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Foreword

Access to justice is the glue that binds our democracy and civil society together.

A democratic society is characterised by appropriate restraints on power, equal treatment before the law and equal access to the protection of the law – for all citizens. Just as defence or police spending is important to keep citizens safe and to protect our way of life, so too is spending on our society’s safeguards.

As the adage goes, the true personification of justice is blind. Justice should be dispensed without fear or favour, regardless of money, wealth, fame, power or identity. Redressing the power imbalances that stem from a person’s lack of capacity, or from unequal access to financial resources, is at the heart of a modern day justice system.

The provision of a formal and independent legal aid scheme upholds these democratic ideals. It safeguards our rights to a fair process and the protection of the law, and enables people to have a real say in the resolution of their legal problems.

Legal aid makes society fairer. Without it, many people would be left to deal with the legal system on their own, take on powerful organisations and governments without support, represent themselves in court, or forfeit their rights entirely. At the heart of it, our purpose is to ensure disadvantaged people can benefit from the same legal rights as everyone else.

However, this is not the limit of our impact. We know that remediying injustice for an individual can have an important curative effect on the protection of rights and freedoms of all citizens and the justice system itself. Holding powerful interests to account in a way that spotlights and improves the administration of justice and the use of power, in all of its conferred forms, benefits us all. The provision of legal aid can also prevent or reduce the escalation of legal problems, which reduces spending on other government services such as health, housing and welfare. Put simply, legal aid is a sound investment for all members of society – not just those directly assisted.

Given our important role, we know we must earn and maintain trust. Living up to our vision and values relies on consultation and collaboration with our justice and community sector partners and the community itself, which is entitled to openness and transparency with respect to the activities we undertake in its name.

The institutions that comprise the Victorian justice system are strong. Civil society is alive and well, but some poor justice policy choices and underinvestment are producing perverse outcomes and inequities. We can do better to build a fairer, more cohesive society, especially for those who need the protection of the law most.

Past reviews and conclusive independent evidence already exists about how to improve our justice system to best meet our community’s needs. The scrutiny this review provides offers an invaluable opportunity to unlock the potential of Victoria’s justice system, to build on its current strengths and address weaknesses to improve access to justice for all Victorians – now and into the future.

BEVAN WARNER
Managing Director
Executive summary

Access to justice is the practical realisation of the rights that exist to protect and serve all citizens. Improving access to justice has the potential to make our society fairer, more equal and more cohesive. An accessible justice system is a public good from which we all stand to benefit.

For many Victorians, access to justice is illusory. Interactions in the justice system often occur in circumstances where there is a significant power imbalance — be it with the state, powerful corporations or other individuals. Our system is one where a person’s ability to access a fair outcome and due process is often predicated on the financial and personal resources at their disposal.

In a deeply unequal society, government-funded legal assistance plays an essential role in redressing power imbalances and ensuring that people with limited financial or personal capacity have access to just outcomes and processes. Victoria Legal Aid plays a central role in setting priorities for and arranging government-funded legal assistance.

The Access to Justice Review provides a welcome opportunity to consider how the sector can best address the significant legal need that exists within our community and reduce the barriers that inhibit access to justice.

Our submission puts forward 10 touchstones for improving access to justice in Victoria, with 29 recommendations to support the realisation of these touchstones.

Part A: Taxpayer-funded legal assistance

In Part A of our submission, and in response to Terms of Reference 6, 7 and 8, we consider the availability and distribution of funding amongst legal assistance providers, coordination between service providers to minimise unnecessary duplication, the role of Victoria Legal Aid and the operation of the broader justice system.

Availability and distribution of funding

Taxpayer funding for legal assistance is finite. To maximise its benefit, both to individuals and to the wider community, funding needs to be distributed in a way that ensures it helps those who need it most.

We support the distribution of government funding through a mixed model of delivery. The mixed model utilises the respective strengths of a salaried staff practice, private practitioners, community legal centres and Aboriginal and Torres Strait Islander legal services.

Victoria Legal Aid plays a central role in allocating funding between mixed model providers and between different matter types. We set guidelines about who gets legal assistance, for what legal matters, to what level of intensity, and at what cost. In accordance with these guidelines, we facilitate grants of legal assistance through private practitioners and our in-house lawyers. We also fund community legal centres.

As an independent statutory authority, we are well placed to carry out these functions. Independence provides a buffer between decisions about the allocation of funding, either to an individual through a grant of assistance or between service providers, and the government of the day. Our service delivery informs allocation of funding across the mixed model and between matter types to ensure limited funds are used to assist those who need it most.

The way in which we distribute funds between mixed model providers shows strong support for community legal centres and private practitioners. We consider that the current distribution of
funding between mixed model service providers is appropriate and effectively leverages the strength of each provider.

Community legal sector reform and collaborative service planning has the potential to improve the distribution of funding to ensure centres are best placed to meet current and future demand. We advocate for a ‘bottom up’ rather than ‘top down’ approach to sector reform, and aim to support rather than mandate greater coordination and joint service delivery. This approach has proved effective, and will be further enhanced through new work to improve evidence-based sector planning between community legal centres and VLA’s in-house practice.

The ability to effectively distribute funding between service providers across the state is constrained by the lack of evidence on legal need in Victoria. There is an opportunity to improve the evidence-base, and better leverage the potential of technology and innovation in the delivery of legal assistance services, through a dedicated, independent research and innovation function in Victoria.

While there is scope to improve evidence-based funding distribution, funding can only be stretched so far. There is a critical underinvestment in government-funded legal assistance, which inhibits the effective operation of the sector and deprives tens of thousands of Victorians access to justice. As well as the individuals who miss out, the wider community suffers socially and economically from this underinvestment with the vast costs incurred elsewhere in the system and in our community.

Various independent reports and inquiries have called for additional investment to improve the operation of the sector, most recently the Productivity Commission’s 2014 Inquiry into Access to Justice Arrangements. While there is a clear need for additional investment nationwide, Victoria is a particularly poorly funded state — at both the Commonwealth and state level — when compared to New South Wales. We call for an additional investment of $71.97 million per annum into the legal assistance sector, with $42.01 million coming from the Victorian State Government.

Building on our current strategic directions, additional investment would enable us to:

- **Reduce the crushing pressure on existing services**: to ensure that services are of a high quality and meet clients’ needs, and encourage holistic lawyering so that issues underlying people’s legal problems are properly addressed.
- **Ensure that services can cope with increasing demand, both now and in the future**: to respond to demand in areas where forecasting predicts that we will face increasing demand due to policy, legislative or broader societal changes.
- **Reduce barriers to eligibility for legal aid services**: to ensure financial eligibility reflects the reality of disadvantage, poverty and the real cost of legal services.
- **Expand Legal Help as the main entry point to the legal assistance sector**: to provide more Victorians with information, advice and triage through our Legal Help phone line and website platforms.
- **Expand specialist civil and family law services**: to expand specialist civil and family law services through VLA and community legal centres, especially in regional areas and outer-suburban growth corridors.
- **Ensure private practitioners are appropriately remunerated**: to ensure that private practitioners are appropriately remunerated for the time required to provide high-quality work and to incentivise experienced practitioners to carry out legally-aided work.

**Duplication of services**

Perceived duplication should be assessed within its context. This involves considering whether the service or information is targeted to the unique needs of a particular client group, and its place within a wider service delivery model. Legal information available through our website forms a critical part
of our service delivery model. It enables us to divert our higher-capability users away from our more intensive and costly services, and provides an entry point for people who are eligible for our other services. We support a focus on coordination and information sharing to reduce unnecessary duplication.

The role of Victoria Legal Aid and the operation of the broader justice system

Various factors influence the current service delivery model and our use of the mixed model. These include: the framework provided by the Legal Aid Act 1978 (Vic), historical settings and fundamental principles about access to justice; our board’s Unifying Principles; our priority client framework; requirements under government funding agreements and other legislation; external legislative and policy changes; and, intelligence gleaned from service delivery, stakeholders and the evidence base.

The VLA Board is responsible for ensuring legal assistance is provided in the most effective, efficient and economical manner. Our skills-based, rather than representational board, is best placed to carry out this statutory objective; this structure was a deliberate decision informed by the ineffectiveness of a representational board prior to the change to the Act. We seek to ensure stakeholder input in various other ways, including through our community consultative committee (now the Sector Innovation and Planning Committee). We support a modest expansion of our board membership from five to seven members to increased diversity in skills.

To ensure we are delivering services in the most cost-effective manner and to deliver the greatest value for taxpayer money, we are in the process of developing and implementing a range of performance monitoring and quality tools. These include tools to measure the relative cost of providing services between staff, private practitioners and community legal centres; determining the average actual cost of providing a legal aid service; measuring and monitoring the quality of services; and, evaluating the impact of services on clients and the wider justice system. This exercise also includes assessing the different ways in which cases are managed to completion and ensuring services are designed in a way that is appropriate and proportionate to need.

The information and insights we glean from these tools and enquiries will allow us to assess our current service settings. It may result in adjustments to the way in which services are delivered and the role of different parts of the mixed model; assessment of whether time allowances and fees paid to private practitioners are sufficient; and, whether service parameters – including the structure of fees structures – appropriately incentivise early appropriate resolution and high quality services.

Our service model has evolved significantly in recent years to best meet the needs and capabilities of our clients and the community, while balancing the need to ensure a sustainable financial future. We have moved towards a more graduated model of service delivery, to ensure we can provide some form of assistance to more people and restrict our most intensive services to those who need them the most. This has included expanding our Legal Help contact centre, and looking at ways to reduce the need for one-on-one services through strategic advocacy and law reform.

Improving the effectiveness and efficiency of the wider justice system

Our ability to operate in an effective and efficient manner is constrained by the operation of other parts of the justice system. Legislative or policy changes have a significant downstream impact on demand for legal aid services. This impact is not currently taken into account in government decision-making and means we face increasing demands without the necessary additional support or investment. We call for the introduction of justice impact assessments as one way to assist us with the challenging task of managing the fixed legal aid fund.

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Inefficiencies in the operations of courts and tribunals also have a significant bearing on our ability to operate in an effective and efficient way and to get the best outcomes for disadvantaged clients. This includes listing processes across a number of courts, and in the Victorian Civil and Administrative Tribunal (VCAT). Improving listing processes would enable a more targeted approach and more efficient use of our limited resources.

Given our role in the delivery of summary crime justice services, we feel the effects of an overburdened, ‘churn-orientated’ summary crime system. Additional investment and reform of the summary crime system would have the greatest impact on the community, compared to other jurisdictions. Delays and lack of transparency in the movement and lodgement of accused persons has created a chaotic court environment, significantly impacting on the ability of legal assistance services to function effectively and limiting our clients’ access to a fair process and the best outcomes.

To reduce the pressure on the summary crime jurisdiction in the medium and long-term, there needs to be a greater investment in specialist and problem-solving courts and reinvestment models that address the causes of criminal offending, interrupt offending cycles and build safer communities.

In family law matters, families and children are vulnerable to slipping through the cracks as they attempt to navigate a system split across state and Commonwealth jurisdictions. While we are piloting innovative ways of providing greater continuity of assistance for families with family law, youth crime and child protection issues, significant opportunities exist for the State Government to make changes that would improve what is currently a fractured and siloed system. We refer to our recent submissions to the Family Law Council’s Terms of Reference on Families with Complex Needs, and call on the State Government to take steps to address silos at the state level and advocate for Commonwealth changes or changes that require collaboration between state and Commonwealth governments.

Our ability to provide an effective and efficient service to clients in regional areas is limited by the increased and additional barriers to access people in these areas face purely because of where they live. This includes reduced or sub-optimal access to both courts and other legal services, and non-legal support services that enable better outcomes in the justice system. Improving access to justice in Victoria must include ensuring courts and related support services in regional and outer-metropolitan areas are adequately resourced and available on an equal basis regardless of physical location.

**Part B: Other services to support access to justice**

In **Part B** of our submission, we provide insights based on our practice experience to address Terms of Reference 1, 2, 3, 4, 5 and 9. These terms relate to various parts of our existing access to justice arrangements, including: the provision of legal information and advice to identify, diagnose and triage legal problems; alternative dispute resolution; the role of VCAT in small civil claims; pro bono legal assistance; and, services to support self-represented litigants.

A well-recognised main entry point, supported by targeted and specialist entry points, is an essential part of providing access to justice for all Victorians. Our Legal Help phone line is the largest entry point to the Victorian legal assistance sector and provides a gateway to the Victorian community for legal triage, information, referral and advice across a range of legal issues. Legal Help hosts around 20 specialist languages lines, staffed by bi-lingual staff, which has a demonstrable impact on access for culturally and linguistically diverse Victorians. There is scope to improve the effectiveness of
triage across the legal assistance sector by developing and growing Legal Help as the main entry point.

Legal information should be targeted, underpinned by a clear strategy and available in various forms to meet a diverse range of needs and capabilities. More targeted strategies are needed to effectively support people of lower legal capability. Working closely with non-legal support workers can be an effective way to help people to identify their legal problems and get connected to the most appropriate assistance. We support approaches that leverage off intermediaries, including colocation and targeted outreach.

We support the use of alternative dispute resolution (ADR) in appropriate situations, where appropriate safeguards and exemptions are in place to ensure power imbalances do not go unchecked. Dispute resolution should be expanded to in accordance with recommendation in the eight-year review of the Charter of Human Rights and Responsibilities Act 2006 (Vic). We support reforms that improve the accessibility, effectiveness and efficiency of ombudsmen services and their expansion. We also support improving the accessibility of VCAT with respect to small civil claims, including through fee waivers and the creation of an internal appeals mechanism.

We support the appropriate use of pro bono services to complement rather than substitute government-funded legal assistance. With respect to self-represented litigants (SRLs), we note there is a lack of evidence as to their characteristics, including why they self-represent. However, our practice experience suggests SRLs are motivated by range of reasons, including the unavailability of legal assistance services and, in regional areas, issues of conflict.

This submission uses case studies based on the personal experiences of a number of our clients. The experiences of these people speak to the fact that access to justice is far more than words on a page or an abstract concept; it is the very real, difficult and deeply affecting experiences people face in their interactions with the justice system. We thank those people who have allowed us to share their stories to assist in agitating for improved access to justice for all Victorians.
## Touchstones for improved access to justice in Victoria

| Touchstone 1: | A more vibrant joined-up legal assistance and allied support sector |
| Touchstone 2: | Bigger and better access to Legal Help’s online and telephone services, as the main entry point to the legal assistance sector |
| Touchstone 3: | Reduced financial eligibility barriers to legal aid to reflect the reality of disadvantage, poverty and the true costs of legal services |
| Touchstone 4: | Incentives for high-quality services and early appropriate resolution of cases |
| Touchstone 5: | More time-intensive legal and non-legal services for persons charged with summary offences to achieve non-custodial sentences where appropriate and reduce reoffending |
| Touchstone 6: | More equitable and time-intensive, specialist and integrated family and civil law services, particularly in regional and outer suburban growth corridors |
| Touchstone 7: | Commonwealth and state agencies and family-focused courts working together better to ensure acutely vulnerable families and children do not fall through the cracks |
| Touchstone 8: | More equitable access to therapeutic justice programs to break the cycle of reoffending and keep our communities safe, regardless of postcode |
| Touchstone 9: | Properly resourced courts and tribunals with processes that place citizens and court users at the centre, including through improved listing practices |
| Touchstone 10: | A strengthened evidence and innovation base to spark adaptation and improvements in the sector |
Recommendations
Our submission makes 29 recommendations to improve access to justice in Victoria.

The availability and priorities for funding the legal assistance sector

Recommendation 1 – Support VLA’s role in sector planning
Support VLA’s role in sector planning at the state and regional level and in making evidence-based decisions about allocation of resources.

Recommendation 2 – Support CLC innovation and reform
Continue to support innovation and reform in the community legal sector.

Recommendation 3 – Improve the evidence base and spark innovation
Establish an independent function to research and explore better service design.

Recommendation 4 – Increase State funding
Increase State funding by $42.01 million per annum to address critical underinvestment. This should consist of:
- an extra $22.03 million per annum to reach parity with NSW (the most comparable state or territory in Australia)
- an extra $19.98 million per annum to address the funding shortfall identified by the Productivity Commission with respect to civil and family legal assistance.

Recommendation 5 – Increase Commonwealth funding
Increase Commonwealth funding by $29.96 million per annum, being Victoria’s fair per capita share of the extra $120 million in Commonwealth funding recommended by the Productivity Commission.

Recommendation 6 – Reduce pressure on duty lawyers
Alleviate time-pressured and over-stretched services to ensure duty lawyers can provide high-quality assistance that meet clients’ immediate and future needs.

Recommendation 7 – Properly fund policies that impact on the justice system
Properly resource legal aid services to keep pace with legislative and agency-led demand.

Recommendation 8 – Reduce barriers to legal aid services
Reduce barriers to help by ensuring financial eligibility tests reflect the contemporary experience of disadvantage, poverty and the true costs of legal services.

Recommendation 9 – Expand Legal Help
Continue to grow Legal Help as the main entry point to the legal assistance sector including by providing extended hours, web-chat and greater integration with our website.

Recommendation 10 – Expand specialist family and civil law services
Expand family and civil law services for issues that most affect people’s rights, especially in regions and outer-suburban growth corridors.
Recommendation 11 – Ensure private practitioners are appropriately remunerated
Take steps to ensure that private practitioners are appropriately remunerated for the time required to provide high-quality legal aid services.

**The role of Victoria Legal Aid and improving the operation of the broader justice system**

**Recommendation 12 – Expand but retain a skills-based board**
Maintain a skills-based board, with consultative arrangements to ensure community and stakeholders’ interests are reflected in decision-making processes, but improve diversity by expanding board membership from five to seven members.

**Recommendation 13 – Promote quality legal assistance services**
Prioritise improving the consistency of the quality of legal assistance for vulnerable clients as a key factor in improving access to justice.

**Recommendation 14 – Promote early appropriate resolution of cases**
Support service parameters, practice standards and funding structures to promote early appropriate resolution of cases.

**Recommendation 15 – Measure the impact of government decisions on legal aid**
Introduce justice impact assessments in Victoria to assess the impact of government policy on the provision of legal aid services and the broader justice system.

**Recommendation 16 – Reduce inefficiencies in VCAT**
Provide for targeted listing in VCAT, to enable duty lawyer services to more effectively assist people at risk of eviction or homelessness and cater to the needs of specific groups.

**Recommendation 17 – Improve efficiency and effectiveness in summary crime jurisdiction**
Increase investment in legal and allied services in the summary crime jurisdiction to address demand and system inefficiencies that are reducing access to justice.

**Recommendation 18 – Eradicate postcode injustice and expand therapeutic and problem-solving courts that have been proven to be effective**
Eradicate postcode injustice, and expand courts and programs addressing the underlying causes of offending equitably across the state, including therapeutic and problem-solving courts, diversion programs and supported case management services.

**Recommendation 19 – Improve continuity of assistance for families with complex needs**
Implement the state-specific recommendations of VLA’s submission to the Family Law Council’s *Terms of Reference on Families with Complex Needs*, including that:

- Department of Health and Human Services (DHHS) appear at the Family Law Court return date to present the findings of its investigation so the court can make
orders that address protective concerns to reduce the need to initiate a second round of court proceedings in the Children’s Court.

- in circumstances where DHHS seeks to withdraw from a family but the parents do not consent to family law orders, DHHS appear at the first Family Law Court date to assist the family in the transition to the Family Law Court jurisdiction
- DHHS establish and communicate a consistent and structured approach for receiving and responding to Notices of Risk
- the Co-Located DHHS Liaison Officers program is expanded.

**Recommendation 20 – Advocate at Commonwealth level for improved approach to cross-jurisdictional family law issues**

Advocate for changes at the Commonwealth level that would help Victorian families experiencing complex issues, to ensure greater continuity of support across state and Commonwealth family law jurisdictions.

**Alternative dispute resolution (ADR)**

**Recommendation 21 – Culturally-appropriate and tailored ADR for Aboriginal and Torres Strait Islanders**

Expand culturally-appropriate and well-tailored ADR mechanisms to assist in the resolution of disputes for Aboriginal and Torres Strait Islanders.

**Recommendation 22 – Ensure appropriate safeguards in any expanded ADR mechanism**

Ensure that any expanded ADR mechanisms are designed with sufficient safeguards and exemptions in mind, especially where there is an unchecked power imbalance between parties.

**Recommendation 23 – Empower Victorian Equal Opportunity and Human Rights Commission (VEOHRC) to provide dispute resolution for Charter disputes**

Implement the recommendation of the Charter Review to give VEOHRC the statutory function and resources to offer dispute resolution for disputes under the Charter.

**Recommendation 24 – Increase accessibility of ombudsmen**

Increase the accessibility of ombudsmen services through reforms targeted towards improving their visibility, efficiency and effectiveness.

**Recommendation 25 – Expand the use of ombudsmen**

Explore the scope to expand the use of ombudsmen in other areas where adjudicating disputes through formal court or tribunal processes is ineffective.

**Victorian Civil and Administrative Tribunal (VCAT) small civil claims**

**Recommendation 26 – Expand fee waivers**

Expand the availability of fee waivers in VCAT to ensure that people are not obstructed from taking up their rights by the financial cost of doing so.
Recommendation 27 – Create an internal appeals process for VCAT small civil claims

Create an internal appeals process to provide a more accessible and affordable right of appeal, improve the quality of decision-making and strengthen jurisprudence.

Legal services delivered outside the legal assistance sector

Recommendation 28 – Support appropriate and complementary pro bono legal assistance

Support the appropriate use of pro bono legal services to complement government-funded legal assistance services.

Self-represented litigants (SRLs)

Recommendation 29 – Improve data on self-represented litigants

Improve the quality of data on why people self-represent, their characteristics and their needs, and whether unbundled legal services would assist.
Part A: Taxpayer-funded legal assistance

Explanatory note: Part A of this submission addresses the terms of reference that relate to the taxpayer-funded legal assistance sector. The terms of reference are:

- **TOR 6:** the availability and distribution of funding amongst legal assistance providers by the Victorian and Commonwealth Governments to best meet legal need
- **TOR 7:** whether there is any duplication in services provided by legal assistance providers, and options for reducing that duplication, including the development of legal education material
- **TOR 8:** the resourcing of Victoria Legal Aid (VLA) to ensure that Government funding is used as effectively and efficiently as possible and services are directed to Victorians most in need, including:
  - within the total funding envelope, the types of matters funded by VLA, eligibility criteria for legal assistance and the level of assistance provided
  - VLA’s current service delivery model, including the use of panel arrangements and internal lawyers, and spending on allied support services.

Legal assistance landscape overview

Legal assistance is provided by a variety of suppliers at varying levels of intensity, according to the nature and severity of a person’s legal problem.

The *Legal Aid Act 1978* (Vic) prescribes VLA’s role in the legal assistance sector. Decisions are guided by objectives set out in the Act, which are to:

- provide legal aid in the most effective, economic and efficient manner
- manage resources to make legal aid available at a reasonable cost to the community and on an equitable basis throughout the state
- provide to the community improved access to justice and legal remedies; and
- innovate in providing legal aid that minimises the need for one-on-one legal services.¹

We facilitate and deliver a range of legal services to the Victorian community, with a focus on assisting people facing disadvantage due to their financial or personal circumstances, including the consequences they face in their interactions with the justice system.

VLA-funded services include legal education, information, advice and representation before courts and tribunals across a wide range of areas of law, spanning the criminal, civil and family law jurisdictions.² We also fund and deliver specialist services, including Family Dispute Resolution Service and Independent Mental Health Advocacy. Appendix 1 sets out a full list of our services.

We have a statutory responsibility to determine guidelines about who gets legal aid, for what legal matters, to what level of intensity, and at what cost. In accordance with these guidelines, we facilitate access to grants of legal assistance (referred to as ‘grants of aid’ in this submission).³

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¹ *Legal Aid Act 1978* (Vic) s 4.
² See Appendix 1 below for more details about the types of matters for which legal aid services are available.
³ The *Legal Aid Act 1978* defines a ‘legal assistance’ as ‘legal services provided under this Act other than by way of duty lawyer services or legal advice’: *Legal Aid Act 1978* (Vic) s 2.
Private practitioners and staff practitioners provide legal representation under grants of aid. Community legal centre lawyers typically do not provide legal representation under grants of aid.

VLA’s other statutory functions include designing the parameters or boundaries of a service, setting the fees paid to private practitioners for a defined service, ensuring the quality of services, and designing and implementing innovative approaches to reduce the prevalence of legal problems in the community.

Legal representation provided under a grant of aid by staff or private practitioners, and the other services VLA provides, are complemented by a number of other suppliers of legal services with specific focuses and expertise. These include:

- community legal centres (CLCs), which exist to serve a local community, or a specific legal need, and focus primarily on providing a range of lower-intensity services, such as information and advice, as well as some case work and advocacy
- Victoria’s two community-led Aboriginal legal services:¹ Victorian Aboriginal Legal Service (VALS) and the Aboriginal Family Violence Prevention Legal Service Victoria (FVPLS Victoria).² These services recognise that Aboriginal and Torres Strait Islanders have specific needs that may not be met through a mainstream legal aid or community legal service.
- Victoria Law Foundation, which offers everyday legal information to Victorians but does not engage in direct service delivery
- Justice Connect, which brokers pro bono legal services for people who cannot access assistance through legal aid services or CLCs
- a broad range of government agencies that provide legal information but do not engage in direct legal service delivery.³

This mixed model is largely replicated throughout Australia with the proportion of the work done by the different services varying for each state and territory.⁴

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¹ VLA does not administer funding for Aboriginal and Torres Strait Islander Legal Services. These services are funded directly through the Commonwealth Government. However, VLA does provide some ongoing staff roles and some funding to both the Victorian Aboriginal Legal Service and to the Aboriginal Family Violence Prevention Legal Service Victoria.

² The Victorian Aboriginal Legal Service was established as a community-controlled organisation in 1973 and predates the establishment of the Legal Aid Commission of Victoria (what is now Victoria Legal Aid).

³ For example, Consumer Affairs, ombudsmen, the Office of the Public Advocate, and various other government agencies all have an important role in providing legal information across a broad range of areas. However, the primary focus of these services is not the direct provision of legal assistance and therefore these services are not considered part of the government-funded legal assistance sector.

⁴ There are some differences in the architecture of each jurisdiction’s legal assistance sector. Not all Australian states and territories have an equivalent body to the Victoria Law Foundation or Justice Connect.
Distribution and availability of funding

**Term of Reference 6:** the availability and distribution of funding amongst legal assistance providers by the Victorian and Commonwealth Governments to best meet legal need

**Section overview**

Government funding for legal assistance is capped. This is unlike pension entitlements or subsidies such as first homeowner grants, where eligibility is specified and funds are expended irrespective of the number of persons who qualify for the entitlement. The provision of legal aid is supply, not demand, driven, and demand consistently outstrips our capacity to supply services. This paradigm requires frameworks for setting priorities, designing and targeting services to reflect legal vulnerability, and monitoring and containing costs. To maximise benefits for individuals and the community, available funding is allocated in ways that help those who need it most and that avoids or minimises preventable legal problems.

This section of our submission addresses:

- the use of both private and salaried practitioners (the mixed model) as the best way to meet legal need
- the role of an independent statutory authority in setting priorities for limited legal aid funding and how different suppliers of services are used within the mixed model
- how funding is currently distributed between suppliers in the mixed model
- opportunities to improve the targeting of services through collaborative service planning
- the need for an independent research and innovation function to improve service design to better meet legal need
- the need for increased investment in the Victorian legal assistance sector
- building on current directions, areas where additional investment would most improve the legal assistance sector’s ability to meet acute legal need.

We then make eleven recommendations as to the availability and distribution of funding to the legal assistance sector:

- Recommendation 1 – Support VLA’s role in sector planning
- Recommendation 2 – Support CLC innovation and reform
- Recommendation 3 – Improve the evidence base and spark innovation
- Recommendation 4 – Increase State funding
- Recommendation 5 – Increase Commonwealth funding
- Recommendation 6 – Reduce pressure on duty lawyers
- Recommendation 7 – Properly fund policies that impact the justice system
- Recommendation 8 – Reduce barriers to legal aid services
- Recommendation 9 – Expand Legal Help
- Recommendation 10 – Expand specialist family and civil law services
- Recommendation 11 – Ensure private practitioners are appropriately remunerated.
Our response to Term of Reference 8 below also considers the way in VLA distributes funding between legal matter and service types. Given that VLA funds both CLCs and private practitioners using government funding, as well as our own service delivery, our response to Term of Reference 8 is also relevant to this section.

The use of the mixed model to best meet legal need

VLA is a strong proponent of the mixed model for the delivery of government-funded legal assistance.

Providing assistance to people across a large geographical area who have a broad range of legal problems, different capabilities, and are experiencing varying levels of disadvantage, requires specialist skills and a dynamic and flexible approach to service provision.

The mixed model recognises and plays to the strengths of each supplier type. It also recognises the desirability of the ‘solicitor of choice’ principle, as set out under the Act.\(^8\)

Resourcing supplier types across the mixed model occurs in three different ways to produce two different provider groupings: salaried and private practitioners.

- **Private practitioners** are typically engaged through an individual grant of aid. They are paid event-based, lump sum fees under various stage-of-matter funding models. This applies across all of the criminal, family and civil law eligibility guidelines, with over 450 different fees for different components of legal work associated with a grant of aid.

