Department of Justice and Regulation
Access to Justice Review

SUBMISSION TO THE DEPARTMENT OF JUSTICE AND REGULATION

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<td>Australian Bureau of Statistics</td>
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<td>ADR</td>
<td>Alternative Dispute Resolution</td>
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<td>CLC</td>
<td>Community Legal Centre</td>
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<td>CLEAR</td>
<td>Community Legal Education and Reform Database</td>
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<td>COAG</td>
<td>Council of Australian Governments</td>
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<td>CPD</td>
<td>Continuing Professional Development</td>
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<td>the Department</td>
<td>The Department of Justice &amp; Regulation</td>
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<td>DIPB</td>
<td>Department of Immigration and Border Protection</td>
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<td>FCC</td>
<td>Federal Circuit Court</td>
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<td>FDR</td>
<td>Family Dispute Resolution</td>
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<td>FVPLS</td>
<td>Aboriginal Family Violence Prevention Legal Service</td>
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<td>the government</td>
<td>The Victorian government</td>
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<td>IAAAS</td>
<td>Immigration Advice and Application Scheme</td>
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<td>ILP</td>
<td>Incorporated Legal Practice</td>
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<td>LCA</td>
<td>Law Council of Australia</td>
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<td>LECS</td>
<td>Legal Expenses Contribution Scheme</td>
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<td>Legal Profession Uniform Law</td>
<td>Legal Profession Uniform Law Application Act 2014 (Vic); Legal Profession Uniform Law (Victoria) (which is Schedule 1 of the Application Act; and Legal Profession Uniform Regulations made under Part 9.1 of the Legal Profession Uniform Law (Victoria).</td>
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<tr>
<td>LEI</td>
<td>Legal Expense Insurance</td>
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<td>Acronym</td>
<td>Description</td>
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<td>LIV</td>
<td>Law Institute of Victoria</td>
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<td>LIVLAS</td>
<td>Law Institute of Victoria Legal Assistance Scheme</td>
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<td>MCL</td>
<td>Major Cases List</td>
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<td>NACLC</td>
<td>National Association of Community Legal Centres</td>
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<td>New Law</td>
<td>Methods of delivering legal services newly available due to emerging and disruptive technologies as well as newer and more innovative methods of dispute resolution such as ADR and ODR.</td>
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<tr>
<td>ODR</td>
<td>Online Dispute Resolution</td>
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<td>OPA</td>
<td>Office of the Public Advocate</td>
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<td>PAIS</td>
<td>Primary Application Information Service</td>
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<td>PwC</td>
<td>PricewaterhouseCoopers</td>
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<td>SRL</td>
<td>Self-represented litigant</td>
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<td>UN</td>
<td>United Nations</td>
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<tr>
<td>VALS</td>
<td>Victorian Aboriginal Legal Service</td>
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<td>VCAT</td>
<td>Victorian Civil and Administrative Tribunal</td>
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<td>VCAT Act</td>
<td><em>Victorian Civil and Administrative Tribunal Act 1998</em></td>
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<tr>
<td>VLA</td>
<td>Victoria Legal Aid</td>
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<td>VLAF</td>
<td>Victorian Legal Assistance Forum</td>
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<td>VOCAT</td>
<td>Victims of Crime Assistance Tribunal</td>
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INTRODUCTION

The Law Institute of Victoria (LIV) welcomes the Department of Justice & Regulation’s (the Department) Access to Justice Review. The LIV represents 19,000 members of the Victorian legal profession, many of whom are actively engaged in promoting access to justice through legally aided work, pro bono activities and community legal centres (CLCs). Through their practices, LIV members encounter the adverse effects of the lack of access to justice experienced by many Victorians on a daily basis. LIV members are regularly faced with having to refuse legal aid applications and reaching legal aid funding caps, increasing demands for pro bono services, growing numbers of self-represented litigants and ultimately dealing with the consequences of escalating legal problems that may have been avoided through the provision of earlier legal assistance.

