



**Community
driven justice.**

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To:

The Commissioners
Victorian Law Reform Commission

Submission regarding the Legal Privilege and Integrated Legal Services Inquiry

Fitzroy Legal Service welcomes the opportunity to contribute to the Victorian Law Reform Commission's inquiry into reforms to privilege for integrated legal assistance services.

Who we are

Established in 1972, Fitzroy Legal Service ('FLS') is Victoria's longest standing community legal centre, championing justice for members of our community facing economic, cultural or social oppression. With a deep commitment to community-driven change, we provide individuals and communities with access to justice when they need it most and boldly agitate for high-impact policy and legislative reforms.

FLS delivers a range of integrated legal assistance services across a variety of settings and in a variety of areas of law. This includes our long-standing Drug Outreach Lawyer program, our Women's Integrated Legal Outreach program, and Health Justice Partnerships, including with the Connie Benn Early Learning Centre, St Vincent's Hospital, North Richmond Community Health, cohealth Innerspace and UnitingCare Regen.

Current Difficulties of Managing Privilege in Integrated Legal Assistance Services

The design and delivery of integrated legal assistance services have been constrained, in part, by legal and non-legal practitioners seeking to avoid the inadvertent waiver of privilege. The intensive management of privilege can limit the depth of integration. To preserve legal privilege, integrated legal assistance services are forced to choose between "loosely" and "closely" integrated models. The current legal framework, including the dominant purpose test, makes it hard to design services that sit between the binary of

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“loosely” and “closely” integrated. This limits the ability of integrated services to be client-centred and client-led.

Key Recommendations

Fitzroy Legal Service:

1. Supports the creation of a new category of legal privilege for integrated legal assistance services.
2. Does not support legislating categories of “closely” or “loosely” integrated services - these categories need to be disrupted.
3. Supports a new category of legal privilege applying across all integrated service settings.
4. Believes that introducing standalone social service professional privilege (option 1), particularly if qualified, will not improve the delivery of integrated legal services.
5. Believes that, if introduced, a standalone social service professional privilege (option 1) should be introduced in addition to a new category of legal privilege (option 2).
6. Any safety exception for social service professionals should protect against serious harm while preserving the integrity of the privilege.

Integrated legal assistance services involve the delivery of legal and social services by professionals working for the same organisation or partnership. Loosely integrated legal assistance services impose strict information barriers between lawyers and social service professionals providing services to clients. Closely integrated legal assistance services promote the joint delivery of legal and social services to clients at the same time, sometimes after obtaining client consent to potentially compromise privilege. How easy or difficult is it to implement these two models of integrated legal assistance services in practice?

It is difficult to deliver integrated legal services across the spectrum of integration without compromising privilege. In the current legal framework, it is easier to maintain privilege if services are contained to either end of the spectrum. This can impact client experience of integrated legal services because:

1. Clients may not be as candid in their instructions if they are concerned about privilege;
2. Lawyers and social services professionals may limit information sharing or impose information barriers;

3. Clients may decide to waive privilege to gain access to more deeply integrated models of service in circumstances where they otherwise would not have;
4. Clients may decline social service supports or decline service altogether because they are concerned about how privilege can be managed or maintained in an integrated setting.

Fitzroy Legal Service delivers a range of integrated legal assistance services across a variety of settings and in a variety of areas of law. Each program is distinct and involves varying degrees of integration across the spectrum – from "fully" integrated to "loosely" independent/cooperative. This includes:

- Where non-legal social service staff are employed by Fitzroy Legal Service to deliver integrated social services to clients alongside lawyers (closely integrated); and
- Where legal services are delivered in outreach settings in partnership with external social services organisations (loosely integrated).
- Where legal services are delivered as one part of a coordinated health and wellbeing case management social service in a health setting (HJP) (towards closely integrated)

Each model of integrated legal assistance presents unique benefits and challenges for maintaining legal privilege. The depth of integration is often limited by legal and social services practitioners balancing confidentiality, privilege, information sharing (eg FVISS, CISS) and mandatory reporting requirements.

Case Study – Women’s Integrated Legal Outreach
Fitzroy Legal Service’s Women’s Integrated Legal Outreach (WILO) program provides gender-informed, integrated legal and social work support to criminalised women and trans and gender diverse people who have significant and multiple complex needs. The program provides legal representation, assertive social work outreach, cross-referral pathways and holistic support with the aim of breaking cycles of

incarceration, improving wellbeing, and addressing factors that contribute to gendered experiences of criminalisation.