- **VLA staff practitioners** are salaried employees who must comply with legal professional practice standards and have a primary duty to their client.\(^9\) Staff practitioners are not confined to doing work under a grant of aid and they are able to provide a broader range of services than private practitioners; however, they are subject to the same limits and conditions as private practitioners when working under a grant of aid.

- **Community legal centre lawyers and Aboriginal legal service lawyers** are also salaried employees. CLCs and Aboriginal legal services receive varying amounts of block funding to employ lawyers to provide services. Community lawyers do not typically undertake work through a grant of aid and retain significant flexibility in how they respond to client needs, in keeping with the policies of individual centres. Aboriginal legal services provide culturally tailored legal services to Aboriginal and Torres Strait Islanders.

In practice, more flexibility exists for salaried employees at VLA and in CLCs and Aboriginal legal services to pilot new ways of assisting people because their role extends beyond providing services under a grant of aid. Conversely, private practitioners are contracted within defined service parameters that do not alter until revised grant of aid guidelines, ongoing merits tests, and stage-of-matter fee structures have been promulgated.

Understanding the value of the mixed model and its components requires looking at the model through various lenses. Relevant considerations include cost, the impact or the quality of the service, and ensuring the right service to match a client’s needs and capabilities.

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\(^8\) *Legal Aid Act 1978 (Vic)* s 8(2).

\(^9\) Ibid s 16.
Generally speaking, the resources allocated to each component of the mixed model and the type of work or legal area in which each supplier type is engaged, is regularly contested; however, the model itself is not.

As we set out below, VLA supports a mixed model of service delivery as a model that:

- provides for specialisation and addresses market failures
- provides flexibility to scale up and respond to demand
- enables conflicts of interest that restrict service availability to be managed
- facilitates innovative, holistic approaches to providing legal assistance
- ensures government and board decision-making is informed by insights gleaned from direct service delivery
- ensures Aboriginal and Torres Strait Islanders have access to culturally tailored services
- permits the use of strategic advocacy to minimise the need for future legal assistance.

The mixed model provides for specialisation and addresses market failures

Legal aid practice areas are specialist areas of law. Clients often experience acute and varied forms of disadvantage and each area of practice has its own rules of procedure, statutes and case law.

The private profession offers high-quality, specialised services across many areas of law for which legal assistance is available. These tend to be areas where there is also a private fee-paying market. However, in other areas, the absence of a private market means that the specialist expertise needs to be developed elsewhere.

For example, social security disputes are almost solely experienced by people who are poor and unable to afford private legal assistance. This means that very few private practitioners have developed expertise in this area. Conversely, family law services are commonly provided to people with the means to pay for their own legal services. This has resulted in a strong private market with many specialist practitioners, some of whom are willing to assist legally-aided clients.

The expansion of VLA’s civil law practice in recent years was necessitated by the need to build specialisation and the lack of availability of private practitioners in some areas. In other legal aid practice areas – such as family and criminal law – private practitioners dominate service delivery.¹⁰

Flexibility to respond to demand

The capacity to provide services through the private profession ensures the legal aid sector has the necessary flexibility to respond to rapid and sometimes unpredictable increases in demand in a way that a fixed capacity, salaried workforce alone could not.

Recent examples of increased demand include:

- increased reporting and awareness about family violence (including increased use of family intervention orders)
- ‘no breach’ policing practices that have resulted in more summary offences, and other reforms that increase the number of people coming before the courts; and

¹⁰ Private practitioners received 61 per cent of the grants of legal assistance for criminal matters and 89 per cent for child protection matters in 2014-15. The exception to this general rule about private fee paying markets is child protection work. This work is almost exclusively publicly-funded but provided almost exclusively by private practitioners. Private practitioners provide approximately 90% of all grants of aid for children and parents in this jurisdiction.
changes within our community, in government policy and in resourcing (for example, an increase in notifications and substantiations of child neglect and in the size of the child protection workforce has resulted in an increase in interventions and the number of families brought before the Children’s Court).  

Most recently, in the six months from 1 July 2015 to 31 December 2015, private practitioner grants of aid in summary crime and child protection increased by 13 per cent and 11 per cent respectively, compared to the same period the year before.

**Managing conflicts of interest between parties**

A conflict of interest may arise in circumstances where, for example, a practitioner has acted in the past for an opposing party to the matter, or where a practitioner is acting for an opposing party in the present matter.

In a number of matters — particularly in the family law jurisdiction — two or more parties may require and be eligible for legal aid. For example, child protection cases heard by the Family Division of the Children’s Courts of Victoria are matters that are multi-party in nature. Legally-assisted representation is often provided to two or more people (for example, the child and the parents when an application is brought before the court by the Department of Health and Human Services). Assistance is provided either by our staff practice, private lawyers who are members of the Child Protection Practitioner Panel or, in a limited number of cases, by CLC lawyers.

Conflicts of interest between legally-aided clients also occur in the criminal and civil jurisdictions. For example, over 100 inmates at the Metropolitan Remand Centre in Melbourne have been charged following riots in June 2015. Supplier flexibility within the mixed model enables aid to be provided to the accused through a combination of grant and practitioner arrangements that will overcome various conflicts.

**Facilitating innovative, holistic approaches to providing legal assistance**

Legal problems very rarely exist in isolation for legal aid clients.

Holistic service delivery models that address interrelated legal and non-legal problems respond to the cause of the issue, rather than just its manifestation as a legal problem. These approaches may be more effective than traditional one-on-one legal advice or case work models.

Piloting new, holistic service delivery models is more easily done through salaried practitioners. When pilots are shown to be effective, they can be scaled up and, where appropriate, applied to the private practitioner contracting model in the form of new guidelines and stage-of-matter fee structures.

The LAW Survey also found that the majority of people with a legal problem will not seek advice from a legal professional.  

Entering into the legal assistance sector provides people with an opportunity to receive support with other legal problems. For example, a criminal lawyer assisting with a summary crime charge may pick up that the person is at risk of eviction. The lawyer can then set up an appointment with a housing service or a make

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11 The drivers of increased demand are explored further [below](#).

referral to a lawyer with expertise in tenancy law. When appropriately resourced, salaried practitioners ensure that multiple and varied legal issues are dealt with in one place, and referrals to external services are made as required.

While private practitioners also make appropriate referrals, they are more limited by the confines of the current contracting model that only pays them to deliver a discrete legal service. This may limit their ability to assist with other unresolved legal and non-legal issues.

**Case study: Pilot project providing holistic child protection services through CLCs**

In June 2015, VLA announced a two-year pilot project to assist clients with child protection and other legal problems. The pilot involves funding two CLCs to provide services to people in the Family Division of the Children’s Court, and at the pilot Family Drug Treatment Court. The CLCs provide eligible clients with advice, representation and referrals on the day they first come to court in relation to a child protection issue, and then continue to assist them with related, ongoing casework.

The pilot was designed to provide a more holistic service to clients, many of whom first present with a child protection issue but may have accompanying or overarching family law, family violence and youth crime issues that have not been addressed. The pilot seeks to coordinate the provision of legal services to deal with these issues and prevent their escalation. By providing an intensity of service at this point, it is likely to help prevent the escalation of those problems.

While the pilot is still in its early stages, it is expected to demonstrate a better and more effective service delivery model for Victorian families struggling with complex legal and non-legal issues.

**Case study: Holistic model for people subject to compulsory mental health treatment**

People who face compulsory treatment under the Mental Health Act 2014 (Vic) face serious rights infractions. Mental health lawyers provide advice and representation to people who wish to challenge a Treatment Order before the Mental Health Tribunal.

It is clear, however, that the significant impact of compulsory treatment goes beyond the process of challenging treatment orders and appearing before the Tribunal. From the time at which people are assessed for compulsory treatment, their autonomy and decision-making can be undermined on a daily basis as a result of decisions by their treating team.

Independent Mental Health Advocacy (IMHA) is a new service provided by VLA that provides non-legal advocacy for people once they have been placed on a Treatment Order. This recognises the significant and continuing limitations on a person’s rights when they are on an order, and the wider supports they require on their journey towards recovery. The service is funded by the Department of Health and Human Services.

IMHA is made up of a team of 13 non-legal advocates across Victoria who support and assist people to participate in decisions about their treatment and recovery through the provision of information, self-advocacy coaching and direct advocacy. The IMHA program exists to ensure the practical realisation of various rights afforded under the Act. It also supports people to access other services in order to address issues that may be impacting on their recovery, such as a lack of secure housing.

Together, our new IMHA advocates and VLA’s pre-existing mental health lawyers work to assist a person with various legal and non-legal problems over the duration of a Treatment Order. This
holistic approach recognises that a person subject to compulsory treatment may face various and intersecting legal and non-legal issues that impact on their recovery and their ability to realise their rights.

Informing decision-making

Hands-on practice experience is an invaluable tool that provides essential intelligence on the operation of the law across various jurisdictions. This informs statutory decision making around legal need, and is necessary for formulating legal aid eligibility guidelines and fee structures. The parameters and appropriate limits for legal assistance could not be formulated in a rigorous way without intelligence gleaned from service delivery.

Practice wisdom also captures and channels the experiences of clients into government policy and law reform processes. The VLA staff practice can quickly identify areas of burgeoning demand or unmet need and can agitate within government for solutions and resourcing.

VLA’s role as a ‘trusted advisor’ on the operation of the justice system, including where laws or systems are operating unfairly, stems from our hands-on practice experience and is reflected in the vast number of confidential consultations and public law reform processes in which we participate every year.

Case study: The baseline sentencing regime

We recently provided a submission to the Sentencing Advisory Council (SAC) setting out our view on how Victoria should approach sentencing guidance.13

The State Attorney-General had asked the SAC to provide advice on this issue after the Court of Appeal's finding that baseline sentencing legislation is ‘incurably defective’ and ‘incapable of … practical application’. The SAC was tasked with considering how to promote consistency in sentencing and public confidence in the criminal justice system.

We were in a unique position to comment on this issue, given our practice experience in representing clients in indictable crime matters across Victoria. We also appeared in the Court of Appeal case that prompted the review.14 In making our submission, we brought together our practice experience and law reform expertise, to inform government how beneficial changes to sentencing guidance could operate.

In our submission, we pointed out the importance of judicial discretion to the administration of justice, and explained that mandatory schemes cause injustice, reduce transparency, increase costs to the public – and do not deter crime. This is an example of how we use our role to advocate for an evidence-based, transparent and fair approach to criminal justice, informed by what we see in practice.


14 DPP v Walters (a pseudonym) [2015] VSCA 303.
Ensuring Aboriginal and Torres Strait Islanders service access

Culturally-tailored services for Aboriginal and Torres Strait Islanders are vital. Aboriginal legal services in Victoria provide a range of services through community-run organisations, largely focussed on criminal law (VALS) and family violence (FVPLS Victoria). These organisations integrate culture into the delivery of their services to improve outcomes. Their strong links to community enables them to provide a safe space for Aboriginal clients who may distrust mainstream services.

Strategic advocacy reduces the need for future legal assistance

Advocating for the fairer application of laws, or changes to unjust laws and practices, can involve running a significant test case in a higher court, or directly engaging the community and decision-makers. By working together, the sector can leverage all abilities and expertise to bring attention to cases that are likely to have a systemic impact, bringing together media and communications expertise, and relationships with stakeholders and government.

Strategic advocacy plays a vital part of fulfilling our statutory mandate to provide legal assistance in the most effective, efficient and economic manner. Cases with a systemic impact can have a curative effect and can help not just the individual client but also a large pool of potential future clients. In this way, strategic advocacy can reduce the need for future individual legal assistance. The case of Director of Public Prosecutions (Cth) v Keating was an example of how through assisting one client we were able to prevent the need for as many as 15,000 future prosecutions. The immediate cost savings from avoiding these prosecutions benefited not only VLA but also the Commonwealth Office of Public Prosecutions and the Victorian courts system.

Case study: Advocating for the use of Community Correction Orders as a reinvestment strategy

Since their introduction in 2012, Community Correction Orders (CCOs) had not been used by sentencing courts to their full potential.

The uncertainty in the scope and operation of CCOs in the context of three very lengthy appeals led to the Director of Public Prosecutions (DPP) applying for Victoria’s first guideline judgment.

In determining whether to make a guideline judgment, the Sentencing Act 1991 (Vic) requires the Court of Appeal to take into account the views of a wide range of bodies, including the DPP, the Sentencing Advisory Council and VLA. This provided a powerful opportunity for VLA to push for evidence-based decision making by courts, and to pursue greater utilisation and investment in CCOs as a reinvestment strategy.

In delivering Victoria’s first guideline judgment, the Court of Appeal agreed with VLA’s submissions that CCOs should be available even in serious cases, and that accepted,
conventional views about imprisonment being the only option needed to change, because of the ‘seriously detrimental’ and criminogenic consequences of imprisonment.

The guideline demonstrates how combining practice experience, empirical research, and targeted submissions on legal principle and statutory construction can lead to beneficial systemic outcomes. In this case, it has led to an explicit recognition by Victoria’s highest court of the value of community-based sentencing in dealing with the underlying causes of offending. Unlike imprisonment, which induces dependency, institutionalisation and anti-social tendencies, community-based sentencing is capable of promoting ‘simultaneously’ the interests of the community, the offender, and the offender’s dependents. It also avoids the significant fiscal and social costs of incarceration.

While it is still too early to quantify the full impact of the guideline judgment, it is clear that, together with the abolition of suspended sentences and changes in parole, the guideline has led to a significant increase in the imposition of CCOs and orders combining a CCO with imprisonment. It has also led to greater investment in Corrections, and greater consistency and transparency in how courts sentence offenders.

Case study: Challenging unfair and discriminatory practices in the insurance industry

For many years, Australians diagnosed with a mental illness have faced blanket mental health exclusions in insurance policies. VLA’s civil law practice assisted a client, Ella Ingram, to challenge the lawfulness of these blanket exclusions in a claim against insurance company QBE Insurance, on the grounds of unlawful discrimination. Given the prevalence of blanket mental health exclusions in the insurance industry, this was a test case with implications for tens of thousands of Australians facing discrimination based on their diagnosis of a mental illness.

VCAT found QBE Insurance unlawfully discriminated against Ms Ingram on the basis of her disability, namely a mental illness, contrary to the Equal Opportunity Act 2010. The case highlighted the deficiencies in the current legislation, which impacts on a large group of people in addition to Ms Ingram. In addition to the significant financial consequences, these people are subjected to the stigma of uninformed practices that are based on discriminatory attitudes and assumptions rather than medical and actuarial evidence.

The litigation was an important part of a wider case strategy, aimed at raising public awareness and pushing for industry change or legislative reform. VLA collaborated with beyondblue, Mental Health Australia and the Public Interest Advocacy Centre as part of a communications strategy to assist in raising public awareness of the issue and decreasing the stigma around mental illness. The case attracted significant mainstream and social media attention over the course of a number of weeks. The organisations also developed law reform recommendations, which have been promoted through parliamentary inquiry processes, and engaged with government decision-makers about possible legislative changes.

VLA was able to secure a positive outcome for our client and the case has the potential to help tens of thousands Australians, demonstrating the impact of effective strategic advocacy.

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18 Boulton v The Queen [2014] VSCA 342 [115].
The role of an independent statutory authority

An independent statutory authority with appropriate expertise that can scrutinise intelligence gained through service delivery is best placed to set priorities and to allocate resources between supplier types to meet legal need in our community. This role involves:

- formulating legal assistance priorities and designing service responses
- allocating available funding between various classes of clients with competing legal needs and between available supplier types.

Independence from government

Independence from government is a desirable feature of Victoria’s current legal aid arrangements. Legal aid is, by its very nature, political – the public have a strong and legitimate interest in how its funds are spent. Decisions about the distribution of funding to individual recipients and between legal assistance providers are contestable and can be vexed.

At an individual level, legal aid is often provided to people who are accused of serious crimes or who have allegedly engaged in other unlawful or unacceptable behaviour. While many have backgrounds or circumstances that could attract sympathy, their actions may not.

In high-profile matters where there is widespread media and public interest, it is important for both the government and the community that decisions about the provision of legal aid are made by an independent statutory authority. This provides a buffer from the government of the day to ensure funding decisions are free from political interference.

Independence also enables VLA to assist people in actions against the government and government agencies. These actions may be contrary to the interests of the government of the day, but ensure public bodies are held to account in exercising their power.

At a systems level, an independent statutory authority with expertise and intelligence gained through service delivery is well placed to make policy choices about the allocation of finite resources.

Since shortly after the creation of a legal aid commission in 1981, VLA has carried out the function of distributing and administering funding for community legal centres in Victoria. We distribute funding for 38 of the 51 community legal centres in Victoria and funds Victoria’s peak body, the Federation of Community Legal Centres Victoria.

As with decisions about individual grants of aid, an independent statutory authority affords the community and the government of the day a measure of protection from the difficult, and at times unpopular decisions, that a funding body is required to make. It normalises non-partisan evidence-based decision making within a framework of public sector accountability.

The benefits of independence extend to other service providers. Community legal centres, like VLA, are often required to act in ways that may be counter to the interests of the government of the day – be it through law reform work and other advocacy, or through individual cases. VLA’s role as funder ensures CLCs can engage in this important work without fear it will have an adverse impact on their funding.

Service delivery experience informs priority setting

VLA is able to draw on its experience as a service provider when carrying out our role of allocating funding and setting service parameters.
Through our practice, we are able to monitor and gain insight into the experiences of disadvantaged communities, build linkages with other community organisations, and hear first-hand people’s needs and legal problems.

This institutional knowledge informs the way in which guidelines and eligibility for grants of legal assistance are set and the distribution of funding between CLCs and VLA offices to best address needs within the community.

Internally, strong links exist between our staff practitioners and our grants and policy-making functions while neutrality and other necessary barriers are maintained at the operational level.

**VLA’s support for the mixed model is demonstrated in practice**

We consider that the current distribution of funding between suppliers fairly leverages the strengths of the mixed model to best meet legal need. As demonstrated below, relative to other states and territories, Victoria’s mixed model is characterised by:

- a healthy and vibrant community legal centre sector
- similar proportion of work done by staff practitioners relative to private practitioners as occurs in other jurisdictions
- a strong *pro bono* culture.

While the current distribution of funding between suppliers is sound, the Victorian mixed model is constrained in its ability to meet legal need due to significant underinvestment, as detailed below.

**The use of private practitioners**

In 2014–15, VLA provided a total of 34,681 grants of legal assistance to 26,805 unique clients, an increase of four per cent from the previous year.\(^{19}\)

Over two thirds (67 per cent) of all grants were assigned to private practitioners.\(^{20}\) By area, private practitioners serviced:\(^{21}\)

- 62 per cent of criminal law grants
- 81 per cent of family law grants
- 21 per cent of civil law grants.

The proportion of private practitioner involvement in grants of aid in other states and territories is as follows:

**Snapshot: Use of private practitioners by state/territory in 2014-2015**\(^{22}\)

1. Queensland – 78 per cent of all grants
2. Western Australia – 71 per cent of all grants
3. New South Wales – 68 per cent of all grants
4. South Australia – 68 per cent of all grants
5. **Victoria** – 67 per cent of all grants

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\(^{20}\) Ibid 23.

\(^{21}\) Ibid 79.

6. Tasmania – 63 per cent of all grants
7. Australian Capital Territory – 38 per cent of all grants
8. Northern Territory – 32 per cent of all grants.

The above table demonstrates that in Victoria, staff and private practitioner involvement in the provision of grants of aid is similar to that of other states and territories.\(^{23}\)

In 2014/15, VLA made a total of $63.6 million of payments to private practitioners. This included payments for the delivery of some duty lawyer services by private practitioners, most notably in regional and rural areas that do not have a VLA office.

It also included $10.6 million in payments to barristers briefed by private practitioners and a further $3.5 million in payments to barristers briefed by VLA staff practitioners.

Barristers represent people before courts and tribunals but are not typically assigned grants of aid. In 2014/15, of the total $14.1 million paid:\(^{24}\)

- 66.7 per cent were criminal law payments ($9.4 million)
- 30.9 per cent were family law payments ($4.4 million)
- 2.4 per cent were civil law payments ($0.3 million).

In 2015/16, VLA is projecting an eleven per cent increase in grants of legal assistance, due to:

- increased police initiations
- means test threshold changes
- a guidance note clarifying conditions for grants in summary crime
- diversion pilots in selected courts
- increased child protection workers
- an increase in Courts appointing Independent Child Lawyers in complex family cases.

**Distribution of funding to community legal centres**

Victoria’s use of the mixed model also reflects strong support for community legal centres. VLA administers funding to the Federation of Community Legal Centres Victoria and 38 centres across the state through the Community Legal Services Program (CLSP). Some funding allocations are made directly through the State or Commonwealth Governments, and some are through VLA.

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\(^{23}\) Some states and territories have a ‘fused profession’, rather than the use of solicitors and barristers. Victoria’s use of barristers on grants of aid is not reflected in these figures, as it may be for states and territories with a fused profession.

\(^{24}\) Legal Aid, above n 19, 81.
Funding of community legal centres in Victoria is proportionately higher than any other state or territory. Victoria is also the only state or territory where more CLC funding comes from state sources (63 per cent of CLSP funds) than the Commonwealth Government (37 per cent of CLSP funds). CLCs also access other sources of government and non-government funds that are not administered by VLA through the CLSP.\(^{25}\) The below graph compares CLC funding between Victoria, New South Wales and Queensland.\(^{26}\)

\(^{25}\) CLCs also receive funding through various other sources, including the Commonwealth Government, through the Community Legal Services Program (CLSP), other government departments, private donations, fundraising and client contributions. See Productivity Commission, above n 15, 691.

\(^{26}\) NSW CLC funding figures do not include payments made from the Public Purpose Fund to CLCs, Care Partner Service Agreements with LANSW or funds provided under the Women’s Domestic Violence Court Advocacy Program (which are shared between CLCs and other service providers). Victoria and Queensland funding, similarly, does not reflect funding from other government and non-government sources.
VLA demonstrates support for the unique contribution of community legal centres through various other projects and funding allocations decisions. As explored above, one of the key value-adds of the CLC sector is its ability to innovate and trial new approaches to addressing legal need that can be scaled up, if successful. In December 2014, VLA announced the creation of a $2 million CLC Innovation and Transformation Fund. The fund was designed to promote innovation in the sector through one-off funding of projects with a potentially transformative impact.

VLA’s use of CLCs for the delivery of child protection services, as discussed above, and the recent response to the legacy caseload are two examples of how we leverage off the strengths of the different parts of the mixed model.

**Case study: Leveraging the mixed model to help asylum seekers**

Between August 2012 and January 2014, more than 30,000 asylum seekers who arrived in Australia were barred from applying for refugee status. The bar on applications is progressively being lifted, and, over the coming months, those asylum seekers will have the opportunity to apply for a permanent protection visa. It is thought that around 11,000 of those asylum seekers live in Victoria.

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27 An example of this is the community legal education project *What’s The Law?*, which started as a CLE project in Melbourne’s western suburbs and was scaled up to a nationwide CLE product for newly-arrived migrants. See below.
Recent changes to the criteria for granting protection visas have made it more difficult for those arriving by boat to obtain protection in Australia and special processing arrangements for this cohort provide limited review rights. Without legal assistance there is a risk that refugees who should receive protection under international law will be subject to unfair decision-making processes and face long periods of detention or return to countries where they are not safe. In addition, funding for legal assistance to make and review applications has recently been cut.

The legal assistance sector recognised that, without a response, there would be significant unmet legal need and the potential for serious and unjust consequences for an acutely marginalised group. In response, the sector came together to form the Legacy Caseload Working Group, under the auspice of the Law Institute of Victoria, and devised a joint model to address the legacy caseload. The model response required $920,000 spread across the three agencies over a two-year period to fund:

- a position at Justice Connect to finalise referral and other agreements and to coordinate referrals of asylum seekers to appropriate sources of pro bono or low cost assistance
- three lawyers at Refugee Legal (formerly the Refugee and Immigration Legal Centre (RILC)) to lead and supervise volunteers through a clinic model that will assist asylum seekers to make applications
- two specialist migration lawyers, as part of VLA’s Civil Justice practice, to support clinics and identify and run judicial review proceedings on the operation of the new ‘fast track’ provisions.

In making the decision to resource the response, VLA recognised the need to act and demonstrated its commitment to the mixed model of service delivery. As a specialist community legal service in the area of refugee and immigration law with strong relationships in the asylum seeker sector, Refugee Legal is well positioned to convene and supervise volunteer clinics. Justice Connect, with its expertise in coordinating referrals and brokering relationships between pro bono lawyers and clients in need, is well placed to manage the referral relationships between agencies and coordinate the pro bono response. Finally, VLA has specialist expertise in the area of migration law and judicial review proceedings, which makes us well placed to provide and target assistance to clients in these proceedings.

**Improving the distribution of funding through collaborative service planning and sector reform**

Improved coordination and collaborative service planning have an important role to play in maximising the impact of legal assistance services. Mechanisms currently exist for suppliers to work together to meet legal needs in an area of law or geographic region. However, by drawing on the growing evidence base, more can be done to ensure services are planned effectively to meet the needs of clients and the community.

In recent years, we have commenced work to ensure services are located in the areas of highest need and targeted to the populations that need the most assistance. This has included expanding services in growth corridors, such as Melbourne’s eastern suburbs, and supporting mergers of community legal centres in the western and inner-northern suburbs of Melbourne to improve their capability and service reach.
It can be challenging to use an evidence-based approach to ensuring funding is distributed in a way that best meets the needs of present and future communities. Without additional investment, it involves moving resources from one area to another — in some cases, from one service to another — which is one reason it is rarely done or rarely succeeds. Balancing all these various tensions requires a principled approach and a capacity to target extra resources in a transparent, collaborative and bottom-up approach that minimises sector disruption.

This approach is reflected in VLA’s Guiding Principles on CLC Funding, as detailed below. The principles signpost the direction for distribution of funding in the CLC sector, in turn providing centres with the opportunity to consider how best to position themselves in order to attract funding. In some areas, this has led to a number of small centres amalgamating to reduce administrative overheads and shift resources to areas of higher need.

VLA’s $2 million CLC Innovation and Transformation fund has also supported this work, with a number of grants going to projects that aim to improve coordination, collaboration or centre reform. For example, Fitzroy Legal Service and Darebin Community Legal Centre have been provided a grant to review services and consider the potential of closer ties to better service Melbourne’s northern suburbs.

**Guiding Principles on Community Legal Centre Funding**

The Guiding Principles on CLC Funding, adopted by the VLA Board in December 2012, guide decisions about the distribution of funding to community legal centres and are expressed as follows:

The VLA Board will prioritise funding for CLCs that:

- are located in population growth areas and areas of relatively high unmet need and disadvantage
- demonstrate a willingness to implement a more efficient service-delivery model, including sharing staff or management of centres, or amalgamating smaller centres
- show they are more effectively targeting their services to need, including through:
  - effective local legal needs assessment and planning
  - co-location of services in health and other settings
  - triage using clearly articulated service guidelines, giving priority to priority clients
  - collaboration and coordination with other legal assistance services, including VLA offices
  - undertaking effective strategic advocacy and legal education work targeted to legal need in their community, rather than just advice services.

**Case study: Supporting CLCs in a new vision for service delivery in west Melbourne**

In 2013, VLA initiated a joint project with four CLCs in the western suburbs of Melbourne to improve coordination in the planning and delivery of legal services, and to develop a new vision for the delivery of CLC services in the west. VLA provided considerable financial investment and other support to the project.

Informed by an assessment of priority legal need, a review of demographic data and existing service delivery responses, the Western Melbourne Community Legal Centre Reform Project
resulted in three CLCs merging into a single Western Community Legal Centre (West Justice). This has resulted in a bigger, more capable centre that is still connected to the local community but has the capacity to better service the western suburbs into the future. The fourth centre, Brimbank Melton CLC, remains independent but took on human resources support and financial management for the newly-merged centre. These arrangements took effect from 2015-16.

A new main premise for West Justice was established in Werribee and staff outreach to areas across the western suburbs. Some of the local service delivery sites were retained as branch offices to allow local identity and legal needs to be catered for.

While it will take time to consolidate and evaluate the new arrangements, it is expected that the new centre will provide for a more targeted response to areas of growing need — both now and into the future. It will also provide for the development of greater specialisation, in areas of law where community need is high. The consolidated and improved corporate services are expected to result in more funding being available for increased and better frontline services.

Our work leading evidence-based sector planning is about to enter into a new phase following the commencement of the new National Partnership Agreement for Legal Assistance Services (NPALAS), which requires legal aid commissions and CLCs to engage in collaborative service planning to ‘ensure that services are directed where they are most needed’.28

VLA has a key role in coordinated sector planning, both because of our knowledge of service delivery and because of our statutory role allocating funds in the sector. VLA makes decisions about funding for private practitioners through our guidelines and panels processes, determines the size and composition of VLA’s staff practice and regional office network across the state, and allocates most funds to CLCs.

There is a link between these decisions: for example, a regional area with few panel practitioners or a small VLA office may need additional dedicated CLC funding to provide certain services to the community. Better using existing institutional knowledge and improving the evidence base to make fair and principled decisions will help in making the legal assistance sector better tailored to the needs of the community.

As detailed above, we have been moving towards a more responsive approach to the distribution of funding across the sector. Building on our work with the CLC Guiding Principles and through the Innovation and Transformation Fund, VLA is well placed to continue playing a leading role in more evidence-based, collaborative approach to sector planning.