There is comprehensive evidence supporting concerns that the justice system is inaccessible to many Victorians. As stated by the Productivity Commission in its 2014 Inquiry into Access to Justice Arrangements Report (the Access to Justice Inquiry Report):

> While this problem is thought of as mainly affecting middle-income earners, it is more widespread. The Commission estimates that only 8 per cent of households would likely meet income and asset tests for legal aid, leaving the majority of low and middle income earners with limited capacity for managing large and unexpected legal costs.\(^1\)

Access to adequate legal advice is an internationally recognised human right and a pillar of the rule of law. The United Nation (UN) Human Rights Committee has emphasised that “the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way”.\(^2\) The availability of legal assistance impacts on the rights of equality before the law and to a fair hearing, as enshrined in Article 14 of the International Covenant on Civil and Political Rights.\(^3\) Legal assistance is something that the Law Council of Australia (LCA) considers should be available to everyone, particularly those people who face criminal charges or other potential restrictions on their liberty.\(^4\)

It is imperative that access to justice is improved for both low to middle income earners as well as for the most disadvantaged Victorians. The LIV submits that this can be achieved by a four-pronged approach.

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Keep funding in-step

First, additional funding for the legal assistance sector is critical. At a minimum, the LIV supports the Productivity Commission’s recommendation that $200 million per year is required immediately for civil justice services across Australia.\(^5\) Of this amount, on a per capita basis, Victoria should receive $60 million. The State should contribute 40% ($24 million) of this amount, as recommended by the Productivity Commission.\(^6\) This recommendation is only the minimum required in the short term. A long term increase in funding is needed to ensure the legal assistance sector is sustainable, not only for civil justice, but for criminal justice and child protection matters as well. This need is made more acute by the increasing number of sentenced and on-remand adult prisoners in Victoria which has increased by 37 percent since 2010, with on-remand prisoners currently comprising 23 percent of the adult prisoner population.\(^7\) Child protection matters and cases involving family violence have also increased substantially (in part due to increased reporting), driving increased demand for legal assistance services. Funding for legal assistance services has fallen far short of this increasing demand.

Increase oversight

Second, service delivery within the legal assistance sector should be regularly reviewed to ensure that legal assistance funding is used as efficiently as possible to promote access to justice. The recent PricewaterhouseCoopers (PwC) report, *Criminal and Family Law Private Practitioner Service Delivery Model* (PwC Service Delivery Report), provides an example of service delivery review. The report was prepared at the request of the LIV. It makes recommendations “aimed at providing legally aided services in the most effective, high quality and optimal manner possible”.\(^8\) As detailed in the submission below, the LIV supports the transitional model for service delivery of legal aid as recommended by PwC. In making decisions around the most efficient and effective allocation of legal aid funding, it is critical that the legal profession’s expertise is drawn upon. This is best achieved if both the LIV and the Victorian Bar and, more specifically, the relevant skills and experience expected in such an important government institution are represented on the Victoria Legal Aid (VLA) board.


\(^6\) Ibid 738.


**Optimise service delivery taking advantage of New Law**

Third, opportunities to optimise the way legal services are delivered should be encouraged through appropriate regulation and investment. The environment in which legal services and information is delivered is changing rapidly with the emergence of New Law. As argued by immediate past LIV President, Katie Miller, in her 2015 report, *Disruption, Innovation and Change: The Future of the Legal Profession*, it is not enough to be aware of external pressures such as “technology, economic pressures and the ever-widening access to justice gap”.9 Lawyers must adapt and find “new ways to help clients to access justice.”10 This obligation extends to the whole justice sector. The LIV submits that this may be achieved through:

- facilitation of technology driven solutions to reduce legal costs and increase accessibility;
- reducing barriers faced by consumers in accessing justice by enabling market-based responses to increase purchasing power; and
- enhancements to the regulatory framework of the legal profession to increase competitiveness and promote innovation.

**Take a system approach**

Finally, promoting access to justice requires a multi-faceted approach. A one-size-fits-all model to service and information delivery inevitably disadvantages groups with different, and often multiple, needs. The Law Council of Australia (LCA), in their submission to the Access to Justice Inquiry, noted that:

> access [to justice] necessarily depends on a range of factors, including geographic location, economic capacity, health, education, cultural and linguistic variations, formal and informal discrimination, and other variable factors.11

In many cases, a person has multiple legal and non-legal needs arising from experiencing disadvantage. The LIV submits that services should be targeted to reduce the impact these variables have on the accessibility to justice. For example, as detailed in this submission below, Aboriginal and Torres Strait Islander people should be provided with culturally specific services to address their over-representation in the criminal justice system and to increase their access to civil justice avenues of redress. Similarly, the legacy caseload of asylum seekers is a disadvantaged group that requires a tailored response, as set out in the section on the legacy caseload below. While this group’s legal

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10 Ibid.
issues primarily concern federal matters, the services provided are generally state-based through legal aid, CLCs and pro bono providers. The failure of the Commonwealth government to adequately fund this group’s legal needs has shifted the cost to state-based services, therefore reducing the resources available to other Victorians requiring legal assistance. People with disabilities also experience specific impediments to accessing justice that require specific solutions, as detailed in the section of this submission on people with disabilities. Similar issues arise in relation to other groups, including people experiencing family violence, as highlighted throughout this submission.

