period which a person must serve in prison and allow them to apply for parole sooner.¹³¹ The research by Adolphe and colleagues identified that, out of 161 gambling-related offences in NSW and SA court records between 1990 and 2019, special circumstances were found in 66 cases. While a custodial sentence was imposed in these cases, the non-parole time was lowered on the basis of the offender’s need and willingness to engage in gambling treatment. The age and/or other psychiatric issues of the individual were also taken into consideration.

Although not counting as explicit mitigation in an offender’s sentencing, the use of ‘special circumstances’ is arguably one example of an indirectly therapeutic approach to gambling-related crime.¹³² As Adolphe explains, judges who make a finding of ‘special circumstances’ can do so without in-depth consideration of the psychological aspects of gambling addiction.¹³³ This enables the offender to access gambling treatment in the community earlier than they would otherwise, meaning that both lawyers and judges can opt for a more rehabilitative approach while scientific understanding of gambling addiction continues to evolve.¹³⁴

South Australia’s dedicated gambling list in its Treatment Intervention Court provides a further example of therapeutic approaches to gambling-related crime. This program involves intake, assessment and multiagency liaison by Courts Administration Authority staff; specialist gambling therapy provided by Statewide Gambling Treatment Services; case management, counselling, court support and restorative justice processes offered by Officer Aid Rehabilitation Services Community Transitions; and bi-monthly court reviews and sentencing.¹³⁵

According to an evaluation of this specialist list, to be eligible for the program offenders must have been charged with a criminal offence; plead guilty to their charges; and have committed an offence related to problem gambling.¹³⁶ Rather than undergo a period of incarceration, however, offenders then receive a suspended (non-custodial) sentence of appropriate length for their offence and a good behaviour bond, as well as being diverted for treatment, case management, counselling, court support and restorative justice programs.¹³⁷

Low referrals in the first six months of this program suggested a low level of awareness among defence lawyers and the legal profession more generally. The simple existence of the dedicated list and its associated recognition of gambling-related crime, however, has begun to raise awareness of the “nexus between gambling behaviour and offending behaviour”.¹³⁸ Given that the eligibility criteria is relatively broad, the program is also capable of servicing a wide range of gambling-related offences. This includes economic crimes and ostensibly un-related crimes, such as driving while disqualified.

¹³¹ Judicial Commission of NSW, *Sentencing Bench Book – Sentencing Procedures for Imprisonment*

<https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/setting_terms_of_imprisonment.html>.

¹³² Adolphe, A, van Golder C. and Blaszyznyski, A (2019), ‘Examining the Potential for Therapeutic Jurisprudence in Cases of Gambling-Related Criminal Offending in Australia’ 31(2) *Current Issues in Criminal Justice* 236, p 240.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Office of Crime Statistics and Research, Government of South Australia (2017), *Gambling Intervention Program Trial: Evaluation Report* p.8, cited in Adolphe above n 132.

¹³⁶ Ibid

¹³⁷ Ibid, p.21.

¹³⁸ Ibid, p.8.

It also can include violent offences, which recent research suggests is committed by ‘problem gamblers’ at higher than expected rates, but is likely to be subject to under-reporting.¹³⁹ A broadened scope in turn is more likely to facilitate access to treatment, including to wider services which can address the complex issues intersecting with gambling harm.

Although the operation of this specialist court list has been relatively brief, evaluators and the presiding Magistrate have deemed the experience a major success. From July 2015 to April 2017, 27 offenders were referred for the gambling intervention run by the court. Of those referrals, 23 defendants were accepted into the program (96 per cent).¹⁴⁰ In terms of completion rates at the time of the evaluation, 11 had completed therapy and 10 were still in treatment. Only one person had withdrawn and opted to be sentenced without completing the program.¹⁴¹ The evaluation also found that all gamblers who accepted intervention had experienced a reduction of gambling harms across the course of treatment. Ten participants had their matters finalised, 9 of whom received a non-custodial sentence, a further indication of the program’s legal and economic benefits.¹⁴²

6.4 Corrections and post-release

Although the CIJ’s 2017 report did not make specific recommendations for correctional facilities and parole boards, it nevertheless encouraged the continued development of mechanisms to link gamblers more effectively with support across multiple agencies in the criminal justice system. Even where specialist treatment is available in custodial settings, however, studies have found that not all eligible people in prison were being referred to gambling treatment support services or, where they were referred, were finding it useful.¹⁴³ Thorough program evaluation is therefore critical to delivering effective gambling services in the criminal justice system and in custody.