Our role in collaborative service planning under NPALAS will be to:29

1. develop tools that measure relative legal need across Victoria and that assess the current level of service delivery across the mixed model across the legal assistance sector; and

28 Coalition of Australian Governments, National Partnership Agreement on Legal Assistance Services (1 July 2015), A1.
29 NPALAS sets out two key elements of service planning: creating an evidence base to identify priority clients and the geographic locations in which people have the highest levels of legal need in order to identify and analyse evidence of disadvantage (as a proxy for legal need) and target legal assistance services within their jurisdiction accordingly; and conducting collaborative service planning meetings at least twice a year to promote discussion of strategies for the delivery of services. See Coalition of Australian Governments, above n 28, A1.
2. develop a framework place-based planning and coordination between legal assistance providers at a regional and local level that leverages VLA’s planning processes and accountability measures under CLC funding agreements.

Our work on developing tools to measure legal need and measure levels of service delivery is in the prototype stage. The proposed methodology attempts to strike a balance between practicality, detail and accuracy. It provides a simple process for measuring legal need using the most up-to-date research and readily available demographic, service and financial data. It will enable assessment of both need and current levels of service delivery at a local, regional level, and statewide level.

Case study: Building the evidence base to measure legal need in Mildura and the Mallee

Understanding and measuring legal need is the first step in carrying out coordinated service planning in accordance with NPALAS. In October 2015, VLA trialled a new model for measuring legal need in regions across Victoria. The trial was held in the Mallee region, comprising the local government areas of Mildura and Swan Hill in Victoria, Wentworth in New South Wales, and Renmark-Paringa in South Australia. Mildura and Swan Hill are outer-regional areas with significantly restricted access to goods, services and opportunities for social interaction.

In this exercise, VLA carried out a needs analysis of the defined region using three Need for Legal Assistance Indicators (NLAS) formulated by the NSW Law and Justice Foundation to identify the people who are most likely to need legal assistance. The need in the region was then benchmarked against the Shepparton region, an area of comparable socio-economic disadvantage.

Based on the NLAS indicators, a number of conclusions could be drawn about legal need in the Mallee region, including that there is a relatively high level of need based on people with low legal capability, and that the region has high Aboriginal and Torres Strait Islander and culturally and linguistically diverse populations. The analysis concluded that overall the level of legal need in the Mallee region is relatively high compared to other regions in Victoria.

Having determined legal need, the analysis considered the legal assistance provided to people in the Mallee region. The region is serviced largely by private practitioners and a community legal centre, as well as VLA’s statewide Legal Help phone line. Services in the area are largely skewed towards less intensive services, rather than grants of aid or casework. Most services provided by VLA or private practitioners relate to criminal law matters. There are comparatively few intensive legal assistance services in the areas of civil and family law.

Based on the assessments of need and existing service provision, we have been able to identify that, compared to the benchmark region of Shepparton, fewer services are provided to people in the Mallee in proportion to the number of people likely to need legal assistance – in particular, in relation to duty lawyer services and grants of aid. We concluded that increased legal assistance investment in the Mallee region is warranted to address legal need and ensure optimal operation of the mixed model.

Building on this evidence base, VLA’s Board and senior executive team travelled to Mildura in October 2015 to meet with local service providers, community members and legal assistance partners. Understanding legal need requires building on, rather than solely relying on, the evidence base. Identifying solutions requires a deep understanding of the region, which is best acquired through working alongside the local community. We are currently working with local legal
and non-legal service providers and other community members in the Mallee to explore how best to meet legal need in the region and increase access to justice.

**Recommendation 1 – Support VLA’s role in sector planning**

Support VLA’s role in sector planning at the state and regional level and in making evidence-based decisions about allocation of resources.

**Recommendation 2 – Support CLC innovation and reform**

Continue to support innovation and reform in the community legal sector.

**Opportunities to strengthen the evidence and innovation base**

**Lack of evidence on legal need**

Collaborative service planning, and ensuring funding is distributed in a way that is appropriate to the needs and capabilities of people and targeted towards the most disadvantaged Victorians, requires a deep and up-to-date understanding of legal need.

Understanding legal need requires an understanding of:

- the pervasiveness of legal problems in the community, the nature of these problems and how legal and non-legal problems intersect
- whether people are accessing legal assistance, from what services (private or government funded) and, if not, why not
- what happens to those people who need assistance and cannot afford a private lawyer but do not receive legal assistance through legal aid, a CLC or another avenue
- how new services, funding models or technologies could assist people who are currently not accessing assistance
- the impact of different forms of assisting people with their legal problem.

The NSW Law and Justice Foundation has played a key role in developing an understanding of legal need and effective service delivery in Victoria. This includes publishing the world’s most comprehensive analysis of legal need, the *Legal Australia-Wide Survey* (the LAW Survey), which was jointly commissioned by all Australian legal aid commissions.

While existing work from the NSW Law and Justice Foundation is of significant benefit, it is understandably tailored and specific to the NSW context. An example of this is the NSW Law and Justice Foundation’s research into the legal needs of prisoners, *Taking justice into custody: the legal needs of prisoners*. While this provides generalised and useful insights into the needs of this client group, including drawing on international research, it is specific and tailored to the NSW correctional system. The significant differences between the Victoria and NSW prison systems, and the way this

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30 Most recently, we directly engaged the NSW Law and Justice Foundation through a two-year agreement to carry out research on issues affecting our clients.

affects the legal needs of prisoners, means the report cannot be relied on in the way a Victorian-specific report could be.

**Addressing legal need through technology and innovation**

Victoria would benefit from the ability to prototype and trial new ways of addressing legal problems through technology and innovation. New ways of tackling complex problems need to trialled and rigorously evaluated to assess the benefits (or detriments) for the client and broader justice system.

An example of this Dutch innovation and justice hub, HiiL Innovating Justice. HiiL utilises technology and new ways of thinking about complex issues to take a person-centred, co-creation approach to tackling issues facing the justice sector and its users. HiiL works with the courts, legal aid bodies, NGOs, government and companies looking to develop fair and innovative solutions that can be sustainably funded and create systemic change.\(^{32}\) It aims to foster relationships between private innovators and publicly funded justice bodies grappling with complex legal problems. It was set up through funding from the Dutch Government and The Netherlands Organisation for Scientific Research. HiiL’s projects include:\(^{33}\)

- the *Measuring Justice* project, which looks at how citizens experience the justice system in a bid to improve service delivery
- the *Innovating Justice Accelerator*, which runs targeted justice innovation challenges to find and accelerate promising justice start-ups that support systemic change and have sustainable funding models
- the *Justice Innovation Lab*, which brings together multi-disciplinary teams to help solve justice-related problems experienced by citizens.

**Case study: Innovative responses to the legal problems of disadvantaged Victorians**

The Fastrack Innovation Program is a three-year collaboration initiated by VLA between RMIT Centre for Innovative Justice, VLA and the Federation of Community Legal Centres Victoria.

The program seeks to apply technological solutions to legal problems that affect large numbers of people. While other universities teach the theory of technology and the law, the Fastrack Innovation Program is about putting that theory into practice and delivering practical outcomes to provide more people with access to justice.

In a first for the university and the legal assistance sector, the program (which began in 2015) brought top students together with industry partners, mentors and coaches, to solve real life challenges.

In 2015, the Most Outstanding Team Award went to a team tasked with addressing issues in the infringements system. Their solution helps to better connect support workers, lawyers and enforcement agencies, allowing special circumstances cases to be managed in a systematic way, getting a better outcome for clients and reducing the workload for lawyers and enforcement agencies.

Other solutions developed by teams included:

- an app that helps users understand their options after receiving a fine, and enables them


\(^{33}\) Ibid.
to pay the fine through an app
• a confidential web-based check-in system for people facing family violence, allowing agencies who help these clients to discover how their clients are connected across organisations
• a web hub for victims of family violence, outlining options for assistance and information on what each agency or service can do to help them throughout the process.

The Fastrack Innovation Program demonstrates the potential for the legal assistance sector to harness technology to respond to the needs and capabilities of its clients.

‘Thanks to Victoria Legal Aid and support provided by community legal centres and Victoria Legal Aid lawyers, we have been able to get some of the best and brightest students to combine innovation and design thinking with social justice.’
– Rob Hulls, Director of the Centre for Innovative Justice and former Victorian Attorney-General

Establish a dedicated research and innovation function

While VLA has prioritised growing the evidence-base and exploring innovative solutions to challenging problems in the legal assistance sector, a local legal needs research and innovation body would:

• undertake a regular and comprehensive analysis of legal need in Victoria (akin to the LAW Survey)
• offer government and service providers an independent body of knowledge about the nature of legal need to inform service improvement
• progress a research agenda that would uncover and highlight areas of emerging legal need;
• develop innovative approaches to complex legal issues in an environment where ideas can be prototyped, tested and evaluated and, if successful, rolled out to the wider legal assistance sector
• support private sector investment into the development of innovative solutions to complex problems
• reflect the unique issues, challenges and strengths of the Victorian legal assistance sector and wider justice system.

The creation of this function would enhance the Victorian legal assistance sector’s ability to provide services in an evidence-based way and grapple with some of the most difficult and challenging issues facing disadvantaged Victorians. This could be vested in an existing body, or in a newly-established speciality body.

Recommendation 3 – Improve the evidence base and spark innovation

Establish an independent function to research and explore better service design.
Underinvestment in the legal assistance sector

A critical underinvestment into the legal assistance sector means that Victorians miss out on essential legal help, limiting the effective operation of the justice system and forcing costs elsewhere onto the taxpayer.

Existing research on underinvestment

The need for greater investment in government-funded legal assistance, and the impact of inadequate funding on access to justice, has been the focus of various government-initiated reviews and reports in recent years. This has included the Productivity Commission’s identification of the critical underinvestment in funding, and call for an additional $200 million to the legal assistance sector to ‘address pressing need’.\(^{34}\) Crucially, this figure extended only to civil and family legal assistance and was framed as the necessary additional investment to address the ‘immediate assistance gap’ and ‘the most pressing needs’\(^{35}\).

Critically, this analysis or quantification of need did not include the highly pressurised state-run criminal justice and child protection systems. Additional assistance for people caught up in these state-sponsored jurisdictions would provide similar benefits to taxpayers.

The Commission identified a number of indicators of current underinvestment into the sector, including:\(^{36}\)

- Australia is one of the lower funding nations of legal assistance services on a per capita basis
- increasingly tight eligibility criteria used by legal aid commissions and the gaps in civil and family law coverage
- the inability to remunerate suitably qualified professionals
- rates of self-represented litigants, including in family law matters
- the high turn-away rates for legal assistance services and the lack of services for some disadvantaged groups
- reductions in resourcing against the backdrop of existing legal need.

The Commission went on to quantify the need for an additional $200 million, recommending that 40 per cent of this funding ($80 million) come from state governments. On a per capita basis, this would equate to $19.98 million additional investment from the Victorian State Government and $29.96 million from the Commonwealth Government to address the pressing need for civil (and family) legal assistance in Victoria.\(^{37}\)

The Commission’s findings represent a comprehensive, considered inquiry into legal need. Over a 15-month period, the Commission heard from a wide range of legal and non-legal organisations, and

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\(^{34}\) Productivity Commission, above n 15, 741.

\(^{35}\) Ibid 739.

\(^{36}\) Ibid 734.

individuals about the impacts of a lack of investment into legal assistance services. It also looked into research and the experience of various other jurisdictions. It makes a compelling case for increased investment from an economic and systems-efficiency perspective, stating that underfunding of legal assistance services can lead to increased costs in other areas of government spending.\textsuperscript{38}

The need for additional investment into legal assistance, and specifically legal aid, was also highlighted by the Victorian Auditor-General’s Office (VAGO) in its 2014 Review of Legal Aid. VAGO found that while VLA was delivering on our purpose of providing legal aid services and administering grants of aid, we face significant challenges in meeting increased demand for our services with a fixed funding model based on 2008 demand levels.\textsuperscript{39} VAGO concluded that ‘VLA faces a challenge in remaining financial sustainable and meeting demand to minimise the further erosion of access to justice for Victoria’s most vulnerable citizens’.\textsuperscript{40}

The Productivity Commission’s findings provide a starting point for governments to act to address unmet legal need. However, additional funding is also needed to ensure people have access to assistance in matters brought by state and some Commonwealth authorities, such as in criminal and child protection jurisdictions. This will require significant additional investment beyond the Productivity Commission recommendation, which was simply a stopgap measure for civil legal assistance.\textsuperscript{41}

While the Commonwealth Government is required to respond to a Productivity Commission report within 12 months of it being made public, this has not happened. The Commonwealth Attorney-General indicated that a government response would be made public before the end of this term of government. Irrespective of the Commonwealth’s response, the Victorian Government should use the current Access to Justice Review to act on the recommendations of both the Productivity Commission and VAGO inquiries by increasing funding to the legal assistance sector.

**Underinvestment compared to New South Wales**

NSW provides a useful comparison to the Victorian legal assistance sector as it shares many core features with Victoria that make them both high-cost jurisdictions.\textsuperscript{42} NSW is also a relatively similar jurisdiction in terms of its use of the mixed model; however, Victoria makes greater use of CLCs within current funding arrangements.

Victoria receives the smallest amount of Commonwealth funding on a per capita basis ($8.07 per capita), on a comparison with other states and territories. If what Victoria receives were be adjusted

\textsuperscript{38} Productivity Commission, above n 15, 739.

\textsuperscript{39} Victorian Auditor-General’s Office, ‘Auditor-General finds legal aid services restricted by financial constraints’ (Media Statement, 20 August 2014).

\textsuperscript{40} Ibid.

\textsuperscript{41} The Productivity Commission defined civil law broadly to included family law matters and excluded criminal: Productivity Commission, above n 15, xviii.

\textsuperscript{42} Both the Victorian and NSW jurisdictions use a model whereby solicitors take carriage of a matter for its duration and brief a barrister, meaning in many cases spending is required on both a solicitor and barrister.
to the average rate for all Commissions ($8.75 per capita), it would receive extra $4 million per annum from the Commonwealth.  

The Commonwealth should respond to calls made by the Productivity Commission to increase its investment and to also become a joint 50 per cent funder of the sector. However, a focus on long-term Commonwealth underinvestment in legal aid, where it has receded from being the major funder to providing 32 per cent of our funds, masks an inequity in State funding. The difference in state funding levels between Victoria and NSW is particularly stark when taking into account the different models for providing public defenders and telephone legal help services. In short, the Victorian legal assistance sector receiving markedly less funding per capita from its state government than NSW.

In 2014-15, NSW Legal Aid received $162.6 million from state sources (government and Public Purpose Fund), an investment of $21.34 per capita. This increases to approximately $22.96 per capita when taking into account comparable services and expenditure on LawAccess NSW and Public Defenders, the equivalent of which are provided by VLA in Victoria.

In 2014-15, VLA received a total of $114.3 million from state sources (government and Public Purpose Fund), an investment of $19.25 per capita.

To achieve parity with NSW, VLA requires an investment of approximately $22.03 million per year.

The below table provides a comparison of funding between Victorian and New South Wales legal assistance sectors.

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43 In 2014/15, Victoria received a total of $47.9 million from the Commonwealth Government. If Victoria’s funding was adjusted to $8.75 per capita, this would increase to $51.9 million per annum.

44 A call for ‘cooperative federalism’ and the need for the Commonwealth to return to an equal share of funding between the state and Commonwealth was made in the 2009 PricewaterhouseCoopers Report Legal Aid Funding: Current Challenges and the Opportunities of Cooperative Federalism: Law Council of Australia, What is the legal sector doing to address the issue <http://www.lawcouncil.asn.au/lawcouncil/index.php/what-is-the-legal-sector-doing-to-address-this-issue>.

45 In Victoria, VLA funds Legal Help, the main telephone entry point, and VLA Chambers, a staff-based public defence service comparable to NSW’s Statutory Public Defenders. In NSW, LawAccess and Public Defenders are funded outside of NSW Legal Aid. Figures for total spending on NSW Legal Aid, Law Access and The Public Defenders were provided by NSW Legal Aid.
<table>
<thead>
<tr>
<th>Victoria</th>
<th>New South Wales</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal assistance is provided by VLA, community legal centres (CLCs) and the private profession.</td>
<td>Legal assistance is provided by Legal Aid NSW, community legal centres, the private profession, public defenders and LAWAccess.</td>
</tr>
<tr>
<td>Telephone advice and information services are provided by VLA.</td>
<td>Telephone advice and information services are provided by LAWAccess with funding from the NSW Government, the Public Purpose Fund and Legal Aid NSW.</td>
</tr>
<tr>
<td>Advocacy services are provided by barristers employed in VLA Chambers and the Victorian Bar.</td>
<td>New South Wales has barristers appointed as independent statutory officers under the Public Defenders Act 1995. These are funded by the NSW Government through the Department of Justice. The Private Bar is also used.</td>
</tr>
<tr>
<td>67% of all grants of assistance were assigned to private practitioners.</td>
<td>68% of all grants of assistance were provided by private practitioners.</td>
</tr>
<tr>
<td>VLA receives a total of $114.3 million from state sources (government and Public Purpose Fund). This is an investment of $19.25 per capita. Victoria requires an investment of approximately $22.03 million to achieve parity with the per capita investment in legal assistance in New South Wales.</td>
<td>Legal Aid NSW receives a total of $162.6 million from state sources (government and Public Purpose Fund). This is an investment of $21.34 per capita. Investment in legal assistance in New South Wales increases to approximately $22.96 per capita when taking into account expenditure on LAWAccess and Public Defenders*.</td>
</tr>
<tr>
<td>In Victoria, the State Government is the majority partner in community legal sector funding.</td>
<td>In New South Wales, the Commonwealth Government is the majority partner in community legal sector funding.</td>
</tr>
<tr>
<td>VLA provides funding to 39 community legal centres. The total per capita investment in community legal centres was $3.92. The per capita State investment was $2.41.</td>
<td>Legal Aid NSW provides funding to 36 community legal centres. The total per capita investment in CLCs was $2.26. The per capita State investment was $0.83.</td>
</tr>
<tr>
<td>The Federation of Community Legal Centre received total funding of $775,290 from the State Government as administered by VLA. Source – Victoria Legal Aid Annual Report 2014-15</td>
<td>Community Legal Centres NSW received funding of $387,512 from state sources (Government and Public Purpose Fund). Primary source – Legal Aid NSW Annual Report 2014-15 * Note – 2013-14 Public Defenders Annual Review data used as 2014-15 data unavailable</td>
</tr>
</tbody>
</table>

**Recommendation 4 – Increase State funding**

Increase State funding by $42.01 million per annum to address critical underinvestment. This should consist of:

- an extra $22.03 million per annum to reach parity with NSW (the most comparable state or territory in Australia)
- an extra $19.98 million per annum to address the funding shortfall identified by the Productivity Commission with respect to civil and family legal assistance.

**Recommendation 5 – Increase Commonwealth funding**

Increase Commonwealth funding by $29.96 million per annum, being Victoria’s fair per capita share of the extra $120 million in Commonwealth funding recommended by the Productivity Commission.
Priority areas for additional investment

Building on Our Strategy 2015-18, the recommendations of the Productivity Commission, and what we know about unmet legal need, additional investment would enable VLA to:

- reduce severe pressure on existing services to ensure they are of a high quality and meeting clients’ needs
- futureproof services to cope with increasing demand, both now and in the future
- ensure eligibility for legal aid services and levels of assistance reflect contemporary experience of disadvantage
- expand Legal Help, the main entry point to the legal assistance sector
- ensure private practitioners are appropriately remunerated
- expand specialist family and civil law services.

Each of the above areas for additional investment are expanded upon below.

Reducing pressure on existing services and meeting future demand

Many of the services VLA provides are stretched wafer thin. In some areas, this means that people miss out on vital assistance. In other areas, it means that services are sub-optimal. For instance, recent research released by VLA showed that, due to high demand, only four in every ten people receive assistance at court in the family violence jurisdiction. Much of the assistance provided is time pressured and some is clearly insufficient. There are similar concerns about criminal duty lawyer services. Simply put, current services are not keeping up with excessive levels of demand.

Over-stretched services also limit practitioners’ ability to provide holistic services. As found in the LAW Survey, a client will often present with a cluster of intertwined and related legal and non-legal problems. Providing an appropriate and effective service for people in these circumstances requires a response to the broader issues that may be impacting on their ability to access a good outcome through the justice system. However, holistic lawyering becomes increasingly difficult, if not impossible, in the time-constrained environment in which many legal aid services are provided.

VLA’s duty lawyer services are particularly stretched. List sizes vary across different practice areas with lawyers servicing the family violence intervention order list seeing on average ten to 12 clients per day, and up to 17 clients per day.

In practice, this means that a lawyer is significantly limited in the time they can spend with a client, and they are required to go over-and-above to ensure a quality service.

On any one day at court, a duty lawyer will be required to: triage clients to assess eligibility; take advice from eligible clients; engage with prosecutors or the other party’s counsel; make appropriate referrals and provide legal information to clients; and, provide representation in court. Having serviced the list, the lawyer is then required to return to the office to complete the necessary paper work and follow up on various client issues that require further work or referrals.

VLA has an obligation as an employer to ensure staff are safe at work, which includes ensuring that their workloads are realistic and services can cope with the presented need. This is particularly important given the intensity of the work and the challenging environments in which lawyers are


47 Coumarelos et al, above n 12, 45.
required to provide services. In a number of other areas of law and at a number of the busiest courts, additional investment is needed to simply ensure that existing services are staffed in a sustainable way so that staff do not ‘burn out’ and to allow them to provide high quality, comprehensive services to clients.

Increased investment would allow us to address areas that are currently stretched too thin, and ensure clients receive a high-quality, appropriate and effective service for their needs.

**Case study: Duty lawyer services stretched thin**

‘In my role as a Senior Lawyer at the VLA, I provide duty lawyer services at the Dandenong Magistrates’ Court. I cover two lists: the Mentions List, for people who are having their charges heard before the Magistrate for the first time; and, the Custody List, for people who are in custody and whose charges are coming before the Magistrate.

When I cover the Mentions List, I work with another colleague and we will, in any one day, assist (through both advice and representation) between 25 and 40 people. Our clients are facing charges for matters such as breaches of a family violence intervention order, property offences, offences involving the use of violence and much more. For each person, we need to get the relevant background to the matter, explain the nature of the charges, explain the consequences they face and the different options open to them, and provide advice on how they should proceed. In some matters, we will also provide the person with representation, meaning we also need to seek instructions from the client, and then go on to provide representation before the Magistrate.

Given the issues many of our clients face, we will often need to contact a range of support services, and if the person is in custody and seeking bail we will need to make the necessary arrangements to ensure they have stable accommodation that will be satisfactory to the Magistrate. This is often difficult and time-consuming given the huge shortage of appropriate accommodation for our clients.

Often, it is around 5pm by the time I have got through the list for the day. I then head back to the office and deal with a range of matters arising from my day at the court. This may involve preparing duty lawyer memos, updating duty lawyer records, attending to correspondence, preparing bail applications where required, contacting support workers and family members of clients, and other necessary tasks.

Many of the clients we represent have mental health and drug issues. Many are drug affected when in custody. We don’t get much time to take instructions from our clients who are in custody. There are several people in the court cells each day and there are only two interview rooms in the cells at Dandenong Court. There is usually a queue of lawyers waiting to see clients in the cells, Corrections officers waiting for their turn to do assessment for reports, and credit bail officers waiting to do assessments. Due to the number of clients that a custody duty lawyer is required to represent, the duty lawyer does not have sufficient time to finalise a client’s case on the same day and often has to apply for an adjournment.

Because of how limited our time is, in many cases we cannot provide people with representation. With more lawyers, we could do more for our clients. We could spend more time on preparation both in terms of research and case preparation and arranging supports in place for our clients. We could also have a better work-life balance.’

**Senior Lawyer, Victoria Legal Aid’s Dandenong office**
Ensure services can cope with increasing demand both now and in the future

In some areas, increasing demand is stretching already-stretched services even further. Family violence and child protection are two areas where this is evident. As explored in VLA’s submission to the Royal Commission into Family Violence in June 2015, over the last ten years there has been an 83 per cent increase in the number of family violence intervention order applications finalised by court and, in the last five years, a 70 per cent increase in the number of family incidents recorded by Victoria Police. In 2013-14, there were 35,135 family violence intervention orders finalised and we provided 10,609 duty lawyer services.48 Similarly, we have seen a significant increase in demand for our child protection services.

In recent years, VLA has met significant additional client activity in our Legal Help phone service, mental health, family violence, and child protection areas. Our most recent environmental scan highlights the demand for help with family violence, child protection, criminal charges and welfare entitlements we expect to face in the future. This assessment is based on existing eligibility settings, rather than expanding into addressing current unmet legal need.

Additional investment from the Victorian Government would enable services to meet demand, both now and in the future, and to ensure clients and the broader community benefit from high-quality, effective services. In addition, as explored below, better forecasting of the impact of legislative and policy changes would assist VLA to manage future demand.

Case study: Future demand for VLA services

VLA regularly undertakes environmental scans to identify trends in the justice sector and broader society that will impact on our clients and demand for our services.

Some of the trends identified in the February 2016 environmental scan include:

- Research shows little change in attitudes towards family violence between 2009 and 2014. This suggests family violence rates are unlikely to reduce.
- Family violence incidents have increased by 62.7 per cent between 2011 and 2015, based on data from Victoria Police. This reflects increased community awareness and confidence in system responses. The Victorian Royal Commission into Family Violence will see demand for services continue to rise.
- An increase in notification and substantiation rates and the number of child protection caseworkers will continue to increase demand for child protection legal services.
- Criminal offending has increased by 6.0 per cent from 2014–2015, with considerable increases in the regions of Horsham, Latrobe and Dandenong. Increases appear to be driven by property and deception offences, drug offences and justice procedure offences (breaches).
- Changes to the Family Violence Protection Act 2008 relating to family violence breach offences has seen an increase in the use of imprisonment as a sentence up from 13.8 per cent to 16.2 per cent of all sentences.
- Prison overcrowding as well as tougher parole and bail laws are limiting access to rehabilitation and reintegration programs and increasing the likelihood of people returning to prison. Higher rates of recidivism creates future demand for VLA's criminal law services.

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48 Magistrates’ Court of Victoria, Annual Report 2013/14 (Magistrates’ Court of Victoria, 2014) 68.
• The Department of Health and Human Services has established *Taskforce Integrity*, which aims to target welfare fraud and will likely lead to increase prosecutions in this area.
• It is estimated that 1,400 people will lose entitlements under changes to the Disability Support Pension. This will likely mean more people will be placed on the much lower paid Newstart Allowance. Changes to payments may increase the number of people who want to review Centrelink decisions, which will increase demand on VLA’s Commonwealth Entitlements program, as well as increase the pool of people eligible for legal aid services.

**Recommendation 6 – Reduce pressure on duty lawyers**
Alleviate time-pressured and over-stretched services to ensure duty lawyers can provide high-quality assistance that meet clients’ immediate and future needs.

**Recommendation 7 – Properly fund policies that impact on the justice system**
Properly resource legal aid services to keep pace with legislative and agency-led demand.

**Expand eligibility for legal aid services**
A significant amount of legal need within the Victorian community is currently not being met. This was illustrated in the LAW Survey, which found that only 51 per cent of people with a legal problem consulted a legal or non-legal professional to deal with their legal problem and, of that 51 per cent, only one third sought advice from a legal professional.49

VLA provides services based on the amount of funding at its disposal, not the actual demand or need for legal assistance. We define eligibility for our services based on our finite pool of funding. While VLA provides some services to the public at large, most of our resources are used in services that are means tested. Details about eligibility for VLA services are set out in Appendix 2.

The means test and our guidelines are two of the key policy levers we use to ration the funding we have at our disposal. In the current environment of significant underinvestment, this is reflected in:

- Financial eligibility that does not extend to people who are genuinely too poor to afford a lawyer
- Tight guidelines that limit assistance to only the most serious matters
- Undesirable limits on the provision of higher-intensity services in some areas.

While our graduated service model with varying levels of intensity ensures people can access some form of assistance, we know that many Victorians miss out on the assistance they need. This is either because of the type of legal matter with which they present or because they do not satisfy the means test or subsequent stage-of-matter merits tests, which can result in aid being terminated.

**Reviewing the means test**
VLA recently announced a modest extension to financial eligibility thresholds to better reflect the cost of living in Victoria, however we know that many people are still not considered poor enough to qualify for legal aid even though they cannot afford the cost of private legal services.

49 Courmarellos et al, above n 13, xvii.
Since the adoption of the National Means Test, on which VLA’s test is based (see Appendix 2), there have also been significant changes in the social and economic environment, and the understanding of ‘disadvantage’. There has been increasing acceptance that income poverty line measures may not reflect the experience of deprivation or social exclusion and may only provide a limited picture of what it means to be disadvantaged. Some of the current policy settings are outmoded and need to be revisited as a result. For example:

- the ‘point in time’ income assessment does not accommodate the experience of casual and intermittent employment and may exclude clients or potential clients on the basis of income when they have no ongoing income or financial security
- the means test is accommodating of mortgage obligations but unforgiving in relation to consumer debt, such as credit cards or personal loans, which are often used by some of the most financially disadvantaged people to meet everyday expenses
- the means test has an allowance for home equity but only a small allowance for savings, which may disadvantage people who are renting or with small amounts of savings (for example, rent in advance or a home deposit).