How to read this submission

This submission comprises an Executive Summary and four parts:

- a table of recommendations;
- an outline of key changes affecting the legal environment and opportunities emerging from those changes;
- responses to each of the terms of reference reflecting the concerns and experiences of LIV members; and
- three areas of specific need as examples of the importance of taking a multifaceted approach to promoting access to justice.
EXECUTIVE SUMMARY

The LIV has long advocated for reforms to the Victorian justice system to ensure that access to legal representation is available to all who need or desire to engage legal professional services.\(^\text{12}\) While legal assistance service providers are providing high-quality services to the most disadvantaged Australians, there is a large body of evidence supporting the concern that a significant proportion of low and middle income earning Victorians do not have the capacity, be that economic or otherwise, to effectively engage with the justice system.\(^\text{13}\)

The LIV contends that this is largely the result of significant underfunding of the legal assistance sector. There are significant flow-on benefits from investment in the justice system. Reports have shown that “returns can be attributed to cost savings from a range of factors, including reduced private and public health costs and lower rates of absenteeism\(^\text{14}\)” as well as “the potential to reduce the escalation of legal issues and associated costs.”\(^\text{15}\)

The LIV strongly supports the Productivity Commission’s call for an immediate $200 million per year in funding for civil justice services across Australia\(^\text{16}\) as a first step to increased funding, of which $60 million should be allocated to Victoria. The LIV further calls for more ongoing funding in Victoria above this amount. This will go some way to ensuring that both civil and criminal justice systems are sustainably funded. It is also critical that both legal aid and CLC funding is increased and sustained to meet increasing demand for legal assistance services.

However, the LIV recognises that unmet legal need will not simply go away with increased funding. The LIV’s recommendations take into consideration:

- the growing role of technology in the delivery of professional services, such as online dispute resolution and legal analytics or artificial intelligence;

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\(^{12}\) The Victorian justice system covers civil and criminal justice, and incorporates public, private and community actors, including all courts, tribunals, relevant state agencies (eg Victoria Police, Corrections, VLA, the Office of Public Prosecutions), community organisations (eg CLCs, OPA), representative bodies (eg LIV and the Victorian Bar) and private legal practitioners.


\(^{15}\) Ibid 47.

• innovative funding models, including support for legal start-ups, Legal Expense Insurance, Legal Expenses Contribution Schemes, alternative billing practices, unbundled legal services and Social Investment Bonds;

• the importance of an efficient and fair regulatory system to ensure an appropriate balance between consumer protection and transaction costs, and specifically the need for further reform to the Legal Profession Uniform Law;

• the importance of multiple entry points into accessing legal services and the coordination of referral pathways once a referral point is accessed;

• the critical role of lawyers in providing access to justice by guiding people through key decision points in the legal system, particularly in the early stages to identify legal compared to non-legal issues and to triage accordingly;

• the role of alternative dispute resolution (ADR), integration of ADR with online technologies, and the use of ADR in specific context, such as cases involving family violence, and matters involving members of the Aboriginal and Torres Strait Islander community or people with disabilities;

• the critical role of VCAT in providing a low cost accessible jurisdiction, highlighting a range of reforms to rules, procedures, information and fees to improve VCAT’s efficiency, effectiveness and ultimately its accessibility;

• the role of pro bono legal services as an important and voluntary addition to, rather than substitute for, the provision of adequate funding for free and accessible legal services; and the importance of adequately funding pro bono referral services such as the LIVLAS program;

• that in addition to sustainable funding for mainstream services, targeted funding is needed for specific groups including Aboriginal and Torres Strait Islander people, the legacy caseload of asylum seekers and people with disabilities;

• the absence of duplication in the provision of legal assistance services and information, taking into the account the high levels of demand, the range of ‘audiences’ for services and information, and the need to provide alternative service options when conflicts of interest arise;

• the distribution and mode of delivery of legal assistance services, recognising the key role of the private profession in delivering approximately 70 per cent of the legally aided services; the apparent underfunding of privately provided legal aid service; and the important role the legal profession should play in the governance of service delivery arrangements; and

• the impact and needs of the large number of self-represented litigants (SRLs) in the justice system, the role of SRL court-based services, and the pressing need for further data of the numbers of SRLs and the reasons why they self-represent to ensure any policy response is evidence-based.