Fitzroy Legal Service completed an evaluation of the WILO program in September 2023 and reflections of legal and non-legal staff working in the program indicated that navigating the legal professions' obligations of protecting legal privilege is a common challenge raised in integrated practice settings, and the WILO program was no exception:

“One thing I think all parties were a bit conscious and a bit nervous about was protecting legal professional privilege, because they were very conscious about not creating (a) situation that would breach that.”

What are the benefits of integrated legal assistance services for clients, service providers and the justice system? Do you have case studies, examples or other evidence you can share?

Integrated legal assistance services provide coordinated responses to legal and non-legal needs. The co-location of legal services allows lawyers to be available where the most vulnerable in our community are likely to present for help. Clients have improved access to justice and access to services because the model collapses the barriers between traditionally siloed and inaccessible systems of justice, health, housing and other social services. Clients often have established relationships with health, housing, social and other service providers and trust can be transferred to more easily and rapidly build rapport with clients.

Scenario – WILO

Zoe was referred to the WILO program with a criminal matter that involved her abusive ex partner as the co-defendant. Zoe met with the WILO Lawyer and Social

Worker, where they explained their respective roles in supporting her with her legal matter and other connected needs, and Zoe consented to having the team share information so they could work effectively together on her behalf.

During early conversations with Zoe, the WILO team learned that the dynamic of control and power that Zoe's ex-partner had over her at the time was a key factor in Zoe's involvement in the criminal matter. Zoe also shared that she was in a new relationship and pregnant with their first child.

As a family violence survivor, Zoe's pregnancy, and the potential for contact during the court matter with her ex-partner put Zoe at high risk. Because of this, the WILO team advocated for Zoe to attend the hearing remotely. The WILO team also supported Zoe with the police application for an Intervention Order, as well as how to report a breach, including what the process would look like. A breach did occur, but Zoe decided not to report it, as she felt this would ultimately keep her safer in her circumstances. Knowing what to expect was key to helping Zoe come to a decision that was right for her.

The WILO Social Worker helped Zoe to engage throughout the legal proceedings with practical support, like transportation to court and letters of support, but also spent a significant amount of time building a relationship with Zoe.

As Zoe's relationship with the WILO team strengthened, she shared more about her life and circumstances. The WILO Social Worker learned from Zoe that she had grown up in care and had a long history of family violence. Knowing about this history of care and trauma helped the team contextualise Zoe's risk and better understand what other supports were needed. Understanding this history and the risk of Zoe's baby ending up in care, the Social Worker talked Zoe through some of the ways she could assist Zoe to prepare for the baby. The WILO Social Worker supported Zoe to access birth classes, navigate the health system, and connected Zoe in with a mothers' group for the practical items Zoe needed.

During Zoe's time with the WILO program, Zoe's financial situation became desperate. She became aware that her ex-partner had stolen her identity and

accrued huge debts in her name. Zoe couldn't access her bank account, Centrelink or Medicare – all critical to her both financially and for accessing antenatal care. Zoe proactively contacted the WILO team for help. The WILO Social Worker worked with Zoe to secure and access her bank account, get parenting payments set up and in the meantime provided her with grocery vouchers. This financial independence was even more important given Zoe's history of family violence, to ensure financial dependency did not become a barrier in the future to leaving a violent relationship.

The criminal matter was finalised and Zoe was sentenced to a good behaviour bond due to her engagement with the WILO Social Worker, likely avoiding a Community Corrections Order. The early intervention on Zoe's financial issues also likely resulted in avoided legal issues. After the matter finalised and the WILO team ensured the social supports Zoe needed were in place, Zoe exited the WILO program and had her baby. The WILO team continue to keep in touch with Zoe to check in on how she's adjusting to parenting.

*This scenario is combination of factual and legal elements of real client circumstances that lawyers at Fitzroy Legal Service have seen.