There is also now better information available about patterns of household expenditure. This invites a more rigorous assessment of how we can identify and assess relative disadvantage, based on contemporary information and standards. The critical need to ensure that legal services are reaching the most disadvantaged is supported by research linking the experience of disadvantage with legal need.

In this context, Our Strategy 2015-18 commits VLA to a thorough review of the means test. The key objective of the Means Test Review will be to establish a contemporary, fairer and more easily understood means test to ensure our services are properly targeted to those most in need. It seeks to address concerns about a growing disconnect between the current means test and the contemporary experience of disadvantage, improve accessibility and transparency and deliver a means test that results in a fairer assessment of a person’s capacity to pay for private legal services.

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50 These include the Australian Bureau of Statistic’s Household Expenditure Survey, the University of Melbourne’s Household, Income and Labour Dynamics in Australia (HILDA) Survey, and alternative models for measuring income poverty, such as that developed by the Organisation for Economic Cooperation and Development, which capture income distribution and identify low incomes relative to median incomes.

51 Courmarellos et al, above n 12.
Providing additional investment to the legal assistance sector would enable VLA to:

- update the current means test to ensure it reflects the contemporary experience of disadvantage and meets the needs of Victorians now and into the future
- expand the means test to ensure it reaches those who genuinely cannot afford to pay for legal assistance
- increase the intensity of services provided in some areas, where VLA has been required to limit assistance in managing a finite fund.

**Recommendation 8 – Reduce barriers to legal aid services**

Reduce barriers to help by ensuring financial eligibility tests reflect the contemporary experience of disadvantage, poverty and the true costs of legal services.

**Expand Legal Help as the main entry point to the legal assistance sector**

Legal Help provides effective information, advice and triage across a broad range of legal issues, and provides a main entry point to the legal assistance sector. Legal Help, as an effective main entry point for the provision of information and triage, is explored in detail with respect to Term of Reference 1 below.

VLA has invested heavily in Legal Help over recent years, including implementing increasingly sophisticated triage processes to cope with a significant growth in calls. However, significant unmet legal need in the community remains. There are many Victorians who have legal problems who do not know where to go, do not access appropriate information or advice, or let their problem escalate.

Further, triage across the legal assistance sector can be patchy. Growing Legal Help as the main entry point would enable greater coordination between services, particularly VLA and CLC services, and provide a smoother client journey to the most appropriate legal assistance service.

Legal Help is a sound and scalable model; its architecture enables us to grow and target new client groups. As detailed below, Legal Help has proven its ability to increase accessibility for hard-to-reach CALD communities through language lines staffed by bi-lingual lawyers.

For a small amount of the additional investment called for above, Legal Help could provide valuable assistance to more Victorians. Investment would increase staffing, allow for extended hours (including weekend access), establish new channels such as webchat and provide greater integration with our website, reflecting the way people now seek information and access services.

**Recommendation 9 – Expand Legal Help**

Continue to grow Legal Help as the main entry point to the legal assistance sector including by providing extended hours, web-chat and greater integration with our website.

**Expand specialist family and civil law services**

The Productivity Commission found that civil and family law issues have a significant impact on the lives of disadvantaged people and, if unaddressed, they can escalate to become more serious issues that are costly for the community and government services.\(^{52}\) However, it found that criminal

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\(^{52}\) Productivity Commission, above n 15, 739-41.
law issues are generally given priority for legal assistance, in part because courts stay criminal proceedings where parties are unrepresented.

An example of the under-servicing of civil law need is evident in the mental health jurisdiction. Despite an expansion in services in recent years, and additional investment from DHHS, a large number of people do not receive any form of representation before the Mental Health Tribunal. In 2014-15, the tribunal conducted 6,619 hearings and only 18 per cent of people received legal representation, which demonstrates that people are not accessing private legal assistance and are appearing unrepresented.

With only 18 per cent of people receiving legal representation, a major access to justice issue exists in the mental health jurisdiction. This is particularly stark in comparison to other jurisdictions. For example, in the United Kingdom every person before the mental health tribunal has the right to free legal advice and representation.

There is also significant unmet demand for assistance in civil law issues that have a major impact on people’s rights and lives, such as tenancy, employment law, discrimination and social security.

Increasing investment in the legal assistance sector would enable the expansion of existing specialist civil and family law services provided by Victoria Legal Aid and CLCs, particularly in regional areas and outer suburban growth corridors.

**Recommendation 10 – expand specialist family and civil law services**

Expand family and civil law services for issues that most affect people’s rights, especially in regions and outer-suburban growth corridors.

**Ensure private practitioners are appropriately remunerated**

VLA has a statutory responsibility to determine schedules of payments for private lawyers who provide legal services to assisted people. These are either lump sum fees or a stage-of-matter limit calculated by reference to board-approved fee schedules. See Appendix 3 for more details on VLA’s fee structures.

VLA is aware that, in some areas, these fee structures mean that private practitioners are not appropriately remunerated for their work, which may make them more inclined to carry heavy file

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54 Ibid 26.

55 This refers to the First-tier Tribunal (Mental Health) in England and the Mental Health Review Tribunal in Wales.

56 *Legal Aid Act 1978* (Vic) s 32(2).
loads that preclude proper client care and attention. There is also a risk of ‘juniorisation’ of legal aid work, where legal aid work is undertaken by inexperienced practitioners.\textsuperscript{57}

The Productivity Commission noted that while there is always likely to be some gap between legal aid rates and ‘market’ rates, there is a need to narrow this gap to ensure experienced private lawyers continue to undertake legal aid work.\textsuperscript{58}

Reviewing fee structures, and as necessary increasing time allowances for some work, is necessary to ensure that clients receive high-quality services.\textsuperscript{59} A lack of adequate investment in the legal assistance sector means that some clients are not getting the high-quality services they deserve and need, and inhibits access to justice.

Given the current underinvestment in legal assistance services and the fact funding is already stretched so thin, addressing inadequate fee structures requires additional investment. The Productivity Commission factored reducing the gap between legal aid rates and market rates into its assessment of the need for an additional $200 million in legal aid sector funding across Australia.

A review of fee structures would also enable us to better incentivise work patterns that lead to the early, appropriate resolution of matters, when in the client’s best interests (as explored below). There is an inherent risk that any lump sum fee structure may inadvertently incentivise lawyers to extend matters to claim fees awarded for subsequent stages or court dates. This risk may be exacerbated when overall rates of remuneration are low.

\textbf{Recommendation 11 – Ensure private practitioners are appropriately remunerated}

Take steps to ensure that private practitioners are appropriately remunerated for the time required to provide high-quality legal aid services.

\section*{The potential of the legal assistance sector to reduce costs elsewhere}

As noted by the Productivity Commission, the provision of legal assistance has the potential to reduce costs in other areas of government expenditure. With greater investment in the legal assistance sector, especially the civil legal assistance sector, the government could realise savings across a range of areas, including the criminal legal system and the health and welfare systems.

Criminal offending is often associated with other markers of disadvantaged, such as poverty, unemployment, low levels of education and family relationship issues.\textsuperscript{60} The most common cluster of legal problems includes the civil areas of consumer law, housing and government, with crime.\textsuperscript{61} Legal assistance in areas such as tenancy, social security and family law can increase a person’s

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\textsuperscript{57} TNS Social Research, ‘Study of the participation of private legal practitioners in the provision of legal aid services in Australia’ (Research Report, Commonwealth Attorney-General’s Department, December 2009) 59-60.
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\textsuperscript{58} Productivity Commission, above n 15, 727-8.
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\textsuperscript{59} See \textit{Term of Reference 8}, for further discussion of other work we are undertaking to ensure high quality services.
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\textsuperscript{60} Victoria Legal Aid, Submission DR252 to Productivity Commission, \textit{Access to Justice Inquiry}, 28 May 2015, 5.
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\textsuperscript{61} Ibid.
\end{flushright}
protective factors against involvement in the criminal justice system, producing a net benefit to the taxpayer.\textsuperscript{62}

VLA has also demonstrated the cost to legal assistance services of young people who come into contact with the justice system as children. VLA’s high contact users are three times more likely to be involved in a child protection or family violence issue prior to the age of 18 than standard users, at a significant cost to the criminal justice system.\textsuperscript{63} Providing legal assistance to families to resolve disputes and ensure children have a safe and stable upbringing has the potential to significantly reduce costs in the criminal justice system further down the track.

\textsuperscript{62} Ibid.

\textsuperscript{63} Ibid.
Duplication of services

Term of Reference 7: whether there is any duplication in services provided by legal assistance providers, and options for reducing that duplication, including the development of legal education material.

Assessing duplication

The mixed model anticipates a range of suppliers or service providers delivering complementary services. In some areas, these services will appear to be similar or even the same. However, perceived duplication of services should be assessed within its context.

For example, as discussed above, in jurisdictions where legal assistance is required for more than one party to a matter the mixed model deliberately ensures there are multiple service providers available to deliver the same service. In this context, what could be perceived as duplication is essential to ensure all eligible parties receive the assistance they require.

In other contexts, services may appear similar but have a different focus or target client group. For example, VLA and the Victorian Aboriginal Legal Service (VALS) both provide services across criminal, family and civil law. However, VALS provides a culturally-tailored service to Aboriginal and Torres Strait Islanders. Culturally-tailored services are essential to build and maintain trust with clients, many of whom will have been failed by mainstream services in the past.

Perceived duplication should also be considered in the context of a provider’s service delivery model. The different parts of VLA’s service delivery model are interdependent. Low intensity services enable VLA to triage priority clients, while providing limited assistance to higher capability clients who may be able to navigate their own problem. Rather than focussing on whether duplication exists, the focus should be on whether there is unnecessary or unjustified duplication. This involves more than simply looking at whether multiple services provide similar services and assessing the following:

- Is it necessary to have multiple providers delivering the same service to adequately meet a legal need?
- Does the service/resource exist to meet the unique needs of a particular client group?
- Does the service/resource form part of a wider strategy or service model, with a purpose that could not be achieved through existing services/resources?

VLA considers that the majority of similar services or resources in Victoria’s legal assistance sector satisfy at least one of the above criteria and, assessed in context, meet a unique need and demonstrate an effective use of resources.

Legal information and education

Legal information and community legal education (CLE) are two areas that are often used as examples of duplication in the legal assistance sector. In part, this is because the strategy underpinning the information or education tool may not be immediately apparent when viewing the material. Rather than pointing to two similar websites or CLE tools, there should be a focus on

64 For example, the issue of duplication was explored at length in Productivity Commission, above n 15.
whether there is duplication in information and education strategies and if so whether the duplication is justified.

To address the question of duplication in the area of community legal education, VLA has prepared a joint submission with the Federation of Community Legal Centres’ Community Legal Education Community Development Working Group.

Therefore, VLA confines this submission to details of how legal information services interact with other parts of our service model. Further details on VLA’s legal information services, including our website and Legal Help, are provided in regards to Terms of Reference 1 and 2 below.

**Legal information as part of VLA’s service model**

Legal information and education are essential parts of VLA’s service delivery model. The provision of legal information is integrated within our service delivery in multiple ways: to complement our legal practice, divert higher-capability users from more intensive services and support our Legal Help phone line.

**Complementing VLA’s legal practice and Legal Help service**

VLA’s legal information resources are part of our direct service delivery model and assist in providing effective services within tight time constraints. Our online information resources cover all of our practice areas and have been drafted through close consultation with staff experts across the relevant areas. Resources contained on VLA’s website can be printed off as stand-alone factsheets, which lawyers provide to their clients at the end of an advice session or before a court appearance. Given that many of our clients see us at a time of heightened distress, it is important to provide them with follow-up materials for them to take away and digest. Fact sheets include a plain language summary of the relevant law and options for further information and referrals.

Legal Help also uses VLA’s information resources to complement its service. Legal Help officers will provide advice and then send a no-reply email with follow-up links and resources to assist the caller to digest the information and further self-help.

VLA’s legal information resources are informed directly by what legal aid lawyers and Legal Help staff require. They are specifically tailored to meet the needs of our client groups and the issues with which we assist. They are refined based on feedback from direct service providers and when the needs of clients change (for example, an issue becomes increasingly prevalent or a law changes), we draw on the expertise of our lawyers to quickly update or create content.

**Case study: Legal information directly informed by VLA lawyers’ expertise**

In July 2014, the *Mental Health Act 2014* (Vic) came into force. The Act was developed over a number of years and VLA’s Mental Health and Disability Law practice played a role in assisting the Department of Health and Human Services in its task. Leading up to the passage of the Act, we worked on developing legal information that would assist practitioners, mental health consumers and the wider mental health sector to understand the practical implications of the new law.65

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This content was created through collaboration with VLA’s expert mental health legal practitioners and our online communications team, who have expertise in plain language content drafting for a range of audiences. The content clarifies the range of new rights and protections afforded to people subject to compulsory mental health treatment, including the new criteria used to assess a person for an order under the Act.

Since the implementation of the Act, we have also created a comprehensive booklet (available both online and in hardcopy) entitled *Going to a Mental Health Tribunal.* The booklet is designed for people who are facing a mental health hearing and includes information about the process, the criterion under which an order can be made, and a range of worksheets for the person to fill out before seeing a VLA duty lawyer. The worksheets cover the different treatment criterion and pose a range of questions to prompt a person to consider the kind of matters that may assist the Tribunal in making its determination.

Diverting higher-capability users from more intensive services

A key objective of VLA’s website is to strengthen the self-help tools available for appropriate clients. While those high-priority clients with the most need for face-to-face contact with a lawyer still find it easy to get the help they need, less disadvantaged clients are encouraged to learn more about their legal problem and what they may do to alleviate it without the need for intervention from lawyers, courts and tribunals. In this way, the online legal information helps to, where appropriate, reduce the demand on more expensive services such as the Legal Help phone line and face-to-face appointments with VLA lawyers.

As detailed below, clients and the workers who support them are the primary audience for our website. As a result, content is designed to be appropriate to the needs and capabilities of our clients, some of whom will have a low literacy rate and need more simple information. At the time of the website redevelopment, we undertook user testing to best tailor it to the client experience. The specific audience of VLA’s website is an important consideration when considering duplication. For example, the VLA website is not designed to assist lawyers or paralegals (although they may find it of benefit, especially for providing content to clients).

VLA prioritises the development of self-help information on areas of law or topics:

- where the law or processes are complex, or where there are numerous complicated forms or paperwork required, to support the legal assistance and advice from Legal Help and VLA lawyers
- there is no appropriate legal information available elsewhere
- where it supports VLA’s business practices.

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Case study: Helping people with fines apply to the special circumstances list

In 2015, VLA developed a self-help kit with sample letters to support people at risk make an application to the Special Circumstances List.67

VLA’s practice areas identified that there was no suitable information (including on the State Government’s Fines website68) to help people make an application to the list. VLA lawyers and Legal Help officers were spending time on the phone explaining the process, and saw a need for a simple self-help resource that they could send to clients in support of the legal advice over the phone.

We created the kit to explain the process in a way that would be clear to anyone – with or without speaking to a lawyer. VLA’s Social Inclusion team, which assists people appearing before the Special Circumstances List and has expertise in the area of infringements, created the content for the kit.

VLA staff now frequently email or text the kit to people who are capable of self-helping without seeing lawyer or who have been given advice by a lawyer and saw a need the material for further action or reference.

In 2014-15, the ‘Fines and Infringements’ legal information pages were one of the top ten topics on our website, with a total of 97,812 page views in the year.

Coordination and information sharing to reduce unnecessary duplication

The risk of unnecessary or unjustified duplication is best addressed through coordination with other service providers and the creation of mechanisms for information sharing and collaboration.

Coordination between providers can assist to reduce the likelihood of providers creating unnecessarily duplicative resources, and can assist to build collaborative relationships for the joint creation of resources.

VLA demonstrates leadership in the coordination of the Victorian legal assistance sector. We established, and continue to fund, the secretariat function of the Victorian Legal Assistance Forum (VLAF). VLAF brings together the state’s eight main legal assistance providers with a focus of improving legal assistance for disadvantaged Victorians.69 VLAF was born out of the 2009 Black Saturday Bushfires, which led to the legal assistance sector coming together to help affected residents and creating what is now known as Disaster Legal Help Victoria.70

The primary objective of VLAF is to improve coordination and collaboration between legal assistance providers. VLAF meets quarterly, bringing together the chief executives (or equivalent) of each of the eight providers. In addition, VLAF establishes various project-orientated and time-bound working groups that consider the needs of particular disadvantaged groups or issues impacting on

69 The eight member organisations of VLAF are: Aboriginal Family Violence Prevention Legal Service Victoria, Federation of Community Legal Centres Victoria, Justice Connect, Law Institute of Victoria, Victoria Law Foundation, Victoria Legal Aid, Victorian Aboriginal Legal Service and the Victorian Bar.
70 Disaster Legal Help Victoria was formed as Bushfire Legal Help. It has since been deployed in various other disasters beyond bushfires, including floods, hailstorms and a large apartment block fire.
the whole sector. There are currently two working groups, the Indigenous Working Group and the Prisoners Working Group, and one regional legal assistance forum in the western suburbs: the Western Legal Assistance Forum. In addition to funding the secretariat function, VLA leads activities relating to the main forum, its working groups and regional forums, and is an active participant in all VLAF activities.

In 2013, VLAF established an Online Working Group, which looked at the creation of online resources for disadvantaged Victorians and ways to reduce any unnecessary duplication within the sector. The group created best practice guidelines for online information that are now used to ensure website resources across the legal assistance sector are effective, of a high quality, and well-coordinated.  

In addition to VLAF, VLA is involved with various other bodies that aim to improve sector collaboration and coordination. For example, VLA sits on a number of the Federation of Community Legal Centre’s working groups, including the Tenancy Working Group and the Infringements Working Group. In other contexts, we attend some of the Federation of Community Legal Centre Working Groups, which enables us to contribute to collaborative efforts within the CLC sector, while respecting the role these groups play as bodies specifically focussed on CLCs.

Various other forms of informal coordination take place across all practice areas, for example through regular meetings with providers of services in a similar geographic location or practice area.

**Case study: Mapping civil and family legal assistance services to Aboriginal clients**

In 2015, the VLAF Indigenous Working Group undertook a collaborative information sharing and mapping exercise to look at access to legal assistance services by Aboriginal and Torres Strait Islanders in five defined geographic regions. This exercise followed the release of a report into the civil and family law needs of Indigenous people in Victoria by the Australian Indigenous Legal Needs Project (AILN Project). The report found that there needs to be a far greater emphasis on the non-criminal legal needs of Indigenous people, and that there are significant gaps in their ability to access legal assistance for civil and family law matters.

The information and mapping exercise involved analysing data from CLCs, VLA, VALS and FVPLS, and a questionnaire completed by VLA and CLC offices in the defined regions. While the mapping was subject to some limitations relating to the granularity of data available for CLCs, VALS and FVPLS Victoria, it provided some useful insights into the levels of access to civil and family law services by Aboriginal people, and where gaps in service provision may exist. The work also looked at some of the projects and programs that had achieved success in engaging with local Aboriginal communities, and considered what lessons could be learnt from these services.

This exercise demonstrates the role VLAF and other collaborative bodies have in highlighting and, where possible, addressing gaps in service provision. The VLAF Indigenous Working Group decided to hone in on the area of tenancy legal services, as an area of significant need identified in the AILN Project, and is now identifying possible collaborative projects that the sector could undertake to help address this need.

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Coordination of CLE resources

VLA’s community legal education tools and resources are created in a highly collaborative way that reduces the likelihood of unnecessary duplication. In creating content, VLA’s CLE program works closely with subject matter experts and organisations engaging in direct service delivery. This ensures strategies are devised in a way that connects to the needs and capabilities of the target audience.

We also work to build CLE capacity within community legal centres and other legal assistance sector organisations. A significant focus of VLA’s CLE program is ‘scaling up’ legal education projects that have been tried and tested by community legal centres. This approach is based on a principle of working together with CLCs, rather than in silos. Further details about VLA’s work with CLCs to roll out CLE projects across Victoria can be found in VLA’s joint submission with the Federation of Community Legal Centres’ Community Legal Education Community Development Working Group.

To ensure we are well connected to other CLE providers and the work taking place in other parts of the sector, including at a national level, the VLA’s CLE program maintains high-level relationships through:

- attending quarterly updates and meetings with CLE counterparts in other legal aid commissions through the National Legal Aid CLE Working Group
- participating in the Federation of Community Legal Centres Community Development and Community Legal Education working group
- participating in the Victorian Legal Assistance Forum Prisoners’ Working Group
- conducting regular half-year meetings with Victoria Law Foundation
- maintaining agreements to distribute content for the Office of the Public Advocate, Victims Services Agency and Victoria Law Foundation.
The role of Victoria Legal Aid

**Term of Reference 8:** the resourcing of Victoria Legal Aid (VLA) to ensure that Government funding is used as effectively and efficiently as possible and services are directed to Victorians most in need, including:

- within the total funding envelope, the types of matters funded by VLA, eligibility criteria for legal assistance and the level of assistance provided
- VLA’s current service delivery model, including the use of panel arrangements and internal lawyers, and spending on allied support services.

**Section overview**

A starting point for considering this term of reference is the Victorian Auditor-General’s Office (VAGO) *Review of Legal Aid* in 2014. In addressing this term, VLA supports the VAGO report and points to it as a recent and considered independent review of similar scope to this term of reference.

Building on VAGO’s report, this section addresses the following:

- the rationale underpinning why VLA funds what it funds, including matter types, eligibility and service intensity
- the role and composition of VLA’s Board, which has the statutory responsibility to ensure that funds are provided in the most effective and efficient way
- our recent work on performance monitoring tools that will enable us to ensure we are providing services in the most cost-effective way, and ensuring high-quality services
- the recent evolution of VLA’s service model to best meet the needs of clients
- the way in which the effectiveness and efficiency of legal assistance services is constrained by other parts of the justice system.

We then make nine recommendations:

- Recommendation 12 – Expand but retain skills-based VLA board
- Recommendation 13 – Promote quality legal assistance services
- Recommendation 14 – Promote early appropriate resolution of cases
- Recommendation 15 – Measure the impact of government decisions on legal aid
- Recommendation 16 – Reduce inefficiencies in VCAT
- Recommendation 17 – Improve efficiency and effectiveness in summary crime jurisdiction
- Recommendation 18 – Eradicate postcode injustice and expand therapeutic and problem-solving courts that have been proven to be effective
- Recommendation 19 – Improve continuity of assistance for families with complex needs
- Recommendation 20 – Advocate at Commonwealth level for improved approach to cross-jurisdictional family law issues.

We note that a number of the areas under consideration in this term of reference are explored elsewhere in this submission — in particular, Term of Reference 6, which accesses the availability and distribution of funding across the legal assistance sector.
The 2014 Victorian Auditor-General’s Review of Legal Aid

In 2014, the Victorian Auditor General (VAGO) completed a review that considered the question of whether VLA was fulfilling its statutory function to provide legal assistance in an effective and efficient manner. Over 12 months, VAGO carried out a broad-ranging review of our operations and decision-making processes. This involved an extensive, independent audit of the following:

- VLA’s service model and the services we provide
- funding settings and the way in which we distribute funding across the mixed model
- strategic and operational planning VLA undertakes
- demand for services
- performance monitoring and reporting
- eligibility criteria and guidelines, including VLA’s priority client framework
- triage and intake processes.

The findings of this report provide an independent, deeply considered perspective on the very questions posed in regards to this term of reference. Following this audit, VAGO concluded:73

‘VLA is performing its role in delivering legal services, and has a sound understanding of the service demands it faces and the challenges it faces around policy settings and funding constraints.’— John Doyle, Victorian Auditor-General

It went on to conclude that while there were shortcomings in VLA’s performance monitoring framework, as a public body it is not alone in this respect. The Auditor-General commented that it was ‘pleasing that VLA has committed to improve its performance framework to provider greater assurance’.74 The VAGO report is publicly available on its website.75

The VAGO audit is an essential start point for the Department of Justice and Regulation in considering this aspect of its Access to Justice Review. VLA endorses VAGO’s summary and findings in respect to the above listed areas.

Why VLA funds what we fund

The current service delivery model for legal aid service delivery, including the matters for which grants of aid are available and the use of different supplier types, reflects an evolution in thinking rather than a point-in-time choice around service settings. Appendix 1 sets out the matter types for which assistance is available, and Appendix 2 sets out eligibility and service intensity.

There are a number of factors that influence the current service model. These include:

- the Legal Aid Act 1978 (Vic)
- historical settings and fundamental principles about access to justice
- VLA’s Unifying Principles
- VLA’s priority client framework

74 Ibid.
requirements under government funding agreements or other legislation
• external legislative and policy changes
• intelligence gleaned from service delivery, stakeholders and the evidence base.

These influences on the continuing evolution of the legal aid service model are set out below.

The Legal Aid Act 1978 framework for service mix and matter types

The Legal Aid Act 1978 (Vic) (the Act) provides VLA with the framework our board uses to
determine the kinds of services we provide and for which legal matters, as well as the best-placed
provider to deliver the service. VLA’s decisions are guided by its objectives as set out in the Act,
which are to:

• provide legal aid in the most effective, economic and efficient manner
• manage resources to make legal aid available at a reasonable cost to the community and on
an equitable basis throughout the state
• provide to the community improved access to justice and legal remedies
• innovate in providing legal aid that minimise the need for one-on-one legal services.\(^\text{76}\)

The Act envisages VLA funding and delivering services and functions that go far beyond simply
providing grants of legal assistance. ‘Legal aid’ is defined broadly in the Act as activities including
education, advice, information in or about the law, alternative dispute resolution programs, duty
lawyer services, legal advice and legal assistance. In setting out VLA’s duties, the Act envisages
that VLA will:

• collaborate with other legal aid commissions and professional bodies in the provision of
legal aid\(^\text{77}\)
• utilise pro bono services offered by private practitioners and law students, where
appropriate\(^\text{78}\)
• use non-legal services such as interpreters, counsellors and welfare officers to assist with
legal aid-related matters\(^\text{79}\)
• communicate and promote legal aid services to the public.\(^\text{80}\)

The Act is visionary in that it recognises that helping people with their legal problems often involves
more than just providing a lawyer. It also recognises the need for flexibility in the types of services
and matters it funds and that, over time, the needs and expectations of the community may change,
and legal aid services need to reflect this. It empowers VLA to use our expertise, gleaned from
consultation and service delivery, to determine what the community needs and how best to achieve
the objectives of a legal aid scheme.

\(^{76}\) Legal Aid Act 1978 (Vic) s 4.
\(^{77}\) Ibid s 7(1)(e).
\(^{78}\) Ibid ss 7(1)(j), 8(1)(b).
\(^{79}\) Ibid s 7(1)(h).
\(^{80}\) Ibid s 6(2)(d).
Historical context of current service delivery model plays a role

Within the framework provided by the Act, historical settings and values continue to influence the current service delivery model. This includes on the matters for which grants of aid are available and the choice of service provider delivering the service.

Early iterations of government-funded legal assistance in Victoria arose from the importance of ensuring representation as an essential part of the right to a fair trial. The importance of legal aid in preserving and enshrining the right to a fair trial is still reflected in VLA’s current service settings, with criminal law forming the largest area of spending in grants of legal assistance.81

‘If you believe in the right to a fair trial, we have to have access to legal aid lawyers. If you believe in the idea of justice, we have to have access to legal aid lawyers. If you believe in the idea that liberty should be deprived only as a measure of last resort, we have to have legal aid lawyers. If you believe in the idea that justice depends on how much you earn, then we have to have access to legal aid lawyers.’ – Professor John Tobin, Melbourne University Law School82

Family and civil law matters have historically attracted less funding and less intensive services than criminal law service. In times of fiscal restraint, family and civil law matters have tended to face more severe cuts, due in part to the underlying assumptions about the relative importance of different legal problems.83 However, in recent years, VLA has increased its focus on civil and family law matters, reflecting the serious consequences people face in these areas, the interconnected nature of legal problems across jurisdictions, and the potential for a positive impact on both the individual and the wider community.

In terms of use of the mixed model, private practitioners have historically provided a large proportion of criminal and family law services, however as detailed above, there have been few private providers for legally-aided matters in some civil law practice areas but a relatively high concentration of CLCs that provide civil law services.

VLA’s Unifying Principles

To assist in our task of determining service type, service intensity, eligibility and the matters for which legal aid services are available, VLA’s board is guided by a set of Unifying Principles. These principles provide a sound basis for the challenging task of balancing multiple and, at times, competing priorities. The board applies the principles in making key decisions, for example, whether to re-prioritise funds between areas, fund a new service, or revise eligibility criteria and guidelines.

81 Another example of this is in s. 24(2) of the Legal Aid Act 1978. This section provides that if VLA is of the opinion that it is desirable in the 'interests of justice' that the person should have legal representation for an indictable offence, it will only have regard to whether the person can afford the full cost of private legal representation.


The principles are based on evidence and values. For example, some principles aim to ensure that funds are spent in the most effective way to reduce the need for future legal assistance, while others reflect the values of fairness and proportionality. The principles reflect four key focuses: services for priority clients; holistic lawyering; quality services; and, ensuring a sustainable financial future.

The Unifying Principles were first articulated in 2012. While historical settings still play a role in current service settings, the principles provide a sound basis for VLA’s current and future decision making.