These key themes have shaped the LIV’s response to the Department’s Access to Justice Review. The LIV would welcome the opportunity to engage in further consultation on any of these issues, or any other issues, covered in this submission.
# RECOMMENDATIONS

## Disruption and innovation in legal services

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<th>Online Dispute Resolution (ODR)</th>
<th>Recommendation</th>
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<tr>
<td></td>
<td>1. That the government:</td>
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<td>1.1. reviews impediments to the development and implementation of innovative dispute resolution mechanisms, such as ODR. Impediments may include overloaded or out-dated infrastructure, barriers to investment (such as tax rules) and court rules;</td>
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<td>1.2. undertakes further research, with the LIV, to examine how to ensure that users are able to engage with ODR services in a fair and efficient manner. Mechanisms to promote engagement may include:</td>
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<td>1.2.1. professional legal advice;</td>
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<td>1.2.2. psychological counselling; and</td>
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<td></td>
<td>1.2.3. financial counselling.</td>
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<td></td>
<td>1.3. works with the legal profession to institute measures of fairness, efficiency and accessibility and does not limit legal representation at any level of ODR in order to manage the inconsistencies in capacity to engage with ODR, except if measures show poor dispute outcomes;</td>
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<td>1.4. identifies with the LIV the pivotal points in ODR processes where legal representation is critical to avoid unnecessary escalation of case costs both direct and indirect;</td>
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<td>1.5. conducts regular independent evaluation of the application of ODR in the justice system, including instances of legal representation, specifically against the following evaluation criteria:</td>
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<td>1.5.1. levels of satisfaction regarding access to, usability of and outcomes from the system;</td>
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<td>1.5.2.</td>
<td>sustainability of agreements or other outcomes reached; and</td>
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<tr>
<td>1.5.3.</td>
<td>unit costs of disputes resolved using the system.</td>
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<td>1.6.</td>
<td>considers the role of technology in infrastructure planning for the courts, in particular to enable simple hearings, such as mentions, to be conducted electronically.</td>
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| Legal analytics or artificial Intelligence | 2. That the government conducts a broad-ranging consultation on the moral and ethical issues associated with the use of these technologies to determine the appropriate balance between potential efficiency gains and protections regarding the use, ownership and control of these technologies and associated data. |