Case Study – Drug Outreach Lawyer Program

Fitzroy Legal Service's Drug Outreach Lawyer (DOL) program assists individuals with legal problems related to alcohol and drug use. In line with the holistic approach of the program, the lawyers work closely and collaboratively with members of the community and relevant health agencies to promote and focus on harm minimisation and areas of high need. Program partners across City of Yarra and City of Darebin include YSAS (Youth Support and Advocacy Service), Living Room, Inner Space, North Richmond Community Health, Odyssey House Victoria and Uniting Care ReGen.

Our drug outreach lawyers have observed that vulnerable and complex cohorts in our community who face greater barriers to justice need coordinated responses to their

whole-of-life needs. When complex needs are managed in the context and during the carriage of a client's criminal law matter this can lead to better legal, health and psychosocial outcomes for clients – including less carceral responses from the Court.

Integrated legal assistance services may compromise a client's ability to retain legal privilege and expose their private information, including through the professional reporting obligations of social service professionals. Do you have case studies, examples or other evidence that indicate how easy or difficult it is for lawyers, social service professionals or clients to manage information disclosure requirements and requests in this context?

The current legal framework for privilege, including the dominant purpose test, results in either:

- Lawyers ensuring that the communication does not include any information that is confidential to the client – to ensure that privilege is not expressly or inadvertently waived; or
- Lawyers ensuring that communications with the social service professional is for the dominant purpose of legal advice or for actual or anticipated litigation – so that privilege is preserved.

The former can result in shallow integration. The latter requires that content communicated be predominantly focused on the client's legal matter in circumstances where the client often has multiple competing priorities; legal and non-legal.

Either way, it is a constraint on the shape and nature of the service delivery. Despite privilege belonging to the client, the client has limited agency in how their information is shared if they wish to maintain privilege. The shape of the service delivery is determined by competing professional obligations rather than the client's needs.

Case study: Family Law and Family Violence Health Justice Partnership

A client is referred to an outreach lawyer from Fitzroy Legal Service for family law advice by their social worker at a Hospital where FLS is part of a Health Justice Partnership (HJP). The client is 8 months pregnant and recently separated following an incident of family violence committed by her former partner.

The client left the home and has been sleeping rough in her car. She accumulated significant parking fines and other infringements for parking her car in places for extended periods. At the beginning of the pregnancy, she eliminated her illicit substance use, but in the weeks since separation she has relapsed into active use.

The client has multiple complex intersecting legal and non-legal needs. The lawyer and the social worker want to meet with the client together to start to unpick those needs and prioritise next steps. But the lawyer is reluctant to have the social worker in the room. She is concerned that it will not be possible to contain the dominant purpose of the appointment to the provision of legal advice or in preparation for litigation. The lawyer is also concerned that the social worker may have information sharing obligations under the FVISS or CISS or reporting obligations. The client is less likely to be candid in her instructions if there is a risk of the social worker disclosing confidential information to a department/agency. The lawyer decides to meet with the client alone.

At the appointment, the client focuses on her immediate needs as she prioritises them: her pregnancy, the impacts of the family violence and her housing need. The client would have significantly benefitted from having the social worker in the room to address these needs.

The lawyer can only offer a further appointment with the social worker to discuss those issues at another time. There is limited room for trauma-informed, client-

centred approaches in loosely integrated settings when legal privilege needs to be so intensively managed.

Should the law enhance protection for communications between clients, lawyers and social service professionals in integrated legal assistance service settings? Why or why not?

If communications between clients, lawyers and social service professionals were better protected, it would allow for and promote deeper service integration. The current dominant purpose test:

- Discourages information sharing between lawyers and social service professionals in loosely integrated models; and
- Encourages intensive information sharing in closely integrated models where professionals rely on the dominant purpose test to maintain privilege.

This “all or nothing” approach to maintaining privilege prevents flexibility in the interdisciplinary partnership to respond to client needs and can limit the benefit that clients derive from truly integrated services.

The categories of “loosely” and “closely” models of integrated legal assistance is an artificial product of the current legal landscape, including the dominant purpose test. The categories would no longer be necessary if legal privilege was extended to capture social services in integrated legal assistance services. Instead, integrated services could spread themselves across the entire spectrum of integration.

Are you in favour of establishing:

- a. a social service professional privilege that would enhance protection for communications between clients and social service professionals in loosely integrated legal assistance service settings and/or***
- b. a new category of legal privilege that would enhance protection for communications between clients, lawyers and social service professionals in closely integrated legal assistance service settings?***

Why or why not?