### VLA’s Unifying Principles

**Principle 1:** All services will have an element of targeting or triaging built in.

**Principle 2:** Targeting or triaging will be directed towards assessing both access (initial eligibility) and intensity (extent) of service.

**Principle 3:** Means or income tests are important, but are not necessarily the starting point for effective triage or targeting.

**Principle 4:** We will only deliver services that have an impact or are effective in delivering benefits to an individual client or the community. ‘Impact’ or ‘effectiveness’ includes consideration of:

- legal merit
- practical benefits to the client (for example, avoiding homelessness or imprisonment, securing income)
- directly contributing to the desired outcome
- evidence-based therapeutic benefits in the provision of a service, as opposed to the outcome (for example, Mental Health Tribunal; hearings, some children’s matters); and/or
- improvements in the proper administration of justice.

**Principle 5:** Service choices and service design will be primarily focused on priority client needs, not just traditional legal problem categories – considering client needs as they present and change over time and giving equitable consideration across competing client needs.

**Principle 6:** Commitment to the mixed model of service delivery in Victoria, but with flexibility to respond to changing circumstances by adjusting the weighting or involvement of staff practice, private practitioners, and community legal centres (CLCs).

**Principle 7:** There should be physical access points to legal aid services across the entire state, but the physical footprint must be appropriately targeted and efficient. Consideration should be given to:

- proximity to major courts
- proximity to other VLA offices, and
- accessibility of alternative legal assistance services (including another VLA office, CLCs and private practitioners doing legally-aided work).

**Principle 8:** Maintain a material footprint through a dynamic staff practice.

**Principle 9:** We will constantly seek out more efficient or lower unit cost service delivery approaches for legal problems or needs and preference those approaches.

**Principle 10:** Proposals, rules or guidelines for services in practice areas will be able to be administered in a way that minimises up front red tape and administrative costs, while ensuring compliance through more efficient risk based targeted and random compliance activities.

**Principle 11:** We will preference more straightforward rules over rules that require application of
subjective judgement.

**Principle 12:** The way that a service is designed and delivered will be amenable to evaluation, scrutiny, and with built-in accountability measures in terms of both performance and community expectations.

**Case study: VLA’s Unifying Principles in action in making changes to child protection guidelines**

Significant amendments to Victoria’s child protection legislation came into effect on 1 March 2016. These changes reduce the role of the Children’s Court but not the level of state intervention in a family. This impacts on the VLA service delivery model for child protection services given that, in the past, provision of a legal service has been triggered by a court date. Under the new legislation, this interaction will no longer take place. A number of other significant legislative changes have also come into effect.

In response to the changes, VLA released a consultation paper seeking feedback from stakeholders on possible changes to child protection guidelines. Following the consultation, we proposed six principal changes to guidelines.

The influence of the Unifying Principles on the board’s decision-making about the proposed guideline changes are clear:

- The new guidelines are targeted to particularly vulnerable individuals because the child has been removed from the home and time has (or is about to) start accruing against reunification (*Principle 1: Targeting of services*).
- Proposed assistance remains focused on cases where reunification remains an option. The proposed changes seek to maintain the level of funding clients currently receive once eligible (*Principle 2: Targeting in terms of access and intensity*).
- The proposed changes introduce the simplified grants process where previously currently a full Assignments assessment is still required, and proof of matter requirements will be clearly outlined for each guideline (*Principle 10: Reducing administrative red tape*).

The board approved the changes, which came into effect on 1 March, at the same time as the legislative changes.

**Priority clients emphasis guides decisions about service types and providers**

VLA makes decisions about the types and intensity of services we provide, and eligibility for these services, based on a priority client framework that ensures that finite resources are directed towards those most in need.

Many of VLA’s clients are financially disadvantaged, socially excluded, and have their access to justice impeded in some way.

Within this cohort of people, VLA’s service design and eligibility prioritises clients who:

- face detention by the state or are having decisions made for them
- are exposed to risk of violence or harm
- are marginalised or vulnerable to exploitation or unfair treatment.

Other indicators of disadvantage that may inform service eligibility or intensity include:

- people who are financially disadvantaged
• children and young people
• women and children experiencing, or at risk of, family violence
• culturally and linguistically diverse (CALD) communities
• people in state custody
• people with mental health and disability issues, and
• Indigenous people.

This framework is complemented by a similar priority client framework set out under the National Partnership Agreement for Legal Assistance Services (NPALAS). The priority client framework is incorporated into VLA’s triage processes, be it in person at a court or other outreach location, or when a person contacts Legal Help.84

A person who falls within the priority client framework may be eligible for a more intensive service than a person who is not. See Appendix 2 for details about eligibility for VLA’s services.

**Service mix reflects government funding requirements**

External funding requirements attached to funding feed into how VLA determines the types and intensity of services available and to whom they are provided.

The Commonwealth Government provides 32 per cent of VLA’s funding to service Commonwealth law matters, such as family law, veteran’s matters and migration law.85

In recent years, the Commonwealth Government has afforded added flexibility in the use of its funding within the scope of the criteria set out under NPALAS. For example, NPALAS sets out requirements around the use of early intervention and prevention services and targeting services to particular clients who face barriers accessing justice. It also sets out the kinds of matters that legal aid commissions should prioritise, with respect to Commonwealth funding.

**External factors, such as legislative changes, impact on the service model**

The service model and the matters for which legal aid is available must be responsive to external factors, such as legislative and policy changes. This is a significant challenge. VLA has a fixed pool of funding and our eligibility and guidelines must be financially sustainable, yet external factors drive demand in a way that is difficult to predict and respond.

This is particularly difficult in the area of grants of aid, which is our largest area of expenditure. Once a guideline has been set, it becomes a statutory entitlement subject to external review: if a person satisfies the eligibility criteria, VLA is bound to provide a grant of aid. When there is a spike in demand in one area for which VLA funds assistance, it immediately erodes funds and impacts on our ability to sustain other service settings. Without additional government investment or repurposing other funds or changing guidelines, services become unsustainable.

Increases in demand come from both policy and legislative changes. For example, a policy decision to increase the number of child protection workers directly leads to a rise in demand for VLA’s child protection legal services. Similarly, changing attitudes towards family violence and increased use of family intervention orders has increased the demand for VLA’s family violence and summary crime services. When demand increases, we are required to consider our existing service settings and, if necessary, make difficult choices about the matters we fund and our service offerings. If demand

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84 See below for a discussion of VLA’s triage processes.
85 Based on 2014/15 levels. The Commonwealth Government provided $51.8 million in 2014/15.
increases and we do not change eligibility for assistance or the intensity of assistance provided, we risk financial turmoil.

Managing changing levels of demand, and the fact that assistance is a form of statutory entitlement, is made even more difficult by the fact that the cost of a grant of aid is often borne over a number of years. For example, it often takes two years or more for an indictable crime matter to resolve and, if assigned to a private practitioner, payments will continue to for the two-year life of the case. This means that when VLA constrains a guideline or eligibility to save or repurpose, cost savings are not immediate. In setting eligibility and guidelines, we need to maintain enough flexibility to cope with increases in demand and the fact that a change in service settings will not necessarily alleviate immediate financial pressures.

As explored below, better assessment of the impact of government decision-making on the delivery of legal aid services would assist VLA with the long-term forecasting we currently undertake.

Another external factor impacting on what VLA funds is the court’s power to mandate the provision of a grant of aid. In some matters, VLA can be ordered by the court to provide assistance in circumstances where we have refused aid on the grounds of means or merit. Again, VLA’s service settings need to be sufficiently flexible to ensure that we can afford to fund matters that we may not choose to fund ourselves.

**Service mix informed by service delivery, stakeholders and research**

The needs of the community are not static, and a changing environment means VLA needs to be constantly assessing whether the mix of services provided best meets the needs of priority clients. VLA consults with staff and other legal and non-legal stakeholders to inform the setting of guidelines and eligibility requirements, and the type and intensity of services provided.

VLA’s practice areas monitor demand and provide feedback on the way in which guidelines and eligibility operate in practice. For example, informed by our staff practice, VLA has proactively identified that imminent changes to the *Children, Youth and Families Act 2005 (Vic)* will significantly impact accessibility to legal assistance at key points in a family’s passage through the child protection system.86

This intelligence also assists in determining the kinds of services required to meet legal need. For example, staff delivering services in courts and tribunals may see the need for additional information or education on a particular topic. Lawyers feed this back to the relevant area, for example the website or community legal education team, which can then undertake a thorough assessment of whether there is a gap in services.

An example of this was the CLE team’s work on *Sex, Young People and the Law*, initiated by staff lawyers who identified the lack of quality information and resources available to young people about sex and the law. The CLE team was able to engage in a scoping exercise to assess what resources were available and, having identified the gap, developed a strategy to best meet the needs of young people.

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VLA’s stakeholders in the wider legal and community sectors also provide valuable insights into the needs and experiences of our priority clients, and the wider societal issues that impact on demand for legal aid services.

**Case study: Consulting with stakeholders on changes to family legal aid services**

In 2015, VLA undertook the broad-reaching *Family Law Legal Aid Services Review* to ensure that family law legal aid services were fair, sustainable and as widely available as possible. The review’s focus was to consolidate what we are getting right in our approach, and to identify and address areas where our service delivery is inefficient, not of a high enough standard, or poorly targeted.

In line with VLA’s commitment to accountability and transparency, engagement with external and internal stakeholders was fundamental to the project.

In the first instance, the Review team mapped VLA’s family law services, identifying opportunities for improvement, and undertook preliminary discussions with key stakeholders to elicit their insights about service improvements. The team conducted more than 50 meetings with stakeholders as part of this stage of the review.

From these insights, a Consultation and Options Paper was released in early 2015, presenting a number of options for reform. Feedback was sought from public and other stakeholders and 29 written submissions were received from external stakeholders, including from Community Legal Centres, private practitioners, the Law Institute of Victoria, the Victorian Bar, community and government agencies and Family Relationships Centres. The submissions were constructive and provided essential feedback on the directions flagged in the paper.

The final review report released in June 2015 recommended 35 changes to current services to help prevent legal problems and resolve disputes before they escalate and included providing services in new ways or at new locations. VLA will adopt these changes over three years.87

VLA is also establishing a working group of private and community lawyers to investigate ways to make the legal aid eligibility guidelines more clear and consistent following feedback that the current guidelines are confusing and hard to apply.

Research and analysis on the needs of legal aid clients, such as the LAW Survey, play an essential role in determining service mix and offerings. An improved understanding of people’s needs, how legal needs intersect, and the impact of legal need on broader disadvantage, has led to a reprioritisation of some services.

In the past, funding has tended to prioritise criminal and, to a lesser extent, family law needs. This reflects the serious consequences in terms of loss of liberty and significant state intervention associated with negative outcomes for a client in these jurisdictions. Civil law problems, such as lack of suitable housing, involuntary mental health treatment and problems securing basic welfare entitlements, have tended to be seen as less of a priority – especially in terms of intensive services. Research into the prevalence of civil law problems, the interrelationship between disadvantage and civil law problems, and the fact that many people with these problems either do not identify the legal

87 Visit [Family Law Legal Aid Services Review](#) for more information.
problem or do not seek help, has highlighted the importance of better servicing civil legal need from an evidence-based perspective.\textsuperscript{88}

**VLA Board’s role in the effective operation of the legal assistance sector**

We consider that a skills-based, rather than representational, board is best placed to meet the statutory objectives set out under the *Legal Aid Act 1978* (Vic). However, expanding board membership from five to seven members would improve diversity and add perspectives to the critically important public interest decision making and stewardship function exercised by the board.

**Skills-based board best placed to carry out the statutory objectives**

The Act expressly provides for the composition of the board, which is made up of the Managing Director and four directors – all of whom are nominated by the Victorian Attorney-General and appointed by the Governor-in-Council. At least one director must have experience in financial management, and one with experience in either business or government. This structure is referred to as a skills-based, rather than representational, board.

The Act also provides for the establishment of a community consultative committee. The community consultative committee has undergone many iterations since it was first legislated and has recently been remodelled.\textsuperscript{89}

The board is also supported by an Audit Committee comprised of the non-executive board directors and with attendance by the Managing Director, Chief Financial Officer and internal and external audit providers. The Audit Committee meets four times a year.

The decision to provide for a skills-based board was deliberate. It was considered in a major report undertaken by Donald Cooper, *Review of the Delivery of Legal Aid Service in Victoria* (‘the Cooper Report’).\textsuperscript{90} This review was tasked with ascertaining whether the then Commission permitted the most effective and efficient delivery of Victorian legal aid services, and included a review of governance structures.

The Cooper Report identified a number of major weaknesses in the Commission’s board at that time; most notably, that its membership was too large, there was a marked lack of expertise in the top levels of management and financial administration, and that the board was fulfilling more of an advisory function rather than a governance function. The report gave particular attention to the question of representation and concluded that stakeholder input would be more effectively garnered in other ways. It stated:

> *If the proposals we make result in bodies losing their direct board representation, we can only say that, historically, that representation appears to have played no*

\textsuperscript{88} Courmarelos et al, above n 12.

\textsuperscript{89} VLA recently established the Sector Innovation and Planning Committee (SIP Committee), which constitutes the community consultative committee in keeping with S12K of the Act.

It goes on to recommend that the board be restructured into two bodies: a Board of Management and an Advisory Board, which would make recommendations to the board in defined areas. This approach was ultimately adopted and the Act was amended accordingly.

The Cooper Report provides essential context when considering VLA’s current governance structure. The current small skills-based board was a deliberate decision to ensure that sectional interests do not restrict the effective operation of what is a large agency responsible for the stewardship of around $160 million per year in taxpayer funds. Stakeholder interests can be and are represented in other, more appropriate forms, forums and consultative processes. In South Australia, a bill was recently introduced to Parliament to amend the structure of the South Australian Legal Aid Commission board in line with the Victorian model.

A commitment to strengthen and improve consultation with stakeholders is evident in VLA’s strategy and demonstrated through various recent consultations. This includes the Family Law Legal Aid Services Review, the establishment of Independent Mental Health Advocacy, recent changes to summary crime guidelines, and the High Quality Criminal Trials project.

Future board composition

The operations of VLA’s skills-based board would be enhanced through a modest expansion in its membership. This was identified in the board’s own review of effectiveness. We believe an expansion in board membership by two persons would add more diverse perspectives and enhance the operation of the board.

Having regard to the existing board composition, people with experience in social justice advocacy and with practical experience of legal and allied service delivery to disadvantaged communities would be the preferred experience and skill base of any new members.

Recommendation 12 – Expand but retain a skills-based board

Maintain a skills-based board, with consultative arrangements to ensure community and stakeholders’ interests are reflected in decision-making processes, but improve diversity by expanding board membership from five to seven members.

The role of VLA’s board

The Legal Aid Act 1978 (Vic) specifies the roles of the VLA board to include determining the policies, priorities and strategies of VLA, and ensuring that we perform our functions and exercise our powers in an effective, efficient and economical manner.

The board is also responsible for managing VLA’s affairs and ensuring we achieve our statutory objectives. This includes managing VLA’s resources to make legal aid available at a reasonable cost to the community and on an equitable basis throughout the state; providing improved access to

91 Ibid 20.
92 Legal Services Commission (Amendment) Bill 2016 (SA) cl 5.
justice and legal remedies; and, pursuing innovative means of providing legal aid directed at minimising the need for individual legal services in the community.

The Managing Director has day-to-day control of the operation of VLA in accordance with the directions set by the board.93

Transparency and accountability

VLA’s Board is accountable to both the State and Commonwealth Governments, and ultimately to the wider community, for how it spends taxpayer funds. In Victoria, the provision of legal aid has benefited from a healthy balance between the board’s independence from government and its accountability for the use of scarce taxpayer funds.

VLA’s core external accountability mechanisms include:

- the National Partnership Agreement for Legal Assistance Services (NPALAS)
- annual reporting94
- State Budget papers95
- client satisfaction surveys.96

In addition, VLA engages in regular meetings with both State and Commonwealth Government officials, including the State Attorney-General, to discuss our operations and topical issues. As required, VLA engages in external reviews on our performance and operations, with recent examples from the past two years including the VAGO Review of Access to Legal Aid and the Royal Commission into Family Violence. In both instances, we provided extensive amounts of internal data and information at the request of VAGO and the Royal Commission respectively.

More informal external accountability mechanisms include providing timely and accessible information about services on the VLA website,97 our fortnightly e-bulletin Legal Aid Brief,98 our social media channels, and engaging with media to share and respond to cases of external interest. These

93 Legal Aid Act 1978 (Vic) s 12A.
94 As required under the Legal Aid Act 1978, each year VLA produces a detailed annual report, which is tabled in the Victorian Parliament. This includes information on VLA’s financial performance, client profile and satisfaction, service delivery outputs and outcomes, organisational performance, and relationships with partners and stakeholders.
95 State Budget Papers provide information to Parliament and the public on how the government intends to collect and spend public money over a four-year period. VLA is accountable under Budget Paper No. 3: Service Delivery as part of the output group ‘Supporting legal processes and law reform’. VLA is accountable for the achievement of four output indicators and one timeliness indicator.
96 Every two years, VLA commissions an independent research agency to carry out a comprehensive client satisfaction survey. The survey involves a random, representative sample of over 1000 clients who received services during the year and asks questions relating to their satisfaction with VLA services (both in-house and private practitioners). The 2014/15 client satisfaction survey can be found here: Victoria Legal Aid, Client Satisfaction Surveys (9 December 2015) <https://www.legalaid.vic.gov.au/about-us/what-we-do/research-and-analysis/client-satisfaction-surveys>.
97 For example, the VLA website provides an overview of all VLA services, profiles of Board and Senior Executive members and past annual reports.
98 Legal Aid Brief is VLA’s primary regular e-news bulletin. It provides updates and relevant news from VLA and other legal assistance partners. Legal Aid Brief was established in 2013 (bringing together a range of other newsletters from across the organisation) and has over 3,500 subscribers. All editions of Legal Aid Brief can be accessed here.
mechanisms aim to provide transparency around our operations and improve public and stakeholder knowledge about the services we provide, our performance and how funds are spent. A commitment to engage externally for accountability and transparency is reflected in VLA’s 2015-18 strategy:

Openness in the way we engage with our partners in the justice sector, consulting them as part of our decision making processes and explaining the reasons for change will enable us to deliver our goal of increasing access to justice. Improving understanding of our role and purpose will also ensure the community understands the value of legal aid and the services we provide.  

Measuring efficiency, effectiveness and quality

The Legal Aid Act 1978 (Vic) requires VLA to arrange and provide legal aid services in the most effective, efficient and economic manner. Essentially, the Act requires us to design and deliver cost-effective services: services that are good value for money. Read in the wider context of the Act, ‘value’ can be interpreted to mean a high-quality service that provides a fair outcome for clients and the wider justice system.

Arranging services in a cost-effective manner involves:

- designing services that are appropriate and proportionate to need
- understanding the impact of services for clients and the wider justice system
- determining the average actual cost of providing a service
- measuring the relative cost of providing services, as between staff, private practitioners and community legal centres
- measuring the quality of services.

The Legal Aid Act 1978 also requires VLA to arrange and provide services at a reasonable cost and on an equitable basis. This requires understanding of the opportunity cost and impact of providing a service to one group ahead of another and the consequence of not providing a service at all, or only providing a limited service.

Viewed together, these requirements necessitate processes and measures that allow us to scrutinise the supplier and service delivery mix to ensure it represents the most appropriate and cost-effective use of legal aid funds. From time to time, adjustments to matters funded and to the type and proportion of work that each supplier provides, or to the resources that each service is allocated, will be necessary. These adjustments may be to:

- the type and way in which services are delivered and by which provider
- whether the time allowances and fees paid to practitioners are sufficient for the legal work required to advance a case
- whether approved service parameters – including the structure of fees – appropriately incentivise early appropriate resolution of cases at reasonable cost, and high-quality practice.

While measurement and evaluation is necessary, having complementary and niche suppliers of legally-aided work operate in a state of constant collaborative (and often competitive) tension is proof itself that ‘value for money’ frameworks exist and are embedded in the way services are currently arranged and supplied. There is no suggestion that one form of supply should disappear entirely so the questions becomes about proportion and performance. These questions include the size of VLA’s staff practice, the cost effectiveness of niche CLCs, and whether arrangements pertaining to private practitioners produce value for money.

Different ways cases are managed to completion

Assessing relative costs must start with the premise that cases will be, and are, managed to completion in different ways. No two cases are the same.

While VLA determines and publishes approved service parameters,100 we do not dictate how a case must be managed. Different practitioners can and will advise their clients and manage cases to completion differently. The attitude of the opposing party, the inherently complex and dynamic nature of legal proceedings and the individualised application of legal judgement and reasoning to a particular set of facts can result in significant variation in how cases are managed.

In legally-aided proceedings, total remuneration represented through the structure and the quantum of lump sum fees101 for various stages of proceedings may also have a bearing on the way cases are managed to completion, but presumably less so for salaried practitioners for whom fees are less directly relevant.

For example, preliminary data comparing the case completion habits of staff and private practitioners has shown that indictable criminal matters that resolve to a plea of guilty do so at an earlier stage for the staff practice, resulting in system-wide savings. This accords with the findings of a study that a salaried practice had a significantly higher rate of guilty pleas than privately-assigned criminal cases.102 Significantly, the rate of conviction was identical. This indicated that salaried practitioners were not compromising their clients’ interests. In both scenarios, the cheaper cost of guilty plea and early guilty plea cases would need to be factored into any assessment of cost effectiveness by supplier type.

When looking at cost effectiveness, it is important to consider costs avoided through early appropriate resolution, as well as costs incurred. In New Zealand, the system-wide savings of avoiding a single criminal trial that runs to a verdict by having a charge resolve with a plea of guilty are estimated at $400,000. Similarly, in family law and child protection proceedings, the cheapest average case costs are invariably associated with early appropriate case resolution, a low number of court events and the absence of formal judicial determination.

Early appropriate resolution of cases is being pursued as a goal across various jurisdictions. In Northern Island, the benefits of early pleas of guilty in criminal cases have been studied and found

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100 Service parameters are the combination of guidelines and procedures that determine the nature and quantum of work that can be claimed against a grant of legal aid. Examples of service parameters include the time and resultant monetary allowance for a gaol visit, the act of taking instructions and reviewing the strength of a family law case sufficient to provide advice or the expectations of what should be achieved and documented when preparing for a complex or voluminous matter in a discrete area of law.

101 See Appendix 3 for more details on how VLA’s stage-of-matter fees operate.

to include the utilitarian benefits of avoiding the time and expense of a trial, lessened impact on victims and witnesses, and a decrease in the time between the offence and a sentencing outcome. This promotes certainty for the accused, earlier intervention into the offending behaviour, and an increase in the efficiency of the court listing process, with court time and resources able to be reallocated to the cases that need the resources more.  

Significantly, the report does not advocate for an increase in the number of guilty pleas, but rather advocates for the removal of obstacles such as lack of early case disclosure that stand between an accused and the early resolution of their case.

More recent research in New South Wales has identified similar issues. In NSW, 26 per cent of guilty pleas in the District Court were entered after having been committed for trial, with a significant proportion of those being entered on the day of the trial. In addition to the cost of representation and court time, late pleas like this are also responsible for additional demands on and disruptions to the jury system.

The system-wide benefits of early pleas of guilty are self evident, with demonstrable savings accruing to many agencies in the criminal justice system: prosecution, defence and the courts. In addition, however, the facilitation of an early plea of guilty can have significant benefits for an accused. In Victoria, the stage of proceedings when an offender first indicated an intention to admit their guilt is a relevant matter to be taken into account in mitigation of penalty. The mitigation provided by an early and uncontested plea of guilty, entered at the earliest practical opportunity has been held to be substantial, justifying a ‘high discount’.

While the examples above consider early resolution in a criminal context, the same utilitarian benefits flow in relation to family law proceedings. Indeed, the resolution of contested family law cases without a hearing may have the additional benefit of preserving rather than harming family relationships.

This search for early appropriate resolution does not presume to erect barriers to cases that should proceed to verdict or judicial determination, and should not necessarily alter the number of cases that resolve without a contested hearing. Rather it seeks to incentivise early disclosure between the parties, meaningful negotiation and resort to courts and judicial processes only where it is truly necessary.

Case study: The case for early appropriate resolution

In the County Court, the average staff-assigned criminal trial runs for six sitting days. A final directions hearing (FDH) is held about a month before the trial is listed to begin and significantly

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107 R v Duncan [1998] 3 VR 208 at 214-5 per Callaway JA.
different fees are payable depending on whether a potential trial resolves to a plea of guilty before the FDH (an ‘early plea’) or after the FDH (a ‘late plea’).

An early plea is two-and-a-half times cheaper than a late plea, and there is a minimum five-fold difference in counsel-only costs between an early plea and an average trial. Expert witness and disbursement costs are also typically associated with a trial that runs to verdict and this would inflate actual average trial costs beyond the five-fold difference in counsel only costs.

The cost to the Legal Aid Fund is not, and should not be, the prime hallmark of a well-run matter. However, in this instance, the best result for the client will arguably occur where they are able to demonstrate that they have pleaded guilty at the first available opportunity. Having pleaded well in advance of the final directions hearing will increase the strength of this argument, and is likely to result in a better sentencing outcome for the client, all other factors being equal.

It is important to acknowledge that the structure of stage-of-matter fees is not the only factor that could influence practitioner behaviour around the culture of early resolution. The practice of criminal law requires the prosecution and the accused to be fully engaged with the material, to make decisions to be prepared to accept professional advice.

Importantly, variations in average case costs can also occur between different private firms and between private firms and the salaried staff practice more generally. There is no truism about performance between supplier types, however, early appropriate resolution does result in fewer court and hence fewer billable events, and therefore a lower average case cost.

The Financial Performance Model

VLA’s Financial Performance Model (FPM) assists in assessing the relative cost of legal aid services. The FPM measures the cost recovery of the staff practice by comparing:

- the cost of having a staff practice, and
- the outputs with fees payable to private practitioners for the same kind of work.

While it assists in assessing relative cost, it is not conclusive – in part because of the different ways that cases are managed to completion, as detailed above.

The FPM measures the cost of providing services through the staff practice (‘attributable costs’) and compares it with the cost of a private practitioners providing for a similar service (‘notional income’). This is referred to as a cost recovery ratio.

The ‘income’ of a service delivered by the in-house practice is determined by attributing a dollar value to a service performed by an in-house lawyer. For some services, such as grants of aid or duty lawyer service, this is derived from the applicable fee that would be paid to a private practitioner. Other services that are not delivered by private practitioners, such as community legal education and professional legal education, have a ‘notional income’ attached.

The FPM commenced operation on 1 July 2014. At that time, VLA had the model independently audited by KPMG, and it was assessed as a ‘reasonable and appropriate way to value or measure the relative cost (and output) of the staff practice’.

In time, the FPM will enable VLA to understand staff workload and output in ways that will allow assessments about the adequacy of time allowances built into lump sum fees. For instance, if a well-led, adequately remunerated, appropriately skilled and industrious staff practice is not able to
recover its costs, then this may say something about time allowances or the adequacy of lump sum stage-of-matter fees.

**Private practitioner fees**

The vast bulk of private practitioner fees are lump sum stage-of-matter fees. Practitioners move through the stages of a case and claim fees as they go. Stages are often linked to significant court or exchange points in a case where negotiations are required with the other party, and are often accompanied by requirements for the practitioner to re-certify that their client’s legal argument is still meritorious. The lump sum for each stage is usually determined by multiplying an ‘underlying hourly rate’ for professional services by ‘an allowance for hours’, reflecting the time an appropriately skilled practitioner would ordinarily need to apply to a standard event. Complexity factors and non-standard fees also apply. There are over 450 different stage-of-matter fees.

Stage-of-matter fees can also be seen as being representative of the ‘approved service parameters’ for ensuring a client’s case is moved forward with no more and no less professional assistance than might reasonably be required. This includes having regard to the ‘proportionality principle’ and the ‘opportunity cost’ of continuing to help one worthy person ahead of another worthy person, through each stage of their legal case. The interaction of eligibility guidelines, their ongoing merits tests and the value attached to the accompanying stage of matter fees, produces ongoing inevitable tension about the appropriateness of individual service design that lies at the heart of VLA’s statutory function.

**Unit costing**

The FPM and In-House Billing module provide an effective basis for capturing the work *output* of the staff practice. It does not, however, capture the time *inputs* necessary to complete a particular task. VLA is undertaking a comparative costing exercise to derive average case costs that will be sensitive to the actual costs of delivering work through staff or private practitioners and that will take account of early appropriate resolution rates, including the relationship between early preparation and cost savings in matter resolution and diminished court time. This work will cross-reference and complement the FPM and provide additional data that compares the relative cost of using a salaried staff practice against the cost savings, system and client benefits of early appropriate resolution.

**Quality of legal aid services**

In its 2014 audit of the FPM, KMPG noted the need for financial measurement to be complemented by quality initiatives. This recognises the fact the legal aid is not just about finding the cheapest way to provide poor people with legal services; it is about providing high-quality, impactful services that meet the needs of our clients, our community and the justice system.