<p>| Legal start-ups | 3. That the government: |
| | 3.1. works with the Commonwealth Attorney-General’s Department and the Australian Tax Office to identify tax consequences which are prohibitive to emerging legal start-ups; |
| | 3.2. investigates funding and other opportunities arising from the Commonwealth government’s National Innovation and Science Agenda to promote research into and support innovative legal start-up models, potentially in collaboration with Victorian universities; |
| | 3.3. allocates funds from Business Victoria’s Future Industries Fund to support professional services delivered by emerging legal start-ups with assistance from Victorian universities; and |
| | 3.4. works with the LIV to develop regulatory models that enable and accelerate legal start-ups including firm accreditation systems and the freeing up of on-line fee arrangements where customers are not seen by on-line firms as in traditional models of practice envisaged by the Legal Profession Uniform Law. |</p>
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<th>Market Based Responses</th>
<th>Recommendation</th>
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| Legal Expense Insurance (LEI) | 4. That the government together with the LIV, investigates the feasibility of LEI and, subject to that assessment, facilitates its introduction in Victoria through appropriate self-regulation. Specifically, by:  
4.1. facilitating LIV recognition of risk controlled practices to perform insurer-auspiced services; and  
4.2. recognition of unbundled legal services, as recommended in relation to Term of Reference 5. |
| Legal Expenses Contribution Scheme (LECS) | 5. That the government, together with the LIV, investigates the feasibility of introducing LECS (subject to the inclusion of protections for low-income earners), either as:  
5.1. a federal scheme that collects individual contributions through the federal income tax system; or  
5.2. a state based pilot that collects contributions through the best of available methods of levy collection such as voluntary payroll deductions from employees or motor vehicle registration levies. Alternatively an investment scheme held by VLA or other government-auspiced fund can be used as another source of legal aid funding. |
| Alternative billing practices | 6. That the government allows for contingency fee billing arrangements to be entered into in Victoria as follows:  
6.1. The prohibition on contingency fees be removed (with some exceptions, set out below) to allow law practices to charge legal fees on the basis of an agreed percentage of what is recovered by the client in the matter (award of damages or settlement monies), or on the basis of some other outcome specified in the contingency fee agreement. In assessing the amount recovered by the client:  
6.1.1. damages, interest and standard party/party costs would be included; and  
6.1.2. medical costs (past or future), amounts the client is required to pay to the Health Services Commission or Centrelink, or amounts awarded but not actually recovered would be excluded. |
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<tr>
<td>6.2.</td>
<td>There be a cap of 35 percent on contingency fees for personal injury matters, i.e. law practices should not be permitted to charge contingency fees at a rate higher than 35 percent of damages or settlement monies received in personal injury matters.</td>
</tr>
<tr>
<td>6.3.</td>
<td>In matters that do not involve a dispute or litigation, the prohibition on contingency fees be removed to allow law practices to charge legal fees on the basis of a percentage of an agreed factor (such as the value of the property in a joint venture agreement) upon a specified outcome occurring or being achieved in the matter.</td>
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<td>6.4.</td>
<td>In matters where a law practice charges contingency fees, they should not be permitted to also charge hourly rates for work done on that matter.</td>
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<td>6.5.</td>
<td>Contingency fee agreements should not be permitted in family law, criminal law or migration law matters.</td>
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<td>Social impact bonds</td>
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<td>7.</td>
<td>That the government considers developing a Social Impact Bond policy to support access to justice initiatives, similar to that in New South Wales. In particular, that the government investigate the viability of arrangements aimed at reducing recidivism and family violence.</td>
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<td>8.</td>
<td>That in supporting such an approach, the government work with the LIV and Monash University or other universities to:</td>
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<td>8.1. develop a data set showing pivot points in the criminal and family law systems where intervention by lawyers will offset downstream costs;</td>
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<td>8.2. undertake a pilot with a legal service associated with the relevant university to test the assumptions of such a scheme and better estimate dividends that might be paid by following through a cohort of assisted persons; and</td>
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<td>8.3. work with the market and the Institute of Public Administration to develop a prospectus based on this information and other information drawn from the experience of LIV lawyers.</td>
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<tr>
<td>Regulatory Framework</td>
<td>Recommendation</td>
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<td>Regulation of the legal profession</td>
<td>9. That the government continues to work with the legal profession to:</td>
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<td>9.1. identify the economic impact on legal transactions arising from the Legal Profession Uniform Law, including the effect of increased transaction costs (estimated by smaller practices to be approximately 10 – 15 percent) on access to justice; and</td>
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<td>9.2. identify any perverse outcomes arising from the Uniform Law, including:</td>
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<td>9.2.1. the anecdotal emergence of restrictive client selection practices, whereby legal practices select lower risk clients to avoid lengthy costs disputes under the Legal Profession Uniform Law;</td>
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<td>9.2.2. the impact of the new costs estimate regime on transaction costs and any reduction in access to justice owing to the requirement that lawyers provide estimates that may overstate the true legal costs; and</td>
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<td>9.2.3. the anecdotal rise of non-legal service providers offering legal services at a lower rate and subject to less protections;</td>
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<td>9.3. develop a fair and efficient regulatory framework that supports a competitive and innovative legal profession; and</td>
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<td>9.4. examine and monitor the impact of new legislation including recent verification of identity requirements and foreign investment checks that limit the capacity of legal practitioners to effectively service clients due to additional unfunded investigative tasks.</td>
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<td>Terms of Reference</td>
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<td>1. The availability of easily accessible information on legal assistance services and the Victorian justice system, including advice on resolving common legal problems.</td>