Fitzroy Legal Service is not opposed to the introduction of a standalone social service professional privilege **if it is in addition** to a new category of legal privilege in integrated legal assistance service settings.

Fitzroy Legal Service does not believe that a standalone social service professional privilege on its own will adequately/appropriately address the problems identified because:

- It would sit outside the lawyer client relationship and would need to be managed and maintained entirely by the social service professional who operate in a less-regulated landscape and often with constraints on resources. How that privilege will be managed by the social services provider is out of the lawyer's hands, particularly where the integrated legal assistance service is a partnership between a legal service and an external social service organisation.
- Lawyers will be reluctant to communicate information that is confidential to a client in a loosely integrated model if they do not know how the parallel professional privilege will be applied.
- It creates a parallel professional privilege – not an intersecting one that is responsive to the specific demands of the integrated legal assistance model.
- Lawyers will still need to advise clients about the different forms of privilege and the various exceptions that may apply in relation to certain disclosures.
- If a qualified social service professional privilege is introduced, lawyers are likely to take a conservative approach to communicating confidential information due to the potential future judicial override and concern about whether the social service professional will have the capacity and resources to uphold privilege if compelled to produce.
- It will still constrain the depth of integration between services and likely maintain the current polarised “all or nothing” approach to sharing information.

Fitzroy Legal Service is in favour of creating a new category of legal privilege for integrated legal assistance service settings. This would allow/encourage:

- Clients to lead the direction of the discussion about their legal and non-legal needs without worrying about inadvertently waiving privilege.
- Lawyers to be involved in case conferences and care team meetings with social service professionals where the dominant purpose is not the provision of legal advice or in preparation for actual or anticipated litigation.
- Social service professionals to participate in conferences with the client where the presence of non-legal supports would assist the client.

- Coordination of the services provided by lawyers and social service professionals to ensure that they are consistent and mutually reinforcing (working towards common goals).

If a social service professional privilege is introduced without a new category of legal privilege for integrated settings, Fitzroy Legal Service believes it should be absolute, not qualified.

If you support a social service professional privilege for loosely integrated legal assistance service settings, do you have a view on the scope, elements, eligibility requirements or implications of the privilege? If so, what is it?

It is not useful to define categories of “loosely” and “closely” integrated models and find solutions for each.

In relation to a potential social service professional privilege, if it is to be introduced, Fitzroy Legal Service believes:

- It should be introduced in addition to the proposed new category of legal privilege for integrated legal assistance settings.
- It should be absolute. A new qualified privilege for social service professionals will not have meaningful impact on the delivery of integrated legal assistance. If qualified, clients of integrated legal assistance services would not have any certainty about how it would be maintained.
- Confidential information should be broadly defined as information that is not public and is shared in confidence with the social services practitioner and to which the ordinary person would reasonably expect to be held in confidence.
- Communications should also be broadly defined to capture the range of ways in which confidential information may be communicated in an integrated setting.

If you support a new category of legal privilege for closely integrated legal assistance service settings, do you have a view on the scope, elements, eligibility requirements or implications of the privilege? If so, what is it?

We are particularly keen to hear your views on the definition of closely integrated legal assistance services, eligibility requirements for the privilege, a safety exception to the privilege, and the implications of the privilege for social service professionals.

It is not useful to define categories of “loosely” and “closely” integrated models and find solutions for each. These binary categories have evolved in response to the current legal privilege framework.

There is limited information sharing in a loosely integrated model:

- There are information barriers between lawyers and social service professionals;
- Confidential information is only shared by a lawyer to a social services professional with the consent of the client;
- The client understands that privilege may be waived in relation to any confidential information shared by the lawyer with the social services professional;
- Social services professionals are less likely to participate in conferences and communications between lawyers and clients.
- Lawyers are less likely to participate in case conferencing and care team meetings with social service professionals and other non-legal supports.

Currently the legislative landscape encourages significant information sharing about a client's legal matter in closely integrated models because of the dominant purpose test. If a new category of privilege were to be created for integrated legal assistance settings, then it should not be limited to closely integrated services settings. It should apply to all integrated service settings to encourage a broader range of integration models. The current legislative landscape is pushing models of integrated service delivery to each extreme on the spectrum of integration. If the new category of privilege is limited to closely integrated models and defining “close integration” and “loose integration” it does not disrupt the current binary or encourage deeper integration for more loosely integrated services. In Fitzroy Legal Service’s view, a new category of privilege for integrated legal assistance ought not refer to “closely integrated” services or define “close integration”.