While the FPM counts and values the number of services that VLA’s in-house practice provides, it does not provide insight into how well they are delivered. It does not capture the quality of the service, its impact or a client’s satisfaction. In the private market, competition between service providers is one mechanism to promote high-quality services: if a person is unsatisfied with a service, they will choose a different provider. While legal aid services afford some degree of choice, people are more restricted than in the private market and providers are less incentivised by competitive forces. The importance of measuring the quality of services provided is further heightened by the fact that VLA is limited in its ability to monitor the quality of services provided by private practitioners, in the absence of the employment relationship it has with in-house lawyers.
In assessing cost effectiveness or its quality dimension, it is natural to consider the result achieved for a client. Although individual practitioners unquestionably look to these results as a source of professional satisfaction, there are reasons why a focus on individual case outcomes is not necessarily the best marker of quality.

Although it is reasonable to monitor individual case outcomes for any material divergence between supplier types, VLA has chosen to focus on process quality and skill attributes in our effort to embed a quality dimension to its obligations to arrange services that are cost effective. Put simply, VLA ensures that only practitioners with demonstrated skill and ability are able to do the work in the first place (through our panels arrangements), and ensures that fee structures are informed by a robust understanding of the underlying process that is required to support a good client outcome. Significantly, the staff practice plays an important part in testing and developing the processes and tools that underlie high quality legal aid work.

VLA has commenced work in measuring the quality of services provided by private practitioners. This includes a new Quality Audit Model, which assesses the quality of work done by private practitioners undertaking legally-aided matters. Quality audits will assess the quality of work done against VLA’s practice standards, which are the minimum quality standards applicable to legally-aided work.

This work complements recent initiatives to not only monitor quality but also improve it. This includes the Panels Project and the High Quality Criminal Trials Project, both of which focus on supporting the delivery of high-quality legal services through both the in-house practice and private practice.

**Evaluating the impact and outcomes of services**

Legal assistance services should be cost-effective and of a high quality, but they also should have a meaningful impact – for the individual involved, the justice system and the broader community. In recent years, VLA has undertaken work to develop its evaluation capability, to assist programs to define what a meaningful impact looks like in their work. Robust evaluation practices ensure that VLA is able to track whether it is fulfilling its statutory objectives and its internal performance goals.

Many of VLA’s specialist program areas have created program logic models, which identify the problem their work addresses and set out the necessary inputs and activities to achieve short and long-term goals. This exercise ensures that these programs have a cohesive understanding of what they are trying to achieve, and that work is directed towards achieving the defined outcomes. Program logic are devised through facilitated discussion with the relevant program, ensuring a sense of ownership for the vision it creates.

Across the sector, more robust evaluation would provide greater surety about the impact of particular service initiatives and interventions. Monitoring and evaluation requires appropriate skills and resourcing.\(^{108}\) Funding surety is integral to facilitating a culture of robust evaluation. Legal assistance services need to be critical of failings in projects and pilots in order to inform decision-making and refine practice. However, this practice can be undermined by a need to rely on evaluations as bids for continued funding. There is scope for VLA to play a greater role in sharing evaluations expertise and assisting others in the legal assistance sector in this work.

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In the absence of a body dedicated to research, evaluation and innovation in the legal assistance sector, there is scope for VLA to play a greater role in sharing our evaluations expertise and assisting others in the sector with this work. As outlined above, VLA considers that a dedicated research, evaluation and innovation function vested in an independent body would strengthen the evidence-base of what works in Victoria’s legal assistance sector.

**Recommendation 13 – Promote quality legal assistance services**
Prioritise improving the consistency of the quality of legal assistance for vulnerable clients as a key factor in improving access to justice.

**Recommendation 14 – Promote early appropriate resolution of cases**
Support service parameters, practice standards and funding structures to promote early appropriate resolution of cases.

**Evolution of VLA’s service model to best meet the needs of clients**
Since the inception of legal aid commissions, there has been constant evolution in the legal assistance landscape alongside societal trends and legislative changes. This has seen a move away from a sole focus on paying for lawyers for financially disadvantaged people, to a more sophisticated approach to providing legal help for people facing various forms of disadvantage. This has been reflected in VLA’s service model, with changes to ensure we can best meet the needs of our clients and the wider community, as well as ensure a sustainable financial future.

This evolution has seen changes in the types of services we provide, and the proportion of services delivered by various suppliers within the mixed model of assistance. A full list of services funded and delivered by VLA is provided in Appendix 1.

At times, this has involved making difficult choices in difficult circumstances. Unfunded demand and the need to manage resources sustainably was the primary driver behind changes to the VLA service model in 2013. With a large and growing deficit, we had to act swiftly to prioritise assistance to ensure we could continue to meet our financial obligations. Insufficient and time pressured community and stakeholder consultation resulted in an erosion of trust about VLA’s stewardship of the Legal Aid Fund.

As part of a package of measures to prioritise assistance and to contain costs, we opted to limit grants of aid and to offer less intensive and less costly duty lawyer services to a large number of people charged with summary offences. This was particularly disruptive to the private profession, to courts and resulted in many eligible clients receiving a lesser service. Given that VLA’s staff practice provides around 93 per cent of duty lawyer services, it also placed significant extra pressure on staff, contributed to a modest increase in staff numbers and altered the proportion of the remaining grant of aid work done by staff.

Significantly, all legal aid commissions in Australia routinely ration and adjust eligibility at the interface between duty lawyer assistance and grants of aid for high-volume summary offences. Although grants of aid for summary offences are not individually costly, they are voluminous and are highly susceptible to changes in law, policy and policing practices, which means there is a high degree of volatility in costs exposures to ‘set and forget’ summary offence eligibility guidelines. For example, very recently, Legal Aid Western Australia has deemed it necessary to cease funding grants of aid in all Magistrates’ Court matters, in light of budget cuts and increased demand.
A more recent and positive evolution of VLA’s service delivery mix has been the move to trial the use of CLCs in delivering legal aid services. This is seen in the recent child protection pilot, detailed above, and in VLA’s increased use of CLCs to deliver duty lawyer services. While VLA’s use of CLCs for child protection matters (and other areas if the service delivery model proves successful) may reduce the number of grants of aid provided overall (reducing the proportion of work done by both staff and private practitioners), this would be a conscious decision to leverage off the strengths of CLCs in their ability to provide holistic services and assist clients with a broad range of legal problems.

Another change in the service mix has been the move towards graduated service delivery and triaging of need. In the past, VLA’s service offerings were relatively homogenous: an eligible person with a legal problem would receive a legal aid service. However, we have expanded our services to ensure more people receive some form of assistance and restricted our most intensive services to those who need them the most.

This has included an expansion of VLA’s Legal Help contact centre, which not only ensures effective assessment, triage and intake, but also enables all Victorians to access some assistance and referrals to address their legal problems. We have prioritised the expansion of Legal Help to not only improve the effectiveness and efficiency of our more intensive services, such as duty lawyer and case work services, but to ensure the service model responds to the wider spectrum of legal need in our community.

As part of maximising our impact within a financially constrained environment, VLA looks for ways to reduce the need for one-on-one legal assistance. Our strategic advocacy work is part of this, and involves running test cases to clarify points of law or challenge the application of the law in a way that has the potential to assist a large number of our clients.109

VLA’s Strategy 2015-18 signposts the future direction for our service mix. The strategy sets out three broad strategic objectives, and commits to a number of changes to the current service mix to meet those objectives. These include:110

1. an intensive, co-ordinated service for at-risk children and young people to address the underlying causes of their legal problem
2. changes to child protection services, focussing on more timely support for parents and integrated help for children at risk of further legal problems
3. an expanded, modernised Legal Help, with longer hours of access and other modes of service delivery
4. more outreach services, including services to support access for Aboriginal and Torres Strait Islanders
5. the creation of Independent Mental Health Advocacy, to support people subject to compulsory treatment to participate in decisions relating to their assessment, treatment and recovery
6. increased service provision in the outer-metropolitan fringe and regional areas
7. the use of strategic advocacy to deliver broad community benefit.

These strategic directions and corresponding commitments came about following extensive consultation with stakeholders and staff. They draw on the Unifying Principles and the insights

109 See example of VLA’s strategic advocacy work above.
110 Victoria Legal Aid, above n 101.
gleaned through direct service delivery, and reflect the evidence base as articulated in various report and inquiries, including that of the Productivity Commission, VAGO and the NSW Law and Justice Foundation.

**Efficiency and effectiveness: a system-wide issue**

The effectiveness and efficiency of legal assistance services is significantly constrained by other parts of the justice system. The actions or inaction of other parts of government and the wider justice system often impedes the legal assistance sector’s ability to deliver services in the most effective and efficient way. To ensure the efficient and effective spending of the legal aid fund, there must be a focus on the broader system in which legal assistance services are delivered.

**Justice impact assessments**

As touched on above, VLA is required to manage a fixed fund in an environment where demand is not static and can be difficult to predict. However, this task is made more difficult by the lack of assessment by both State and Commonwealth Governments into the impacts of policy or legislative change on the delivery of legal assistance services.

Impact assessments are used by various jurisdictions around the world to determine the potential impacts of proposed policy and regulatory and legislative change. Impact assessments are a set of logical steps to be followed as a tool, not a substitute, for decision making.

In the United Kingdom, the Justice Impact Test is used as a tool used to assist policy makers to systematically consider the impact of government policy on the justice system (civil and criminal), including legal aid, courts and tribunals, prisons, prosecuting bodies and the judiciary. The Justice Impact Test requires all proposals to undergo an impact assessment that begins with the question: does the proposal affect the justice system? Where there is a potential impact identified, the detailed assessment includes the quantification of the costs and benefits of potential outcomes and triggers consideration of alternative approaches with the aim to avoid or minimise the impact on the justice system. The Ministry of Justice must agree with any policy proposal with a justice impact before it can be submitted for consideration by ministers.

How policy changes may impact on legal aid is a key consideration of the UK’s Justice Impact Test. For example, the creation of new offences could lead to additional applications for legal aid, changes to welfare benefits could affect the quantity of people eligible for legal aid, and changes to penalties or mode of trial for offences may increase the of providing legal aid. The Organisation for Economic Co-operation and Development (OECD), of which Australia is a member, recommends the use of Regulatory Impact Assessments (RIAs) as a tool for improving the quality and reducing the costs of regulations.

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112 Ibid 5.
113 Ibid 4, 12-14.
114 Ibid 15.
115 Ibid 6-7.
116 Ibid.
In September 2013, the Law Council of Australia (LCA) proposed that Commonwealth Government departments adopt a justice impact assessment process. The LCA argued that the existing RIA process in Australia is focused on productivity and compliance costs for business, with no requirement to consider the social impacts of regulatory change, including the impact upon the justice system. For example, no impact assessments were done prior to the introduction of increases to the Federal Court filing fees in 2010 and 2013, which increased the cost of legal aid. VLA supports the adoption of justice impact assessments as a tool that would improve the efficiency and effectiveness of legal aid services. These assessments would:

- afford decision makers with better intelligence about the broader impacts of a policy or legislative change on the justice sector
- ensure that the real costs associated with a policy or legislative change are measured, and the legal assistance sector is appropriately funded to respond to associated changes in demand
- allow justice agencies to engage in more robust forecasting and plan service delivery with greater financial certainty.

**Recommendation 15 – Measure the impact of government decisions on legal aid**

Introduce justice impact assessments in Victoria to assess the impact of government policy on the provision of legal aid services and the broader justice system.

**Improving VCAT listing processes**

VLA often encounters difficulties in providing an effective service for clients due to wider system inefficiencies or failures. VCAT’s current listing processes for the Residential Tenancies List, a list that hears and adjudicates a large number of claims each year, limits the ability of the legal assistance sector to provide an effective and efficient service.

Since 2001, VLA Social Inclusion sub-program has provided a daily duty lawyer service at the Melbourne VCAT. This service covers the Residential Tenancies List, and VLA’s duty lawyer service focuses on providing assistance to tenants who are at risk of eviction and homelessness. Residential tenants in these circumstances are one of the most socially and economically disadvantaged and excluded groups in the community, and advice and representation is an essential part of upholding their rights.

In recent years, VLA has attempted to extend the reach of this important service to outer-metropolitan and regional VCAT locations. However, it is only an efficient use of VLA’s resources to service the tenancy list if possession orders, which may result in an eviction, are listed on the same day. VCAT’s current listing processes mean that disputes relating to far less serious matters such as repairs are listed with serious matters like possession orders. If VLA services the list, we end up only assisting only a small number of the priority matters for which legal assistance is needed – and for which limited legal aid services should be provided.

VLA made a commitment to VCAT that we would extend the coverage of our tenancy duty lawyer services to other VCAT locations but that it would only be a justified and efficient use of VLA’s funds.

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119 Ibid.
120 Ibid.
if VCAT’s listing processes took a more targeted approach. While some Residential Tenancy List applications are listed through ‘auto-scheduling’ software, landlords who do not engage property managers and rooming house operators still commonly file applications in hard copy, which are then listed manually. As these operators are often more likely to breach their legal obligations, VLA proposed that VCAT list these matters on the days VLA lawyers are in attendance at regional venues.

VCAT considered but ultimately rejected the proposal, on the basis that it would lead to inefficiencies. VLA trialled providing duty lawyer services on a fixed day in regional locations, hoping that this would facilitate negotiations with VCAT, however regional offices opted to stop providing these services when it became apparent that the duty lawyer’s time was being used for matters that are not a priority for VLA.

If VCAT was to take a more targeted approach to listing matters, VLA estimates that, in conjunction with CLCs, it would be able to service two or three business days each week at the five main regional VCAT venues. This would likely be sufficient to cover all possession order hearings. This would significantly increase access to justice for disadvantaged people facing significant consequences in their interactions with the justice system. Given the interrelationship between homelessness and other legal problems, including criminal offending, the benefits of sustaining tenancies for these people would extend to the broader community.

Targeted listing would also enable VLA and CLCs to provide more targeted services to better meet the needs of priority clients, such as Aboriginal and Torres Strait Islander clients. Improved listing processes in the Magistrates’ and Children’s Courts would also enable VLA to deliver more effective and targeted services in these jurisdictions.

Recommendation 16 – Reduce inefficiencies in VCAT

Provide for targeted listing in VCAT, to enable duty lawyer services to more effectively assist people at risk of eviction or homelessness and cater to the needs of specific groups.

Impact of inefficiencies and ineffectiveness in the summary crime jurisdiction

Improving the efficiency and effectiveness of the summary crime jurisdiction would have significant downstream benefits on VLA’s overall efficiency and effectiveness. This is due to the large volume of work VLA undertakes in this jurisdiction.

The balance between efficiency and effectiveness is always difficult to achieve in the highest volume jurisdiction. However, the current system is, out of necessity, geared towards ‘churn’ based efficiency, often at the expense of effectiveness. The summary jurisdiction is in need of both investment and reform, which given its scale would have the greatest direct impact on the community compared to any other court jurisdiction.

Significant growth in demand and complexity in the summary crime system means non-legal and legal service providers are limited in the time and resources they can spend assisting clients. As detailed above, clients are not always getting the quality or holistic service they need, whether it be from lawyers, support services, Corrections or magistrates.

In combination with overcrowded prison and police cells and increased family violence matters, the summary criminal justice system is highly pressured, resulting in increased costs, delay and unfairness.
There is a concerning increase in the number of clients in custody who have not been transported to court on time, in contravention of court orders. The delay and lack of transparency in the movement and lodgement of accused persons has resulted in a chaotic court environment, which impacts adversely on prisoners, magistrates, lawyers and support services. Delays have led to significant uncertainty about lawyers’ ability to finalise hearings and applications, have precluded timely assessment of accused persons by bail support services, and have regularly extended court hours beyond usual business hours. An increase in the number of adjournment and costs applications has resulted in further court congestion, backlog and expenditure.

Of particular concern is the impact of court transportation delays on prisoners. In some cases, this has led to prisoners who were likely to have been released on bail or sentenced to non-custodial dispositions being deprived of their liberty for weeks or months longer than necessary. Some of VLA’s most vulnerable clients are being held in unsatisfactory conditions for extended periods in regional and rural police cells, or in the Melbourne Custody Centre, with limited access to fresh air or natural light. Their telephone calls or visits from family or legal practitioners are limited; they have inappropriate bedding; and, needed supports or supervision is absent — even if they have significant custody management issues. Clients are routinely shuffled between police cells with limited access to family and legal representation, and are often subject to lengthy lock-downs.

The incarceration of some of our clients in unsatisfactory conditions for extended periods exacerbates their risk of self-harm and further offending. The current delays in transportation have worsened this issue.

The combination of ongoing delay and other inefficiencies, including inconsistent listing approaches and practices within the Magistrates’ Court, places further strain on an already over-burdened system. There is a need for greater investment in legal and allied services and for more innovative approaches to the summary crime system and the Magistrates’ Court jurisdiction more broadly, particularly around the use of modern technology for efficient list and case management.

**Recommendation 17 – Improve efficiency and effectiveness in summary crime jurisdiction**

Increase investment in legal and allied services in the summary crime jurisdiction to address demand and system inefficiencies that are reducing access to justice.

**Effective responses to criminal offending through therapeutic justice**

Reducing pressure on the justice system, including legal aid services, requires a more effective approach to criminal offending. Without addressing the issues underlying a person’s offending, court models will continue to act as a revolving door.

Specialist and problem-solving courts such as the Drug Court, the Koori Court, the Assessment and Referral Court (ARC) List and the Neighbourhood Justice Centre (NJC) shift the focus of the court from determining a legal contest between opposing sides to being actively engaged in addressing the underlying causes of offending. For example, the Drug Court’s use of its authority to provide treatment solutions to the deeper causes of drug related offending has been demonstrated to significantly reduce re-offending rates.
Although evaluations demonstrate that these courts are effective in achieving their aims, they are only available to offenders in specific catchment areas, with many only funded on a pilot basis.

Similarly, programs that aim to support accused persons on bail and reduce the likelihood of re-offending, such as CREDIT/Bail and the Court Integrated Services Program (CISP), are not available in all locations. Even where these programs are offered, resource restrictions often result in significant waiting lists. The lack of adequate, state-wide funding means that some accused persons, particularly those in regional areas, are remanded for longer than necessary because bail supports are not available to them.

Also lacking is a coordinated statewide diversion scheme for children and young people. This is despite clear evidence of the benefits of diversion, and the emphasis placed by the Children’s Court on rehabilitation and diverting children from the criminal justice system. A formalised diversion pilot is currently available in seven locations, however the funding of, and approach taken to, diversion in other locations remains ad hoc.

VLA supports justice reinvestment approaches that shift funds allocated to expensive end-of-process options, such as imprisonment, to initiatives that focus on addressing the causes of criminal offending. Reducing the pressure on an overburdened and reactive criminal justice system requires a focus on long-term initiatives that seek to interrupt the offending cycle and address increasing recidivism rates.

To eliminate inequities in current service provision, we support statewide access and funding of bail support and youth diversion programs. We also support the expansion of therapeutic and problem-solving courts.

**Recommendation 18 – Eradicate postcode injustice and expand therapeutic and problem-solving courts that have been proven to be effective**

Eradicate postcode injustice, and expand courts and programs addressing the underlying causes of offending equitably across the state, including therapeutic and problem-solving courts, diversion programs and supported case management services.

**A unified approach to family law matters**

The need for a more effective approach to protecting children in families with complex issues is not new. Researchers and practitioners working in the state family violence and child protection  

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121 KPMG, ‘Evaluation of the Drug Court of Victoria’ (Final Report, Magistrates’ Court of Victoria, 18 December 2014); Department of Justice, *The Drug Court: an Evaluation of the Victorian Pilot Program* (2005); Zoe Dawkins et al, ‘County Koori Court’ (Final Evaluation Report, County Court of Victoria and the Department of Justice, 27 September 2011); Mark Harris, ‘A Sentencing Conversation’: *Evaluation of the Koori Courts Pilot Program, October 2002–October 2004* (Department of Justice Victoria 2006); Stuart Ross, ‘Evaluating neighbourhood justice: Measuring and attributing outcomes for a community justice program’ (Trends and Issues in Crime and Criminal Justice No 499, Australian Institute of Criminology, 2015); Anthony Morgan and Rick Brown, ‘Estimating the costs associated with community justice’ (Trends and Issues in Crime and Criminal Justice No 507, Australian Institute of Criminology 2015); See also Victorian Ombudsman, ‘Investigation into the reintegration and rehabilitation of prisoners in Victoria’ (Report, September 2015), which refers to an internal independent evaluation of the ARC list. A further evaluation of the ARC list is currently underway.

jurisdictions, and the Commonwealth family law system, have made the case for better support for these children and their families for many years.

This policy discussion has arisen from research into the experience of families attempting to navigate the siloed family violence, child protection, and family law jurisdictions. These families may either be involved in concurrent or sequential court proceedings in each jurisdiction.

Reviews and complementary research have led to law reform and initiatives to improve the intersection between the jurisdictions. While this has led to some important developments that have improved the interface between the multiple jurisdictions, our experience suggests that more can be done to consistently support families with complex needs when there is a parenting dispute on foot, a history of family violence and/or child protection involvement.

This has been confirmed by an analysis of VLA client data, undertaken in 2015, that shows that there remains a small but significant number of people with problems that cross over family law, child protection and family violence jurisdictions.123

If policy makers were to re-imagine the legal system in Australia, the establishment of a unified court that could address family law, family violence and child protection matters would be in the best interests of children and families, and more resource efficient. VLA supports the principle of a unified court to comprehensively address the challenges experienced by families with complex needs.

Recognising the constitutional challenges in establishing a unified court, the significant change that this would encompass, and lack of a reform agenda to deliver a unified court, a suite of changes should be implemented to improve the interface between the multiple jurisdictions. This would improve the system for families with complex needs.

Procedures and structures should be built into the system so that families are not solely relying on individuals within the respective jurisdictions who are committed to good communication and supporting them to navigate the system.

Through our submissions to the Family Law Council’s Terms of Reference on Families with Complex Needs, we have made recommendations to: fulfil the one court principle; improve information sharing; strengthen assessment and responses to risk as a family progresses through the court system; and, improve how the court system coordinates with non-legal service providers to assist family members wanting to address underlying issues that impact on a child’s safety.124

Recommendations are specific to the state family violence and child protection jurisdictions or the Commonwealth family law jurisdiction, as well as well as whole-of-justice-system responses that will require coordination between the state and Commonwealth jurisdictions to achieve a comprehensive response.

We recommend that the State Government act on the state-specific recommendations while working with the Commonwealth Government to adopt the whole-of-justice-system responses. In addition, we see an important role for the State Government in advocating on behalf of Victorians for changes at the Commonwealth level that would help Victorian families experiencing complex issues.


124 Ibid.
Case study: Lack of continuity of assistance across state and Commonwealth family jurisdictions

Jack (client’s name has been changed) was living in the care of his adult sister on a child protection order overseen by the Victorian Department of Health and Human Services (DHHS), which was working with his mother to reunite them. His mother passed away before this could happen. Jack’s father had died when he was much younger.

Jack wanted to continue living with his sister, and she wanted to continue caring for him as his legal guardian. The Children’s Court considered an application from Jack’s sister that would have transitioned him from a state child protection order to a Commonwealth family law order. It would have been the simplest approach, as the Children’s Court had all the information relevant to Jack’s situation. This order would give his sister sole parental responsibility and provide certainty and security for Jack.

While the Children’s Court agreed that it was in Jack’s best interests to live with his sister, it refused to make the family law parenting order as it was of the view that it did not have unambiguous jurisdiction to make parenting orders.

This outcome has created uncertainty and distress for Jack and his sister due to the delay and complexity of having to navigate two different court systems that are each overseeing an aspect of his future.

Recommendation 19 – Improve continuity of assistance for families with complex needs

Implement the state-specific recommendations of VLA’s submission to the Family Law Council’s Terms of Reference on Families with Complex Needs, including that:

- Department of Health and Human Services (DHHS) appear at the Family Law Court return date to present the findings of its investigation so the court can make orders that address protective concerns to reduce the need to initiate a second round of court proceedings in the Children’s Court.
- in circumstances where DHHS seeks to withdraw from a family but the parents do not consent to family law orders, DHHS appear at the first Family Law Court date to assist the family in the transition to the Family Law Court jurisdiction
- DHHS establish and communicate a consistent and structured approach for receiving and responding to Notices of Risk
- the Co-Located DHHS Liaison Officers program is expanded.

Recommendation 20 – Advocate at Commonwealth level for improved approach to cross-jurisdictional family law issues

Advocate for changes at the Commonwealth level that would help Victorian families experiencing complex issues, to ensure greater continuity of support across state and Commonwealth family law jurisdictions.

We are also taking steps to address how we assist our clients with complex issues. Our own client data shows that the family violence intervention order applications at the Magistrates’ Courts are the first point of contact into the legal system for many families experiencing family law issues. Of the 1,604 clients that received a grant of aid for a parenting dispute matter in 2012-13, 22 per cent
received assistance for a family violence issue either in the year prior or the one year after receiving assistance for a parenting dispute issue. The most common cluster of legal issues was a parenting dispute with a family violence issue in the one year prior. The second and third most common clusters were a parenting dispute with a family violence matter in the year after and family violence issues both before, and after, receiving assistance for the parenting dispute.

Stakeholders provided feedback through the Family Law Legal Aid Services Review process that supports the data. The review concluded that the Magistrates’ Courts can be better used as a point of intervention to screen for family law issues and provide required referrals for clients. VLA committed in the review to consider the way in which family violence duty lawyer services are provided, with a view to enhancing intake opportunities at Magistrates’ Courts by supporting lawyers to screen clients more consistently for family law need. This is expected to assist with the identification and resolution of family law issues at an earlier stage, reducing the likelihood of problems escalating, and creating future demand for more intensive family law legal assistance.

This is also expected to reduce the risk of family violence escalating, which drives further demand for more intensive family violence legal assistance (including criminal law services). For example, respondents to a Family Violence Intervention Order may breach that order if they believe it means they are unable to see their children. If the respondent was able to access family law advice about permitted contact arrangements under the order, and receive a warm referral to a parenting dispute lawyer to assist with implementing longer-term care arrangements, the risk of them breaching the order is likely to be reduced. The likelihood that respondents would only seek legal assistance once disputes had become acute or protracted may also be reduced.

Another example of work VLA is undertaking in this area, in collaboration with CLCs, is a two-year pilot project to assist clients with child protection and other legal problems, as detailed above. The pilot is designed to provide a more holistic service to clients, many of whom first present with a child protection issue but may have accompanying or overarching family law, family violence and youth crime issues that have not been addressed.

**Eliminating barriers to access to justice in regional and outer-metropolitan areas**

VLA’s ability to provide effective and efficient services in regional and outer-metropolitan regions is hampered by the increased barriers to access in these areas. As a result, our clients in these areas may experience different outcomes through the justice system compared with metropolitan residents.

Distance from courts and related services and inconsistencies in the level of services and therapeutic programs combine to create an unequal system, where outcome is determined by the vagaries of where an individual lives.

Our clients in these areas will:

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125 Ibid.
126 Ibid.
• have fewer support services in the community to assist them with parenting, anger management, drug and alcohol and other issues. This may impact on the quality of the outcome they are able to achieve in court
• have fewer court services to assist them to comply with bail requirements, or engage in pre-sentence rehabilitation
• have less access to court diversion programs in their region, and limited opportunities to avoid involvement in the court system for minor criminal matters
• face delays in the resolution of their matter due to the infrequency of court sitting dates
• experience uncertainty as County Court listing practices result in frequent changes to trial dates as circumstances change.

These circumstances constrain a lawyer’s ability to provide an effective and efficient service to their client. Addressing postcode injustice and ensuring clients have access to appropriate legal and non-legal services, including therapeutic courts as detailed above, would enable VLA to provide a more effective and efficient service.
Part B: Services provided to improve access to justice

Explanatory note: Part B of VLA’s submission addresses the terms of reference that relate to the existing services and service models that improve access to justice. The terms of reference are:

- **TOR 1**: the availability of easily accessible information on legal assistance services and the Victorian justice system, including advice on resolving common legal problems
- **TOR 2**: examine options for diverting people from civil litigation and into alternative services where appropriate, such as a ‘triage’ model
- **TOR 3**: whether and how alternative dispute resolution mechanisms should be expanded so that more Victorians can make use of them
- **TOR 4**: potential reform to the jurisdiction, practices, and procedures of the Victorian Civil and Administrative Tribunal (VCAT) to make the resolution of small civil claims as simple, affordable and efficient as possible
- **TOR 5**: the provision and distribution of pro bono legal services by the private legal profession in Victoria, including:
  - ways to enhance the effective and equitable delivery of pro bono legal assistance
  - opportunities to expand the availability of pro bono legal services in areas of unmet need
- **TOR 9**: options for providing better support to self-represented litigants throughout the justice system.

Identifying, diagnosing and triaging legal problems

**Term of Reference 1**: the availability of easily accessible information on legal assistance services and the Victorian justice system, including advice on resolving common legal problems

**Term of Reference 2**: examine options for diverting people from civil litigation and into alternative services where appropriate, such as a ‘triage’ model.

People experiencing legal problems need to be able to access appropriate legal help in a way that is matched to their needs and capabilities. This requires legal problems to be identified, diagnosed and triaged in a timely way. To achieve this, the legal assistance sector must be accessible, ‘multifaceted’ and ‘integrated’; multifaceted to cater for the diverse needs of the community and integrated to provide tailored, intensive assistance to those who need it most.\(^{127}\)

Effective entry points to identify, diagnose and triage legal problems

The legal assistance sector must have a well-recognised main entry point, supported by targeted and specialist entry points, to enable it to provide multiple effective entry points. Research produced by the NSW Law and Justice Foundation demonstrates that effective entry points can facilitate broad community access to legal services and the justice system, minimise referral fatigue, and maximise the timely resolution of legal problems.\(^{129}\)

\(^{127}\) Courmarellos et al, above n 12, xx.