Linking prison populations with gambling support and treatment in custody is also critical for building a bridge beyond custodial settings. Training of prison staff and personnel to identify gambling harm among those in contact with the criminal justice system are similarly key. Given the stigma associated with disclosure of gambling – as well as the potential for people with gambling problems to assume that they may be able to address issues on their own - a further way to improve the response of justice systems to the interrelated issues of gambling and crime is to bolster financial counselling services in prisons.¹⁴⁴

One positive example of this has been the Centre for Innovative Justice’s delivery of financial counselling services for women at Dame Phyllis Frost Centre (DPFC), Victoria’s maximum security women’s prison. In partnership with MHLC’s Inside Access Program, the CIJ’s pilot involved the provision of weekly information sessions on debt management and credit reports; one on one appointments; and casework.

¹³⁹ Adolphe, et al, above n 6, 408.

¹⁴⁰ Adolphe et al, above n 132.

¹⁴¹ Ibid p.15.

¹⁴² Ibid p.24.

¹⁴³ Perrone et al, above n 1.

¹⁴⁴ Financial Counselling Australia, above n 108, p.22.

The CIJ's pilot collaborated with other financial counsellors providing targeted services into DPFC,¹⁴⁵ although it worked primarily with women on remand, as this was identified as a service gap. The CIJ's financial counselling pilot found that building rapport with people in custody, including through continuity of service, was crucial to effective service provision, as well as to the development of trust. The earlier that referrals to the financial counsellor could occur in a person's time in custody, the earlier that work could commence – including through the delivery of 'quick wins' which would contribute to this sense of trust and confidence.

This in turn enabled the disclosure of a spectrum of gambling harms and associated referrals to appropriate services. For example, of the 110 clients seen over a 10 month period by the CIJ's pilot service, 39% disclosed some form of gambling harm, including harm experienced as a result of a family member's gambling. Of that cohort, 72% in turn identified gambling as having a direct relationship with their offending, suggesting a more significant form of problem gambling.¹⁴⁶ Referrals were then able to be made to relevant Gambler's Help support in custody, or in the community where the client were nearing release.

Although provision of financial counselling is not formally linked with other services in custody, including Gambler's Help therapeutic services, this pilot demonstrated the value of greater alignment of financial counselling and therapeutic gambling counselling services to enable more opportunities for positive intervention. Just as importantly, it signalled the value of linking clients with relevant services in the community post-release. Important to note here are findings from a 2020 report by Financial Counselling Australia which suggests that a significant increase in the demand for financial counselling services is resulting in unmanageable caseloads, stress and burnout across the profession. Any introduction of financial counsellors within the criminal justice system should therefore be cognisant of these challenges.¹⁴⁷

7 Conclusion

Given that opportunities for gambling and associated harm may be increasing - especially through the combination of new online gambling platforms, as well as through the impact of a serious economic downturn in the wake of COVID-19 – the need to mitigate the likelihood of further gambling harm is becoming more apparent.

As this Issues Paper aims to highlight, this includes recognising contact with the criminal justice system as a form of gambling harm and, where relevant, using this contact as a form of positive, rather than negative, intervention. Possible windows for intervention at the front end of the justice system include the potential introduction of gambling screening tools at the point of arrest to link people with referrals to treatment services, as well as raising awareness amongst legal practitioners about the intersection of gambling and crime in the lives of their clients to ensure appropriate referrals and support.

¹⁴⁵ At the time these included financial counsellors from Good Shepherd, the Australian Vietnamese Women's Association and Banyule Community Health.

¹⁴⁶ See a discussion of these issues in a recent webinar hosted by the CIJ, Centre for Innovative Justice, above n 8.

¹⁴⁷ Financial Counselling Victoria, (2020) *Counting the Costs: Report on financial counsellor stress and work overload* <<https://fcvic.org.au/publications/counting-the-costs-report-on-financial-counsellor-stress-and-work-overload/>>.

Proposals for addressing gambling harm at the middle stages of a gambler's interaction with the criminal justice system include reduction in the non-parole period by way of 'special circumstances'; the adoption of a specialist gambling streams to divert offenders from custody and facilitate gambling treatment; and, more generally, courts considering the relevance of emerging clinical understanding of gambling to mitigate sentence where appropriate. This includes the imposition of community-based, rather than custodial, sentences as recommended by the Australian Law Reform Commission nearly 15 years ago. Here the CIJ notes that any shift in judicial views from seeing gambling as a 'choice', rather than as a form of compulsion, will depend considerably on an appropriate test case being run before a relevant court.

Measures relevant to the back end of the criminal justice system include increasing access to quality gambling treatments in prison, as well as facilitating awareness of, and access to, financial counsellors at the beginning and towards the conclusion of a person's time in custody, as the CIJ's pilot program so clearly confirmed.

While clinical assessments of gambling harm wait to be fully recognised by Australian courts - including through the appropriate alignment of evidence and legal argument - criminal justice system contact should not see this harm further compounded by the justice system's response. Instead, people at the intersection of gambling and offending need to experience the justice system as a positive intervention – particularly when the current economic climate means that justice-related gambling harm is likely to become more acute in the months, if not years, ahead.

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