“Safety exception”

Legal privilege is currently subject to the exceptions at sections 121-126 *Evidence Act 2008*. Fitzroy Legal service does not support any change to the statutory exceptions to legal privilege for lawyers or social service professionals working in integrated settings.

If a new legal privilege is created for integrated legal assistance services, Fitzroy Legal Service supports:

- Social service professionals in integrated legal assistance settings being exempt from information sharing, FVISS and CISS, even if their organisation is an Information Sharing Entity;

- Social service professionals being exempt from mandatory reporting obligations of child abuse under the *Children, Youth and Families Act 2005* in integrated legal assistance services;
- The codification of a “safety exception” describing the circumstances in which social service professionals may disclose confidential information, including where a person is at risk of harm.

Lawyers have a higher “threshold” than social workers in relation to disclosing confidential information when a person is at risk of harm (ASCR 9.2.5). Fitzroy Legal Service does not propose any change to the current thresholds for lawyers and social workers – even though one is higher than the other. Provided the requirement to report or disclose is not mandatory and the differing thresholds are clearly defined and can be explained to clients. Codifying the “safety exception” threshold for social service professionals will assist in providing certainty for clients and practitioners in integrated legal assistance setting.

Scenario – WILO

Women’s Integrated Legal Outreach client, Emma*, is a 29-year-old woman charged with drug possession. Emma is the sole parent of child. Emma meets with the lawyer and social worker for an initial integrated appointment and then has 1:1 sessions with the social worker in the community and via phone. The social worker also attends each scheduled court date with Emma and her WILO lawyer to provide emotional support throughout the legal process. These appointments enable a therapeutic relationship to be built, and trust to be established between the social worker and Emma.

The social worker supports Emma to link into mental health supports and secure housing and helps her plan ahead for attending court dates.

Emma then discloses to the social worker that she has recently relapsed into heroin use, following an experience of significant family violence. Emma is fearful of child

protection involvement and remembers child protection being involved with her family when she was a child.

Emma tells the social worker that she has used heroin while her child was at home on 2 occasions, leaving her child unsupervised for a few hours. Her child was not physically harmed, but Emma reflects that if an emergency had occurred, she would have been unable to respond.

The social worker understands the risk to her child to be within the context of Emma's trauma experience and substance use as a survival mechanism, perpetuated by a high stress period of family violence.

The social worker consults with a colleague in relation to keeping her child safe and then supports Emma to create her own plan to engage with additional supports, taking the least intrusive path for the family to remain together and meaningfully supported. The social worker notes that Emma has been generous in sharing this information and aims to maintain the therapeutic relationship while supporting Emma to implement community and family led support. Emma agrees to engage with an AOD service, develops a safety plan around when she uses drugs (not while caring for her child), and identifies family support available for high-risk periods for relapse – stating she can call her sister to care for her child if needed.

Emma initially forms a good relationship with her AOD worker but finds it hard to keep appointments due to managing so many stressors at once. Emma then discloses to the social worker that she has relapsed and left her child unsupervised multiple times for long periods - and has not been able to action a plan in relation to seeking family or community support to care for her child. Emma also states that she does not want to engage with AOD supports anymore, and states that “my child isn't impacted by (my) drug use”.

At this point, the social worker must explain to Emma that they are ethically obliged to report to Child Protection, as her child is continually unsupervised and unable to care for herself.

This scenario demonstrates the importance of extending legal professional privilege to social workers within integrated legal services, as Emma's disclosure and the onboarding of supports was only possible due to the relationship built throughout the support period. However, it also illustrates why any legislative extension of privilege should include an exception permitting disclosure where a social worker reasonably believes a child is at risk of significant harm. It is noteworthy that a report should be made only after less intrusive, community led and culturally responsive interventions have been exhausted. This structure would support integrated practice, while enabling social workers' ethical responsibility to protect children to be upheld, where risk to children becomes unable to be mitigated by community led supports.

*This scenario is combination of factual and legal elements of real client circumstances that lawyers at Fitzroy Legal Service have seen.