\(^{128}\) Ibid.

\(^{129}\) Pleasence et al, above n 108, 33-34.
Legal Help the main phone entry point to the Victorian legal assistance sector

A main, well-signposted contact point facilitates access to legal assistance for people who recognise they have a legal problem and are ready to take action. A central entry point provides a mechanism for coordinating preliminary legal needs assessments and referrals, monitoring statewide demand and evaluating the effectiveness of service delivery across the sector. As identified by the NSW Law and Justice Foundation, to be efficient and effective, the main entry point should be:

1. well-known to the public and convenient to use
2. able to act as a legal ‘triage’ service, providing either a comprehensive legal ‘diagnosis’ or at least a preliminary legal diagnosis followed by suitable referral for a more complete legal diagnosis
3. well-connected to a wide range of legal and non-legal services to be able to provide relevant referrals to specialised services as appropriate; ideally also as the starting point for quick access to the most relevant service
4. well resourced in order to meet public need and demand.

VLA’s Legal Help telephone service is the largest entry point to the Victorian legal assistance sector. Legal Help provides a gateway to the Victorian community for legal triage and referral on a broad range of legal matters, under both State and Commonwealth laws. Legal Help staff apply a ‘triage’ model to assess callers. At VLA, triage refers to the process of finding out enough about a person’s circumstances and legal matter to provide the most appropriate assistance. For example, Legal Help workers may provide phone advice on the spot, organise intake into another VLA service, or make an external referral, such as to a CLC.

Legal Help is well connected to a wide range of legal and non-legal services and is increasingly formalising new referral pathways. Other agencies and services divert their calls to Legal Help and the phone number is widely dispersed throughout the justice system, including being listed on every Charge and Summons issued by Victoria Police. There is scope to disperse the Legal Help number further, for example on Notices of Hearing in applications for possession before the VCAT residential tenancies list. Increasing Legal Help’s visibility and continuing to strengthen referral pathways with other legal and non-legal service providers has the capacity to further reduce referral fatigue and provide a more linked up, holistic service for people experiencing legal problems.

There is potential to increase information sharing between VLA and other agencies within the justice sector to create a more effective and efficient entry point service. For example, facilitating advanced access to records for compulsory mental health patients in hospital settings allows VLA lawyers to provide more comprehensive phone advice in the first instance, sometimes resolving issues without the need for more intensive assistance. There is scope to extend cooperation in other areas. For example, the early provision of electronic access to police briefs in criminal matters would enable VLA to provide a more effective, efficient and streamlined triage service.

Legal Help is an essential part of VLA’s service pyramid. The triage model facilitates the provision of varying levels of assistance in accordance with a caller’s needs and capabilities. Effective triage ensures that people with higher capabilities and greater agency are provided with lower intensity services, such as information and basic advice. More intensive services are provided for people with priority legal needs, including women and children experiencing family violence, people who are homeless or at risk of homelessness, people living in regional, rural and remote areas who may not

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\(^{130}\) Ibid 33.
otherwise have access to a lawyer, and people living through natural disasters. Effective triage by Legal Help means that VLA resources are targeted; higher-intensity services are only provided to the people who need it most.

As identified by the LAW Survey, legal problems are often clustered together and many people face multiple legal and non-legal problems concurrently. To be effective, a main entry point must be equipped to identify, diagnose and triage these issues together. VLA’s Legal Help model is sound and scalable. Additional capacity and increased promotion of the service would ensure that more Victorians know where to start if they have a legal issue.

### Legal Help: the main entry point to the legal assistance sector

Legal Help is the main phone entry point to the Victorian legal assistance sector.

In 2014-15, Legal Help took at total of 114,390 calls. This equates to one in every 51 people in Victoria calling Legal Help last year. On a per capita basis, Legal Help now takes more calls than NSW's LawAccess phone line, which took 132,000 calls in 2014-15, equating to one in every 57 people in NSW calling LawAccess.

Legal Help takes calls across a broad range of areas. In 2014-15, 60 per cent of its calls werecivil law issues (including consumer rights, credit issues, neighbourhood disputes and tenancy problems), 25 per cent were criminal law (including infringements), and 35 per cent were family law issues (including family violence). Around 15 per cent of the calls received were for legal or non-legal matters outside of VLA’s expertise, such as wills and small business matters. In these instances, Legal Help will make an appropriate referral.

Legal Help also provides referrals to a range of legal and non-legal agencies for further assistance. In 2014-15, Legal Help made almost 70,167 external referrals, of which over 22,867 were to community legal centres, 21,370 were to private practitioners and 5,610 to dispute resolution and support services. Legal Help also made 41,163 referrals to other VLA services. This demonstrates the way in which Legal Help operates as a gateway to VLA services and to the wider legal assistance sector.

Legal Help is integrated with VLA’s website. People who go to our website call Legal Help if they need help to understand the information provided. Legal Help officers also refer people back to the website for follow up information if required. In 2014-15, the legal information section of our website recorded 2,823,331 page views.

### Targeted and specialist entry points are required for hard-to-reach groups

More targeted strategies are needed to expand the reach of legal services to people unlikely to use the main entry point. For example, the NSW Law and Justice Foundation identified that alternative entry points may be needed for people who require specialist assistance and those who do not identify a problem as legal or as capable of legal resolution, or who have reduced agency or capacity to seek out assistance. The design, operation and location of specialist entry points will necessarily differ according to the specific needs of the target group.

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131 Courmarellos et al, above n 12, xxii.

132 A call may have multiple matter types, which is why the total percentage for matter types is more than 100 per cent.

133 Pleasence et al, above n 108, 34.
VLA’s Legal Help service offers targeted entry points for a range of CALD communities with dedicated phone lines in 21 languages and bilingual lawyers who can provide a more holistic and linked service for CALD callers.

The language lines have significantly increased the provision of legal assistance to non-English speaking people. In 2014, Legal Help employed two Mandarin speaking lawyers. Calls from people speaking Mandarin increased from 395 (in 2013-14) to 1488 (in 2014-15). A similarly significant increase was seen following the introduction of the Vietnamese language line, which saw an increase from 89 calls in 2013-14 to 1017 calls in 2014-15.

**Case study: Language lines increase access for CALD communities**

‘Callers often have multiple legal and non-legal problems at the same time. Sometimes they don’t know which problem is the most urgent or how to begin dealing with any of them. For callers who can’t speak English it can be really difficult to articulate what they need help with. It is even more difficult for non-English speakers with severe mental illness or other disabilities. For example, a caller recently rang Legal Help after separating from her partner. The caller was experiencing family violence but, because of language and cultural barriers, was having difficulty fully explaining her circumstances to the police. As a result, there was no family violence intervention order in place and the caller was homeless and scared.

After intensive triage, I was able to identify the underlying issues and help the caller explain her situation to the police. I was also able to make warm referrals to ensure she received emergency assistance in addition to more intensive help from one of our family lawyers. Making a warm referral means contacting the service directly, linking the caller in with the service and with their consent, providing background information to ensure a smooth transition. Warm referrals are particularly important for some non-English speakers who might already be too overwhelmed by a multitude of legal and other problems to call a service directly.

Some callers don’t trust the justice system because of their past experiences. Speaking Vietnamese helps me to build trust with callers so that I can identify and work through their different problems and make sure they get the help they need. Building trust is really important for providing effective assistance. If callers don’t trust me then they will not disclose all of their problems, and it is likely that the issues will multiply and get worse.

Because I have strong connections with the Vietnamese community I receive many referrals from other organisations who might not otherwise know about VLA or the work that we do. When I began in 2012, I received approximately two to three Vietnamese-speaking calls per week. Now the Vietnamese language line is staffed by two full-time workers and I receive up to 20 Vietnamese calls every day.’

**Legal Help Officer, Vietnamese language line**

**Effective triage must be applied across the legal assistance sector**

Effective triage must be applied across the legal assistance sector. People experiencing legal problems should be directed to the most appropriate place to resolve their problem, irrespective of
how they make contact with the system.\textsuperscript{134} To be effective, triage practitioners must be equipped to identify a person’s legal and non-legal issues and consider relevant and appropriate options for resolution. For some people, this will include consideration of alternative dispute resolution mechanisms.

The provision of advice and triage services requires knowledgeable and experienced practitioners who understand the needs of clients, can quickly evaluate the dispute, and recommend an appropriate course of action.

VLA is working with legal and non-legal service providers to strengthen our triage process. For example, VLA’s Improved Client Access and Triage (iCAT) project aims to ensure that we provide a consistent and holistic needs assessment at the time a person first makes contact with our service. The project also seeks to streamline access to legal assistance and improve the accuracy and effectiveness of referrals across the sector.

**Case study: Independent Mental Health Advocacy (IMHA) – effective triage in action**

Our IMHA advocates recently assisted a woman receiving compulsory mental health treatment to access the help she needed. Kelly* contacted the IMHA phone line requesting help advocating to her treating team about the current dose of her medication. IMHA was able to make internal and external referrals to support Kelly with a range of different needs. For example, Kelly was referred to VLA’s specialist mental health lawyers who represented her before the Mental Health Tribunal hearing, resulting in her Compulsory Treatment Order being revoked.

The IMHA advocate also assisted Kelly to complete a complaints form and submit it to the Mental Health Complaints Commission to ensure that her concerns about the mental health service were followed up. Significantly, Kelly also disclosed current family violence and the IMHA advocate assisted her to contact her local family violence service.

When Kelly’s circumstances changed, and she needed more intensive family violence support, the IMHA advocate assisted her to access this. The IMHA advocate also provided Kelly with coaching so that she could self-advocate to the mental health clinical team to better respond to her experiences of family violence and mental health in the future.

*not her real name.

Duty lawyers at courts and tribunals necessarily provide holistic triage and referrals to both legal and non-legal service providers in the course of their duties. For example, a person with significant mental health issues who is evicted following a VCAT hearing may require assistance obtaining crisis accommodation. For people with lower capability or other specialist needs, a warm referral to the most appropriate service may be required. In some cases, more intensive advocacy may also be needed to ensure a person is linked in with the help they require.

Legal health checks are increasingly championed as an effective tool for identifying legal issues. There is obvious value in using screening tools to identify the full spectrum of a person’s needs, particularly those that the individual may not readily recognise as a legal problem. However, an effective check can be time and resource intensive. For example, in the context of a very busy duty

lawyer service, as explored above, providing a 'legal health check' for one person is likely to significantly limit the lawyer’s capacity to assist others.

**Effective triage adds value to other services**

Triage services can streamline a person’s access to the most appropriate legal assistance. Effective triage also adds value along the way. For example, Legal Help workers referring callers to other services frequently provide preliminary advice and information to ensure the caller understands the process and is as well prepared as they can be.

**Case study: Legal Help adds value to duty lawyer services**

Legal Help officers frequently receive calls from people who have a charge and summons to attend court. In a recent case, the caller was due to appear in a rural magistrate’s court on an obscure criminal charge. The Legal Help worker was able to:

- assess the caller for priority factors and eligibility to see the duty lawyer
- add the caller’s details to VLA’s client record system
- refer the matter to the relevant VLA office
- prepare the caller for court by providing preliminary advice.

In this case, the Legal Help worker identified that the caller had been diagnosed with a severe mental illness and was able to provide advice in relation to the case, including advising the caller to obtain an up-to-date psychiatric report. The Legal Help worker then let the caller know that a referral would be made to the duty lawyer.

The Duty Lawyer at the VLA office received the e-referral, noted the procedural advice and factors about the caller’s mental illness, and was able to check the obscure charge in advance of the court date. When the lawyer met the client at court she was able to assist without delay, reducing the client’s agitation and enabling the legal matter to be favourably resolved on the day.

Without an effective triage model in place, the Legal Help worker may not have elicited information about the mental illness, would not have provided procedural advice, and would not have been able to make a warm referral to the relevant duty lawyer.

**Case study: Legal Help adds value to clinic appointments**

In a recent matter a woman with a disability, Carolyn,* called Legal Help following a violent separation from her partner. Many of her belongings had been thrown out of her house, her wallet was lost and her personal documents destroyed. Carolyn was impecunious and homeless.

The Legal Help worker identified that Carolyn required assistance with a number of legal issues, including obtaining a family violence intervention order, making arrangements to see her child and finalising a property settlement. The Legal Help worker was able to provide procedural advice and make an appointment for Carolyn to see a family lawyer at her local legal aid office.

The Legal Help worker also assisted Carolyn with referrals to services to deal with her more immediate concerns - Centrelink for emergency funds, domestic violence support services and crisis accommodation providers.
By the time Carolyn attended her family law appointment she was receiving support to address her non-legal issues and the family lawyer was able to focus on helping her gain access to her son.

*not her real name.

**Targeting legal information to meet a range of needs and capabilities**

Legal information in Victoria is provided by a range of agencies, including VLA, CLCs, Victoria Law Foundation, the Law Institute of Victoria and various government departments. As articulated by the NSW Law and Justice Foundation, legal information is ‘an integral part of the ‘kitbag’ of legal assistance tools’. To maximise impact, legal information needs to be targeted, underpinned by a clear strategy and available in various forms to meet a diverse range of needs and capabilities.

Findings by the Productivity Commission suggest that the provision of legal information can improve legal capability, with the potential to improve the functioning of the civil justice system as a whole. For example, provision of legal information can prevent disputes from escalating or enable people to resolve them without more intensive assistance. Drawing on unpublished data from the LAW Survey, the Productivity Commission estimates that self-help resources were used in response to around one fifth of all civil (including family) law problems.

VLA’s primary consideration when designing legal information and community legal education is the needs and capabilities of the target audience. While we are increasingly moving away from hardcopy print publications to online content, we recognise that hardcopy print publications still have a role to play in providing information to those who will not seek it out. Additionally, as articulated by the Law and Justice Foundation, legal information alone is ‘not a one-shot magic bullet which can … replace the need for more intensive services, nor can it meet [everyone’s] needs’. More targeted strategies are needed to effectively support people with lower legal capabilities.

VLA’s Sex, Young People & the Law project is designed to address the growing need for preventative legal education about sex and sexuality for disengaged or at risk young people in their early teenage years. VLA and CLC lawyers and educators deliver a series of interactive sessions to secondary schools, Victorian Certificate of Applied Learning (VCAL) programs and other youth education programs across Victoria. Since 2013, we have run over 150 sessions with more than 4,150 participants. Students are generally in Year 9 but sessions have been run with students ranging from Year 7 – 10 (and older students in VCAL settings). More than 90 per cent of students who provided feedback say they will take more time to consider the consequences of their choices.

**Case study: Targeted legal education – Sex, young people and the law**

“I arrive, put on a big happy grin and tell the students that I'm here for two hours today and we're going to talk about sex. That usually captures most of the class. Today's session is about consent

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135 Suzie Forell and Hugh M. McDonald, ‘Beyond great expectations: modest, meaningful and measurable community legal education and information’ (Justice Issues No 21, Law and Justice Foundation of New South Wales, December 2015) 9.

136 Productivity Commission, above n 15, 155.

137 Courmarelos et al, above n 12.

138 Productivity Commission, above n 15, 158.

139 Forell and McDonald, above n 135, 9.
and the age of consent. Many of the students are baffled by the “24 month rule” and we have hearty discussions about how it is best to check someone’s age before anything happens. We watch a couple of short films and discuss what it means to consent to sexual activity and where there cannot be consent; the most topical is always the party environment where someone may be affected by drugs or alcohol. The students are always interested to know that consent can be withdrawn at any moment, even by body language alone - we agree that if you’re not too sure if someone is into it then you should ask. Valuable lessons for these high-risk young people to know.

Throughout the session there is a lot of laughter, we do some pop quizzes and some interesting scenarios. There is always lots of participation. Before we finish up for the session I give out some handy little wallet cards and a great VLA resource called, Am I old enough? The students ask, ‘When will you be back again?’ I say, ‘Later in the semester to talk about Cyberbullying and Sexting.’ A few students laugh at the term sexting, ‘That’s not what we call it’.

I also say we will come back to do ‘Street Law’ sessions. Some of the students respond, ‘I know my rights!’ and the likes. The students show a keenness to know their rights and obligations under the law, even though the concept of law does not seem that sexy or interesting to them.

I can see from the interest in the group that the next modules will be equally as beneficial for this class. Before I leave for the day, feedback forms are filled out. Part of the form asks students for other topics that they want information on. I tell the young people this - a few kids from the back of the class call out, ‘Drugs Miss’.

‘Ok’ I say, ‘Drugs it is’.

VLA Lawyer, Ringwood Office

The role of non-legal workers in identifying and addressing legal problems

Findings from the LAW Survey confirmed that people frequently talk to non-legal professionals like doctors and social workers before identifying a problem as ‘legal’ or seeking legal assistance. Additional research shows that people with higher levels of disadvantage are more vulnerable to experiencing legal problems and are likely to be the least equipped to deal with them. Building basic legal literacy amongst non-legal workers and integrating legal services more closely within the broader service sector has the potential to:

- encourage and enable people to obtain timely help to resolve their problems
- increase the likelihood of an individualised response to a person’s circumstances and the likelihood of meaningful and enduring resolutions
- promote broad dissemination of legal information to a diverse range of communities, expanding the reach of legal assistance.

VLA’s Community Legal Education team works closely with non-legal service providers. Targeted CLE can develop non-legal workers’ capabilities to identify legal problems and to connect people to the most appropriate assistance available. For example, building basic legal literacy amongst non-

140 Courmarellos et al, above n 12.
legal workers can increase appropriate referrals to Legal Help or other entry points to the legal assistance and justice sector.

**Case study: Working closely with non-legal partners to help newly-arrived migrants understand the law**

The CLE sub-program works closely with external organisations to provide education to hard-to-reach priority communities. As part of a national legal aid commission education project, in 2011 the CLE sub-program produced and rolled out the Victorian edition of the What’s the law? kit. The kit covers ten legal topics and is aligned with curriculum requirements of the federally-funded Adult Migration Education Program (AMEP).

The kit equips AMEP teachers in Victoria with high-quality and visually engaging legal education teaching material that helps newly-arrived CALD people identify everyday legal problems in Australia and introduces them to referrals for where to get help. The legal problems covered by the kit were chosen through evidence and consultation.

Additionally, across 2014, the CLE sub-program worked closely with one AMEP provider, Adult Migrant Education Services (AMES), to re-purpose five topics in the What’s the law? kit into more simplified teaching content for teachers in the Humanitarian Settlement Services (HSS) program. Students in the HSS program are very recently arrived and tend to have lower levels of English language skill. The resultant Australian law in orientation aligns with the HSS curriculum and provides teachers with tools they can use to deliver legal education.

The CLE sub-program has partnered with other statewide agencies, such as the Victorian Department of Education and Training. In partnership with the departments, we developed our online kit, Learning the law and rolled out professional development training. Learning the law provides videos, online activities and teachers’ notes on fines and on particular driving offences. This kit is unique in that it was developed for special school teachers after through research and consultation by the CLE sub-program identified a gap in resources for these teachers. The kit was launched in 2015.

As well as resourcing other settings with legal education tools, the CLE sub-program also works with various organisations to deliver more tailored education sessions directly to clients. Arising out of VLA’s first Disability Action Plan, in 2011, the CLE sub-program began a conversation with the Victorian Advocacy League for Individuals with Disability (VALID) to discuss legal education needs. This has resulted in the program developing and running annual series of sessions at VALID members’ self-advocacy meetings across metropolitan Melbourne on legal topics selected by VALID. Key legal messages and simple referrals form a part of each session.

Other approaches to working more closely with non-legal partners can include co-location or full integration of services. The integration of legal assistance with social services and public organisations requires establishing and maintaining strong links with the target communities and their support organisations; locating services in places frequently accessed by the target group; effectively marketing services; providing appropriate staffing and resourcing; establishing strong referral systems with support organisations; and developing appropriate monitoring and evaluation mechanisms. A number of CLCs in Victoria are advanced in this work, including through Health Justice Partnerships, co-location and targeted outreach.
Ensuring that information, advice and assistance is timely

Information, advice and legal assistance must be accessible at the time a person needs it. As identified by the NSW Law and Justice Foundation, a focus on ‘timely intervention’ recognises the myriad of ways that legal issues are experienced and how and where help is commonly sought.\footnote{142}{Pleasence et al, above n 108, 119.}

For disadvantaged people, with disproportionately high legal need and lower capability to address that need, assistance is likely to be most effective if it is responsive to their legal problems, appropriate to their capability and provided at a time and place where it is most likely to be used.\footnote{143}{Forell, above n 141, 10-11.}

Provision of timely legal advice can prevent legal problems from escalating or becoming intractable. For example, a parent who accesses timely legal information and advice about the consequences of travelling overseas with a child might avoid escalating a parenting dispute, minimising the likelihood of protracted court proceedings.

Use of self-help kits

People with higher capabilities can use self-assistance tools to help them to resolve their legal problems. This diverts users away from needing more resource intensive legal services. Intermediaries can also use self-help kits to support people with lower capabilities.

It is important to evaluate the usefulness and effectiveness of self-assistance kits. However, if not sufficiently targeted or appropriate, investment in them risks stretching already limited resources away from more effectual services.

To be efficient and effective these tools must be sufficiently targeted and recognise the needs and capabilities of those using them and must also be supplemented by an on-the-ground engagement strategy. An example of a well-targeted self-help kit is our infringements resources detailed above.

Case study: Self-assistance tool developed for prisoners facing mandatory visa cancellation

Due to recent legislative changes, more prisoners face the prospect of visa cancellation than ever before. Changes in process mean that cancellation will more likely occur when affected people are in prison, restricting their access to advice and assistance.

To assist people in prison facing the prospect of visa cancellation and removal, VLA’s Migration team designed a self-help kit that is used in conjunction with a number of other strategies to improve its effectiveness. These include:

- CLE sessions in prison to emphasise key issues
- engagement with prison staff, who are likely to be the first people affected prisoners turn to for advice
- the provision of legal advice by telephone and videoconference.
The self-help kit includes a range of tools designed to make it as straightforward as possible to take action in relation to a visa cancellation or proposed cancellation. These include:

- a fact sheet setting out basic information about the process
- a flow chart showing the essential process in outline
- template letters to assist in dealing with procedural steps and gathering important information
- detailed step-by-step instructions on how to draft a submission.

The success of this project demonstrates that self-assistance tools can be very effective when designed with a narrow focus, targeted towards a specific audience and supported by an on the ground engagement strategy.
Alternative dispute resolution

**Term of Reference 3:** whether and how alternative dispute resolution mechanisms should be expanded so that more Victorians can make use of them.

Alternative dispute resolution (ADR) can be an effective and efficient way to resolve disputes. However, despite its advantages, ADR is not always the most appropriate way to resolve a legal problem. Expansion of ADR mechanisms must be accompanied by exemptions, which recognise it is not suitable in every case, and safeguards to address power imbalances when it is used. There is also scope to expand the use of ombudsmen and other services with sufficient investigative and enforcement powers to adequately resolve complaints and tackle broader systemic issues.

VLA frequently provides information, advice and representation to people involved in ADR processes in the civil and family law jurisdictions. As part of our existing triage model, Legal Help makes referrals to the Dispute Settlement Centre of Victoria and relevant ombudsmen and complaints processes. VLA operates its own dispute resolution service, the Family Violence Dispute Resolution Service (FDRS), for matters in the Commonwealth family law jurisdiction. Our lawyers also have extensive experience assisting clients in relation to discrimination issues where the use of ADR is embedded in the legal process.

Legal assistance is often critical to helping a person adequately prepare for ADR. For example, legal advice can assist parties to identify the relevant issues and work out their interests and options prior to partaking in ADR. In our experience, parties who are adequately prepared for ADR are more likely to reach a resolution that meets their interests.

To be effective and accessible, ADR mechanisms must be well tailored to the diverse needs of different users. For example, culturally appropriate services are important to engage particular communities. Research commissioned by VLA into the civil and family law needs of Aboriginal and Torres Strait Islanders in Victoria, confirms there is scope for ADR to be used more frequently in the resolution of disputes, provided it is well tailored and culturally appropriate.

**Recommendation 21 – Culturally-appropriate and tailored ADR for Aboriginal and Torres Strait Islanders**

Expand culturally-appropriate and well-tailored ADR mechanisms to assist in the resolution of disputes for Aboriginal and Torres Strait Islanders.

The appropriateness of ADR

ADR is not always the most appropriate way to resolve a legal problem. For example, ADR is not suitable when there is an unchecked power imbalance between parties to a dispute, whether because of socioeconomic disadvantage or a history of violence. Likewise, ADR is unsuitable in circumstances where one party is unduly pressured into relinquishing fundamental rights in order to

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144 Productivity Commission, above n 15, 283-309.
145 Ibid 307-308.
146 Ibid 308.
147 Schwartz et al, above n 72, 206.
148 Productivity Commission, above n 15, 289.
reach a ‘resolution’. While there is scope to use ADR more extensively, sufficient safeguards and exemptions are required to ensure it is used appropriately.

VLA’s Family Dispute Resolution Service (FDRS) provides a good example of an ADR mechanism designed with sufficient safeguards and exemptions in mind. FDRS allows parties to have legal representation, offers shuttle conferencing in circumstances where a party requires this protection and provides exemptions where there has been family violence.

**Recommendation 22 – Ensure appropriate safeguards in any expanded ADR mechanism**

Ensure that any expanded ADR mechanisms are designed with sufficient safeguards and exemptions in mind, especially where there is an unchecked power imbalance between parties.

**The role of adjudication and public decisions**

VLA’s Equality Law program assists people to make complaints of discrimination, sexual harassment, victimisation and racial and religious vilification in both State and Commonwealth matters. The vast majority of these complaints are resolved through formal ADR processes, or otherwise withdrawn or settled prior to hearing.

These ADR processes are often confidential. While there are discernible benefits to confidentiality in some cases, it can also be disadvantageous. In discrimination matters, confidential resolutions restrict the availability of public information about settlement outcomes and can mask the extent to which discrimination remains a problem in society. High rates of confidential settlements also mean that for the few matters that do proceed to hearing, the body of available jurisprudence is underdeveloped and awards for damages tend to be disproportionately low.

ADR is most effective when it operates in the shadow of the law; that is, when the likely outcome of an adjudicated decision is relatively clear and there is little incentive to incur the cost, time and emotional energy involved in proceeding to litigation. For this reason, there must be a balance between policy initiatives that encourage efficient and effective resolution of matters through ADR processes, and other mechanisms that support meritorious public interest cases continuing to decision with adjudicated, transparent proceedings and reported outcomes. In discrimination cases, this balance could be better achieved by legislation allowing for costs orders against unsuccessful defendants and limiting costs orders against unsuccessful applicants to instances where the application is frivolous, vexatious or without foundation.

**Expanding ADR for Charter claims**

In September 2015, Michael Brett Young handed down the eight-year review of the Victorian Charter of Human Rights and Responsibilities Act 2006 (Charter Review). The Charter Review recommends that ‘the Victorian Equal Opportunity and Human Rights Commission be given the statutory function and resources to offer dispute resolution for disputes under the Charter’ (recommendation 22). The review found that the introduction of dispute resolution for Charter matters would assist people to resolve complaints related to human rights concerns in an accessible and resource-effective way. VLA supports this recommendation. However, as discussed above, sufficient safeguards and exemptions would be required to ensure it is used appropriately.

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**Recommendation 23 – Empower Victorian Equal Opportunity and Human Rights Commission (VEOHRC) to provide dispute resolution for Charter disputes**

Implement the recommendation of the Charter Review to give VEOHRC the statutory function and resources to offer dispute resolution for disputes under the Charter.

**Expanding ombudsmen services**

ADR is an ineffective mechanism for resolving broader systemic issues that require a whole of system response and that cannot be adequately remedied by an individual complainant. For example, in discrimination matters, reliance on a complaints based system where individuals must hold discriminators to account is particularly problematic in some cases where the burden of enforcing rights is so great that a complainant will either accept a poor settlement or simply walk away, rather than pursue legal proceedings.

**Case study: Too unwell to take it further – Claire’s story**

‘When I applied for the job I told the boss that I have depression and chronic Post Traumatic Stress Disorder (PTSD). I explained that it wouldn’t affect my ability to help customers but if someone is rude or aggressive to me I can get teary and upset. After I started working for the company one of the bosses became abusive and derogatory towards me. He shouted and swore at me so many times that I eventually had to leave because I couldn’t take it anymore.

I made a discrimination complaint to the Victorian Equal Opportunity and Human Rights Commission. My complaint went to conciliation. The process was horrible and, although my bosses didn’t deny the allegations, we couldn’t get them to make a reasonable offer. I settled for a very low amount, which only covered the things I was already entitled to.

I wasn’t well enough to take my complaint any further, even though I knew I had a very strong case. Thinking about it further exacerbated my PTSD and I also desperately needed the money. I haven’t worked since - I’m too scared to work anywhere else because my ex bosses made me feel worthless.

This outcome would have been very different if someone could have investigated my complaint. This would have made me feel more confident and most definitely I would have taken the complaint further.’

As identified by the Productivity Commission, ombudsmen can provide ‘independent, timely and accessible dispute resolution in particular areas and industries’.\(^{150}\) The Productivity Commission identifies several ways that ombudsmen promote access to justice; they can:

- provide a mechanism for resolving low value disputes
- help to overcome power imbalances
- provide a process that is simple to use
- identify and address systemic issues
- resolve both legal and non-legal issues.\(^{151}\)

VLA supports increasing the accessibility of ombudsmen services through reforms targeted towards improving their visibility, efficiency and effectiveness. There may also be scope to expand the use of

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\(^{150}\) Productivity Commission, above n 15, 311.

\(^{151}\) Ibid 315-317.
ombudsmen in other areas where adjudicating disputes through formal court or tribunal processes does not work well.

**Recommendation 24 – Increase accessibility of ombudsmen**

Increase the accessibility of ombudsmen services through reforms targeted towards improving their visibility, efficiency and effectiveness.

**Recommendation 25 – Expand the use of ombudsmen**

Explore the scope to expand the use of ombudsmen in other areas where adjudicating disputes through formal court or tribunal processes is ineffective.
Reform VCAT in respect to small civil claims

**Term of Reference 4:** potential reform to the jurisdiction, practices, and procedures of the Victorian Civil and Administrative Tribunal (VCAT) to make the resolution of small civil claims as simple, affordable and efficient as possible.

VLA does not regularly assist people with small civil claims in VCAT’s Civil Division, however we frequently refer people seeking assistance with consumer issues to the Consumer Action Law Centre (CALC). CALC is a specialist consumer legal practice, providing free legal advice and representation for disadvantaged consumers across the state. VLA endorses CALC’s submission and recommendations as it relates to Term of Reference 4. In particular, VLA supports CALC’s recommendations on the availability of fee waivers to ensure that people are not obstructed from taking up their rights by the financial cost of doing so.

VLA acknowledges the government’s stated intention that the majority of people should not need a lawyer to make an application to resolve a small civil claim at VCAT. To achieve this aim, VLA recommends improved protections for unrepresented litigants. For example, there is currently no access to internal reviews of decisions made in the small claims list at VCAT. Internal appeals would provide a more accessible and affordable right of appeal; increase the consistency, predictability and quality of decision-making and ultimately strengthen jurisprudence. Internal appeals are available in comparative jurisdictions in both the New South Wales Civil and Administrative Tribunal and the Queensland Civil and Administrative Tribunal.

**Recommendation 26 – Expand fee waivers**

Expand the availability of fee waivers in VCAT to ensure that people are not obstructed from taking up their rights by the financial cost of doing so.

**Recommendation 27 – Create an internal appeals process for VCAT small civil claims**

Create an internal appeals process to provide a more accessible and affordable right of appeal, improve the quality of decision-making and strengthen jurisprudence.

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152 Department of Justice and Regulation, ‘VCAT small civil claims’ (Background Paper, Access to Justice Review), 8.
Legal services delivered outside the legal assistance sector

**Term of Reference 5:** the provision and distribution of pro bono legal services by the private legal profession in Victoria, including:

- ways to enhance the effective and equitable delivery of pro bono legal assistance
- opportunities to expand the availability of pro bono legal services in areas of unmet need
- options for expanding existing incentives for law firms within the Victorian Government Legal Services Panel.

Victoria has a highly developed *pro bono* legal assistance sector that provides significant and valuable legal services in Victoria. Justice Connect, the Law Institute of Victoria and the Victorian Bar each facilitate the provision of pro bono legal assistance by lawyers and barristers. These schemes are co-located and coordinated by Justice Connect. The schemes are intended to provide assistance as a last resort and only if all other avenues of assistance have been exhausted.

As identified by the Productivity Commission, pro bono work represents a relatively minor component of overall legal assistance and is no substitute for well-funded legal assistance services.\(^{153}\) Moreover, improving the provision and distribution of pro bono legal services is not a panacea for the problem of private legal fees being unaffordable for ordinary Victorians.

**Pro-bono work in relation to legal assistance schemes**

The Productivity Commission found that the extent and type of pro bono legal assistance provided by the legal profession is limited by factors including capacity, expertise, conflicts of interest and firm culture.\(^{154}\) The Productivity Commission also identified a mismatch between ‘clients’ legal needs and lawyers’ preferences to volunteer in particular areas’.\(^{155}\) As a result, there is a risk that the provision of pro bono assistance will reflect ‘the attractiveness of particular areas of work, rather than a systemic approach to addressing unmet legal need for disadvantaged people’.\(^{156}\) This defies the potential value of pro bono services complementing existing government-funded legal assistance schemes.

The skills of pro bono lawyers are best harnessed when used to provide services relating to existing knowledge and expertise. This is more efficient, cost effective and useful for people needing assistance. For example, provision of pro bono assistance to disadvantaged clients can be invaluable in areas of law where this limited capacity and affordable specialist expertise within the wider legal assistance sector (such as defamation matters). There may also be a limited role for pro bono services with litigation expertise to assist in large-scale complex cases that are beyond the capacity of the sector to absorb. For example, large public interest cases requiring extensive research and preparation can benefit from discrete pro bono assistance.

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153 Productivity Commission, above n 15, 823.
154 Ibid.
155 Ibid.
156 Ibid.
As identified by the Productivity Commission, there are costs (and opportunity costs) involved in facilitating pro bono if there is ‘a mismatch between the expertise of the volunteer lawyers and the areas of pro bono law (and skills needed to effectively interact with pro bono clients’).  

Justice Connect takes a sound approach to ensuring that the skills of pro bono lawyers are appropriately harnessed. Where a pro bono lawyer has capacity to offer a service and needs appropriate training, Justice Connect provides training and supervision. This enables Justice Connect to provide a large number of services to people facing infringement issues and experiencing homelessness who may otherwise miss out on legal assistance.

**Recommendation 28 – Support appropriate and complementary pro bono legal assistance**

Support the appropriate use of pro bono legal services to complement government-funded legal assistance services.

**Facilitating professional development for law students**

VLA notes the department’s intention to explore strategies to facilitate greater law student involvement in pro bono work. VLA supports a number of programs offering law students exposure to legal practice. The focus of these programs is appropriately targeted towards assisting students to develop their practical legal skills, rather than providing a substitute for the provision of qualified legal assistance.

For example, students enrolled in Melbourne University’s Public Interest Law Clinic complete 12 days of clinical placement in VLA’s Civil Justice Program. These students predominantly assist clients with infringement problems who experience disadvantage and social exclusion. Under the supervision of VLA lawyers, students conduct client interviews and take instructions at client advice sessions. Students in this program also have the opportunity to appear as advocates for clients in hearings in the Special Circumstances List at Melbourne Magistrates’ Court and undertake research tasks for VLA lawyers.

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157 Ibid 824.
Self-represented litigants

**Term of Reference 9: options for providing better support to self-represented litigants throughout the justice system.**

The prevalence of self-represented litigants (SRLs) in the Court system is often cited as a source of delays in the courts, and a burden to judges, magistrates and tribunal members.

There is a widespread perception that the numbers of SRLs are increasing. Some data confirms that this is the case in certain matters, but there is little research on the impact of SRLs on the court process, the numbers of people who are unrepresented in the legal system, and the reasons why that is the case.

An Australian literature review cited research and evaluation that identifies seven classes of SRLs:158

- people with an overall lack of social resources (such as, education, financial, and community/family support)
- low-income people with some social resources
- people living with additional social barriers that interfere with accessing justice
- people unable to find an available lawyer and who wish to hire a lawyer
- people who were previously represented
- people in cases where representation is supposed to be unnecessary
- people who could access representation but prefer to self-represent.

There are a variety of legal fora that are designed to be informal, with little or no need for representation. The VCAT jurisdiction is an example of this, and the presence of SRLs in this environment is consistent with this aim with more than 80 per cent of people who have a matter before VCAT representing themselves. VCAT describes its processes as deliberately informal and supporting self-representation, enabling Victorians to access justice without incurring significant legal fees.159 The mere presence of SRLs is not an indicator of system failure; in some jurisdictions it is a sign of success.

Other jurisdictions, such as the Magistrates’ Court are more formal, but have types of cases where self-representation is common. Indeed, little advantage would be conferred to a represented litigant in a relicensing application or in various proceedings under the Road Safety Act, where the courts have limited discretion to depart from the minimum penalties defined in the statute. In such cases, SRLs are common and cause minimal disruption to the business of the court. Expending public resources on ensuring representation in such cases would be unlikely to improve the outcome for the individual, and would be a funding burden largely bereft of benefit to the court or society more broadly.

Clearly, there are other jurisdictions where the presence of legal representation would:

- ensure a fairer outcome for the person
- ensure that the resources of the court are used more efficiently

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be appropriate given the seriousness of the matter or the complexity of the law.

In such cases, representation may be desirable.

As indicated above, there is a lack of current, cogent data in Victoria about why people become SRLs. Anecdotally, VLA’s practice experience suggests that the factors impacting on a person’s decision to self-represent include:

- being unable to afford, or reluctant to pay the full cost of legal services
- where conflict of interest rules and a lack of available legal representation precludes access by some parties to a dispute
- being unable to secure legal aid due to the nature of the matter, or being unable to demonstrate lack of means, or lack of merit
- being unwilling to accept and act on the advice of legal representatives
- believing that they are best placed to argue the merits of their case
- being unable to locate and retain an appropriate lawyer to represent them.

Unbundled legal services

There are some people whose cases have merit and who fall between qualifying for legal aid and being able to self-fund their litigation. Expansions to legal aid funding and relaxing the means tests would assist to ensure that this cohort of people is represented.

Unbundled legal services are another way in which SRLs can be assisted, recognising that legal aid may still only be available to the poorest and most disadvantaged.

The traditional model of legal service delivery embraces the end-to-end provision of services to the client – from preliminary advice, taking of instructions, drafting and filing of documents, appearance in court and post-appearance advice.

In some respects, this is a ‘one size fits all’ approach and may not fully account for the varying wishes and abilities of clients. Some clients may be comfortable to draft and file documents but may seek assistance with an actual court appearance; others may be confident of their ability to argue their case in court but need help to draft documents.

Tailoring services to the needs and abilities of the person seeking legal help is a fundamental principle of VLA’s approach to service delivery and, as such, we support innovative methods of providing legal assistance. However, there are practical and ethical issues that are yet to be resolved, and we advocate an evidence-based approach to the promotion of unbundled services.

Legal practitioners are bound by strict ethical and professional obligations and duties to the Court. These obligations govern, for example, candour, the obligation not to pursue unmeritorious points, and the disclosure of relevant information. Increased client participation in the preparation or appearance phase may cause a rise in breaches of those obligations, whether deliberate or inadvertent.

Similarly, if a legal practitioner’s involvement is limited to the appearance phase of the proceeding, counsel may be placed in a position where they are being instructed to run an unmeritorious point, which could never have been viably pursued. Given the emphasis on early identification of relevant issues in contemporary court proceedings, it is easy to see how unbundling services in this manner could lead to lengthy proceedings or conflicts between client and counsel.

More research is needed into the possible benefits of unbundled services in this jurisdiction. Data is needed to demonstrate that funding spent on the provision of legal coaching or unbundled services...
would produce a benefit for clients. The magnitude of that benefit will determine if unbundled services are a valuable investment in legal assistance or if funding would be better spent on direct service delivery.

**Recommendation 29 – Improve data on self-represented litigants**

Improve the quality of data on why people self-represent, their characteristics and their needs, and whether unbundled legal services would assist.

**The role of plain language legislation**

Whether legislation is seeking to protect or curtail an individual’s rights, it should be expressed in clear, readily comprehensible language. The movement to plain language drafting is at least 30 years old, but statutes continue to be expressed in a way that is difficult for everyday people to understand.

In some cases, this may be related to the structure of the act, where repeated amendments have created a legislative labyrinth that only a professional could hope to navigate successfully. Legislation like the *Road Safety Act 1986* impacts on millions of Victorians every day, and should be readily understandable to those whose activity it seeks to govern. In practice, its complex structure makes it difficult to comprehend.

Where legislation impacts of the rights and obligations of ordinary people, re-drafting for clarity and comprehensibility is one way to assist everyday people who wish to enforce their rights before courts and tribunals.

**Cost shifting and alternative supports**

The effectiveness of approaches to assisting SRLs should be evaluated to determine if the intervention is successful and cost effective. Careful service planning and assessment will be required to avoid simply shifting the cost of supporting SRLs onto other agencies. It may be that resourcing an expansion of direct service delivery is a more effective way of assisting SRLs than the creation of a new layer of service delivery. VLA supports a strongly evidence-based approach to alternative service delivery to SRLs to ensure that cost shifting without any real benefit is avoided.
Appendix 1: VLA services

VLA funds or delivers services across the following areas:

**Criminal Law**
- summary crime
- indictable crime
- youth crime
- higher court appeals.

**Civil Law**
- mental health and disability law
- social inclusion (including working with children checks, infringements and tenancy)
- migration
- equality (anti-discrimination law)
- Commonwealth entitlements (including matters relating to Centrelink entitlements such as Age and Disability Pensions, Newstart Allowance, war veteran matters and more).

**Family Law**
- parenting disputes
- family violence
- independent children’s lawyers
- child support
- child protection.

Across all of these areas, services include:
- legal information through Legal Help, VLA’s website or hardcopy publications
- legal advice from a duty lawyer or through Legal Help
- client appointments
- minor work files
- community legal education
- representation and casework delivered through a grant of legal assistance.

Eligibility for these services are detailed in Appendix 2.

**Other services**

In addition to these services, VLA delivers a number of specialist services:
- VLA Chambers
- Legal Help (which includes referrals for matters outside of VLA’s practice areas)
- Independent Mental Health Advocacy
- Family Dispute Resolution Service.
Appendix 2: Eligibility for legal aid services

Eligibility for VLA services varies depending on the service provided. As the service intensity increases, eligibility tightens, as demonstrated below.

Victoria Legal Aid’s service pyramid

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Legal information and Legal Help

VLA’s lowest intensity services are available to all Victorians. This means there is no eligibility criteria applied. These services are:

- information on a range of legal problems provided through VLA’s website
- hardcopy publications on a range of legal issues, distributed across Victoria and available to the general public
- information through VLA’s Legal Help phone line.

Legal Help provides legal advice for people who have a priority indicator (see above).
Community legal education
VLA community legal education work is targeted to assist priority communities, and the intermediaries who support them, to better identify legal issues, take steps to resolve or act on issues, and facilitate appropriate legal referrals.

Legal education projects, materials, events, sessions and trainings are targeted to reach these communities and workers.

Content and toolkits created to support this work are accessible for use by the public and other agencies via the VLA website.

Duty lawyer services
Duty lawyer services are provided at courts and tribunals across Victoria. Different eligibility tests apply in different jurisdictions. The below example demonstrates how eligibility works in the Magistrates’ Court context.
Ongoing case work under a grant of legal assistance

A person’s financial capacity to pay for their legal costs (means test) operates alongside whether their legal problem is the type of matter for which VLA provides assistance (guidelines) and whether the matter has ‘ongoing merit’ (merits assessment).

Means test

VLA uses different eligibility tools and policy levers to ration the supply of legal aid to ensure that available legal aid resources are targeted to those most in need of assistance. Financial eligibility, measured by the means test, is the first hurdle of eligibility for a grant of legal assistance — the most resource intensive and costly form of legal assistance. Financial eligibility is considered alongside the type of the legal problem and the legal merit of the matter (see below).

In determining an application for a grant of assistance, the Legal Aid Act 1978 requires VLA to consider the capacity of an applicant to meet the full cost of legal services from a private lawyer. VLA has a wide legislative mandate to assess financial circumstances including income, available cash, debts and living costs.160 The Means Test applies to all applicants, except to children, war veterans and to any person who is subject to a supervision order under the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997.

Like other legal aid commissions in Australia, our means test is based on the Henderson Poverty Line (HPL)161 and the National Means Test (NMT).162

From 1 March 2016, following a modest extension of eligibility under the means test,163 a person will generally meets VLA’s means test where:

- they receive the maximum rate of an income support payment or benefit from Centrelink; or
- their assessed income, following allowable deductions, is $360 or less per week164; and
- asset limits are not exceeded (for example, applicants can have up to $500,000 in equity in a home and $20,000 in a car).

The Means Test takes into account the applicant's income, assets and debts, as well as the expected cost of private legal representation. The Means Test makes allowance for certain deductions, such as the applicant’s cost of housing, childcare and number of dependants.

160 Section 24(3)
161 The HPL was developed in the mid-1960s and was originally defined as the basic wage plus child endowment for a family of four (two adults and two children). It has been the subject of significant criticism on the basis that many of its assumptions around a male breadwinner and a family of four, linked to 1950s patterns of expenditure, are no longer relevant today.
162 The NMT was developed in 1995, with thresholds for the following indicators: housing costs, net disposable income, maximum assets allowance (excluding home), equity in motor vehicles, equity in home, financially associated person allowance, child care benefit, equity threshold for farm/business where main source of income, lump sum payments and contributions on income and assets.
163 From 1 March 2016, in advance of the full review process to examine the means test, VLA extended the existing means test to better reflect the current cost of living. This will make more people eligible for legal assistance in the short term, ahead of the Means Test Review and the implementation of a new framework for assessing financial eligibility for legal aid.
164 People with assessable income, following allowable deductions, of more than $360 per week may still be eligible subject to the payment of a financial contribution toward the cost of their legal assistance.
The table below sets out when assistance will be granted against VLA’s three categories of estimated legal costs.

<table>
<thead>
<tr>
<th>Costs category</th>
<th>Estimated legal costs</th>
<th>Assistance granted</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Category 1</strong></td>
<td>Less than $1555</td>
<td>VLA will make a grant of legal assistance for net disposable income up to $469 a week. Between $361 and $469 the person would be required to pay a contribution.</td>
</tr>
<tr>
<td>Includes: summary crime, family violence, personal safety intervention, infringements.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Category 2</strong></td>
<td>Between $1555 and $6560</td>
<td>VLA will make a grant of legal assistance for net disposable income up to $539 a week. Between $361 and $539 a week, the person would be required to pay a contribution.</td>
</tr>
<tr>
<td>Includes: family law (up to but not including trial stage), child protection, criminal appeals to the County Court, family law appeals.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Category 3</strong></td>
<td>More than $6560</td>
<td>If net disposable income is more than $360 a week, VLA will usually make a grant of legal assistance unless the required contribution would exceed the estimated legal costs.</td>
</tr>
<tr>
<td>Includes: indictable crime, family law (trial stage), criminal appeals to the Court of Appeal.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Guidelines**

As VLA has limited resources we cannot fund all legal matters or provide legal representation to everyone who needs it. Under the *Legal Aid Act 1978*, VLA must determine guidelines in relation to the provision of services. The guidelines set out the types of legal matters that VLA will fund. Different guidelines apply to state and Commonwealth matters.

VLA’s Board determines the guidelines and fees payable in legally-aided matters. The Act does not allow the board to delegate its power to determine guidelines.

Recommendations for guidelines and fees (or changes to guidelines and fees) are referred to the board for decisions and can arise in response to legislative change, new court processes, the need to find savings or to assist an identified client group.

In 2014/15, 58 per cent of grants were under criminal law guidelines; 38 per cent were under family law guidelines, and four per cent were under civil law guidelines.

165 Section 9
Criminal law guidelines
The criminal law guidelines set out the conditions under which a grant of legal assistance may be made for the following types of matters:

- summary criminal offences
- indictable criminal offences
- bail applications in the Magistrates’ Court, the County Court and the Supreme Court
- criminal appeals
- hearings under the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997
- breach proceedings in the Magistrates’ Court and County Court
- proceedings pursuant to the Serious Sex Offenders (Detention and Supervision) Act 2009.

Family law guidelines
The state family guidelines set out the conditions under which a grant of legal assistance may be made for a child, parent, guardian or other interested person in the following matters:

- a case in the Children’s Court (Family Division), including an Interim Accommodation Order appeal to the Supreme Court
- an internal review of a case planning decision made by the Department of Health and Human Services
- an application to the Victorian Civil and Administrative Tribunal for external review of a case planning decision.

The Commonwealth family law and child support guidelines set out when a grant of legal assistance may be made in relation to the following Commonwealth family law and child support matters being heard or determined in Victoria:

- mediation of family disputes
- family law matters relating to children
- spousal maintenance and arrears
- child support and child maintenance and arrears
- nullity of marriage
- appeals of family law or child support matters
- international child abduction matters.

Civil law guidelines
The state civil law guidelines set out when a grant of legal assistance may be made for the following state civil law matters being heard or determined in Victoria:

- general civil claims
- appeals from decisions of the Mental Health Tribunal
- guardianship and administration cases in the Guardianship List at the Victorian Civil and Administrative Tribunal
- coronial inquests
- equal opportunity and discrimination cases
- family violence protection order matters
- personal safety intervention order matters
- representation of a child in adoption proceedings
- Infringements Court proceedings
- public interest and strategic litigation cases
• Director of Police Integrity/Chief Examiner (Witness Assistance) cases for legal advice and representation for a witness
• social security cases at the Authorised Review Officer stage and the Social Security Appeals Tribunal stage.

The Commonwealth civil law guidelines set out when a grant of legal assistance may be made in relation to the following Commonwealth civil law matters being heard or determined in Victoria:
• social security matters and disputes, and cases involving other Commonwealth pensions, benefits or allowances
• war veterans' matters
• action for damages under Commonwealth law
• migration
• discrimination or equal opportunity matters
• extradition proceedings
• proceeds of crime.

Public interest and strategic litigation
VLA has a set of strategic advocacy priorities, which are endorsed annually by the VLA Board. These priorities are a consideration under the VLA's Public Interest and Strategic Litigation (PISL) guideline.

The PISL guideline states that legal assistance may be granted to a person for a legal proceeding that is not otherwise covered by VLA's guidelines but carries significant public benefit by seeking to:
• clarify or test the scope of existing legal rights and duties; or
• challenge the accepted interpretation of legal rights and duties; or
• establish new legal rights and duties in the common law or under statute; or
• improve administrative decision making, and the efficiency and fairness of the justice system.

In deciding whether to grant legal assistance VLA must have regard to:
• the priority client groups in VLA's Strategic plan
• the service priorities in VLA's Strategic plan
• VLA's strategic advocacy priorities
• whether the case is a good vehicle for dealing with the relevant issue of law
• the likely cost of the proceedings
• the merit of the legal argument proposed to be made, including whether it is likely to succeed in the particular proceedings, expose an inequity in the law or form part of a larger strategic advocacy plan.

State special circumstances guideline
There is also a guideline for people with special circumstances. This applies if the person is under 18 years old, has a language or literacy problem or an intellectual or psychiatric disability. The means and merits tests still apply.

Merit
Different merits tests apply to state and Commonwealth matters. The merits test is one of the threshold issues that a person seeking assistance must satisfy for most matters for which VLA may provide a grant of assistance.

Commonwealth merits test
A person applying for a grant of legal assistance for a Commonwealth matter must meet each of three tests to satisfy the Commonwealth merits test.

1. **The reasonable prospects of success test**

   VLA must be satisfied that, legally and factually, the proposed action, application, defence or response for which the person seeks a grant of assistance is more likely than not to succeed. This requires much more than just having an arguable case, and more than having a 50/50 chance of success.

2. **The prudent self-funding litigant test**

   VLA must be satisfied that a prudent, self-funding litigant (that is, one with limited financial resources) would risk their own finances in paying for the proposed action, application, defence or response for which they seek the grant. By this test, the Commonwealth aims to put assisted people into a position equal to, but not better than, people ‘without deep pockets’ (that is, with limited financial resources) who risk their own money in litigation.

3. **The appropriateness of spending limited public legal aid funds test**

   VLA must be satisfied that the costs involved in granting assistance are justified by the likely benefit to the person seeking the grant of assistance or, if appropriate, the likely benefit to the community.

**State merits tests**

The state reasonableness test applies to all applications for assistance for state matters, for example child protection, family violence, and state civil law matters.

Under the state reasonableness test, the person’s lawyer or VLA must consider:

- the nature and extent of any benefit that a grant of legal assistance might give to the person, the public or any section of the public
- the nature and extent of any detriment that a refusal of a grant of legal assistance might cause to the person, the public or any section of the public
- in the case of assistance for a proceeding other than a criminal appeal — whether the proceeding is likely to end in a manner favourable to the person
- for a criminal appeal — whether there are reasonable grounds for the appeal.

The cost of the desired legal services must be weighed against the likely benefits to the person or to the community. Sometimes, even if a court might make the orders the person seeks, the cost may not be proportionate to the benefit the person would get — that is, the cost may be much greater than any benefit.

The interests of justice test applies to all state indictable criminal law matters. If it is considered ‘desirable in the interests of justice’ that the person should have legal representation, then the person must only satisfy the means test for assistance to be granted, although VLA will still consider the merits of the application.

**Assessment of applications**

Unlike other Australian legal aid commissions, VLA’s process for assessing applications for legal assistance relies almost exclusively on the recommendation of lawyers on our specialist panels established pursuant to the *Legal Aid Act 1978*. VLA’s decision about granting legal assistance to an
applicant is primarily based on a lawyer’s recommendation as to whether the matter meets the VLA guidelines and merits test under a Simplified Grants Process.

This is underpinned by VLA’s view that lawyers undertaking legally-aided work are honest and trustworthy professionals who are committed to providing legal aid services to the community. This process has resulted in greater efficiency and reduced expenditure for the administration of the legal assistance scheme.

This process is supported by a compliance function to minimise any risk to the Legal Aid Fund posed by an improper assessment of eligibility for legal assistance and fraudulent claims. The compliance function involves VLA checking lawyer files that were approved through the Simplified Grants Process to ensure that the recommendations made to VLA and the fees claimed were appropriate.

One of our guiding principles is to administer rules or guidelines for services in a way that minimises red tape and administrative costs, while ensuring compliance through more efficient risk-based targeted and random compliance activities.

The compliance function is integral to managing the Legal Aid Fund effectively, efficiently and economically and supports VLA to meet its obligations, goals and strategies, and to plan for a sustainable financial future.

VLA must strike the correct balance of rigour and accountability in a practical context, recognising compliance demands on lawyers as well as the benefits the automated grants system provides in terms of immediate approval and prompt payment. Streamlining processes for efficiency must also be balanced against ensuring quality and consistency of decision-making. This requires oversight and scrutiny to protect the Legal Aid Fund, which is demonstrated by VLA staff conducting compliance checks on lawyers’ files.

An important role of the compliance function is also to educate, support and train lawyers in VLA’s funding guidelines and requirements to ensure compliance. Attendance at a workshop or training session may be compulsory for lawyers with high rates of non-compliance and it may be a condition of entry to our specialist panels or ongoing panel membership.

Administrative review rights

The Legal Aid Act 1978 provides for a two tier system of administrative review — reconsideration and independent review. A person affected by a decision of VLA regarding the provision of legal assistance (usually the applicant or their lawyer) may request an internal reconsideration of that decision by a VLA officer. If a person is dissatisfied with the outcome of that internal reconsideration they may apply to have the decision reviewed by an Independent Reviewer.
Appendix 3: Fees paid to private practitioners

There are around 400 different fee structures across the matter types VLA funds. This reflects the fact that there are many different types of work that are undertaken under a grant of aid. For example, preparing for a bail application in the Magistrates’ Court will require less work than preparing for a bail application in the County Court or the Supreme Court. Therefore, there are three different fee structures for bail applications and different fees within each structure for preparation, appearances and a mention or adjournment.

All fee structures are set out in the VLA Handbook, which is accessible online.\(^\text{166}\)

Appendix 4: Defining democracy

The Museum of Australian Democracy (at Old Parliament House) describes our democracy as:

‘A liberal democracy, being one that champions the development and well-being of the individual, is organised in such a way as to define and limit power so as to promote legitimate government within a framework of justice and freedom.’

It goes on to describe four critical elements of our democracy being legitimacy, justice, freedom, and power, as follows:

(Nota: emphasis added)

Legitimacy
A legitimate government is one that has the appropriate mandate or authority to rule. This usually means a high degree of popular support as demonstrated by a free electorate and frequent elections. For example:

- the government is chosen by a popular vote in which a majority of officials in a majority of electoral regions receive the majority vote; and,
- rules (or laws) are framed to maximise the well-being of all or most citizens.

Justice
Justice is achieved when citizens live in an environment in which all citizens are treated equally and accorded dignity and respect. This may occur in democracies tempered by constitutionalism, free elections and restraints on power. For example:

- the demands made by vested interest groups seeking special privileges are questioned; and,
- society is encouraging of talent and rewards citizens on merit, rather than on rank, privilege or status.

Freedom
If freedom is to exist, there must be:

- self-determination such that citizens may make decisions, learn from them and accept responsibility for them;
- the capacity to choose between alternatives;
- the autonomy to do what the law does not forbid; and, where prohibitions do exist, they should be for the common good; and,
- respect for political and civil liberties.

For example:

- government intervention in political, economic and moral matters affecting the citizenry is limited or regulated; and,
- the scope for religious, political and intellectual freedom of citizens is not limited.

Power
In a liberal democracy efforts are made to define and limit power, often by means of a written constitution. Checks and balances, such as the separation of the Parliament, executive government and judicial power, are instituted. There are conventions of behaviour and a legal system that complements the political system.

For example:

- civil liberties are defended and increased against the encroachment of governments, institutions and powerful forces in society.’