<td>10. That the government together with the LIV, improves training and information given to social service and legal service providers to ensure legal issues are identified early and triaged to an effective referral pathway. Professional development targeted to social service providers that concerns legal issues should draw on the expertise of the legal profession.</td>
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<td>11. That the government maintains multiple entry points for legal information and access to legal services, while improving coordination of referral pathways once a person accesses an entry point.</td>
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<td>12. That the government supports LIV initiatives to train lawyers and to participate in initiatives to educate police, judicial officers and court officers about family violence issues and to coordinate responses across the justice system.</td>
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<td>13. That the government does not publish typical legal fees for various types of legal matters. Lawyers are subject to consumer protection legislation that ensures that clients are well informed of the costs arising from legal matters. If the government does undertake a review of legal fees with the intention to publish these fees, this review should be done through Australian Bureau of Statistics (ABS) data collection.</td>
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<td>14. That when considering any reform to access to justice arrangements that will impact upon the Aboriginal and Torres Strait Islander community, the government prioritises the community’s self-determination.</td>
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<td>15. That the government supports and invests in the expansion of Aboriginal community driven early intervention support services, specifically the VALS Client Services Officer service, and draws on the principles underpinning the Koori Court in the delivery of services.</td>
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<td>16. That the government works with the Commonwealth government to increase funding of Aboriginal Controlled Community Legal Services to provide community legal education.</td>
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<td>17. That the government:</td>
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<td>17.1. identifies and addresses gaps in existing interpreter services for Aboriginal and Torres Strait Islander people in Victoria; and</td>
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<td>17.2.</td>
<td>provides appropriate training and funding to ensure that these services act as communication assistants to overcome not only language difficulties, but also cultural misunderstanding.</td>
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<td>18.</td>
<td>That the government increases funds for service delivery to Aboriginal communities in regional areas, specifically in the areas of civil and family law.</td>
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<td>19.</td>
<td>That:</td>
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<td>19.1. the government provide funding to either the courts or the Victorian Law Foundation to develop Easy English guides to court processes to assist people with cognitive impairment to navigate the legal system; and</td>
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<td>19.2. Courts and Tribunals review the way they communicate, and how they can communicate in alternative ways with people who are particularly vulnerable, such as people with a disability.</td>
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<td>2. Options for diverting people from civil litigation and into alternative services where appropriate, such as a ‘triage’ model.</td>
<td>20. That when considering options for diversion from civil litigation, the government ensures that individuals have access to accurate legal advice provided by lawyers at the earliest stages so that they are properly advised on whether civil litigation is appropriate for their circumstances. In considering such approaches, the government should:</td>
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<td>20.1. build in accepted research that early informed legal oversight or direct legal involvement in triage decisions will result in fewer downstream costs;</td>
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<td>20.2. recognise that sophisticated legal services are required to deal with complexity regardless of the subject matter of the dispute particularly in developing resolution options and in assessing and cutting through to relevant information; and</td>
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<td>20.3. ensure that these functions apply in private mediation, other forms of ADR, arbitration or conciliation models.</td>
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<td>21.</td>
<td>That the government does not introduce pre-action protocols for resolving all disputes and that any requirement to engage in pre-action protocols excludes the scenarios listed in the LIV’s submission.</td>
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<td>22. That the government supports the LIV working with the Victorian Aboriginal Legal Service (VALS) to develop and promote a Continuing Professional Development program (CPD) on Victorian cultural awareness training and a cultural protocol for non-Aboriginal lawyers, specific to areas of practice where possible.</td>
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<td>3. Whether and how alternative dispute resolution mechanisms should be expanded so that more Victorians can make use of them.</td>
<td>23. That the government work with the Victorian Aboriginal community to develop Aboriginal-specific ADR services (including family dispute resolution services), similar to those used in the Northern Territory.</td>
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<td>24. That Aboriginal-specific ADR services should be based in regional areas (such as Shepparton, Mildura, Sale, Wodonga and Warrnambool), as well as metropolitan areas.</td>
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<td></td>
<td>25. That the government work with disability service providers and the Office of the Public Advocate (OPA) to develop information and training for ADR providers on methods of adjusting ADR processes to better accommodate the needs of people with cognitive impairment.</td>
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<td>26. That the government increase funding to the Disability Services Commissioner to allow it to adequately investigate complaints.</td>
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<td>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.</td>
<td>27. That the government conduct a broad review of jurisdiction, practices and procedures at VCAT as well as broader legislative reform of the Victorian Civil and Administrative Tribunal Act 1998 (the VCAT Act).</td>
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<td>28. That VCAT establish an internal appeals division with jurisdiction to hear appeals on questions of law, or otherwise on leave.</td>
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<td>29. That VCAT consider expanding its Civil Division’s Real Property List.</td>
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<td>30. That the threshold for a “small civil claim” in VCAT be reduced from $10,000 to $5,000.</td>
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<td>31. That VCAT amend PNVCAT1 to incorporate examples of where and when lawyers are allowed to represent parties for amounts under the threshold.</td>
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<td>32. That the government provide further resources to fund VCAT Duty Lawyer services and to expand the availability of this service.</td>
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<td>33. That VCAT consider implementation of “self-represented litigant coordinator”, or other non-lawyer assistance services for self-represented litigants.</td>
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<td>34.</td>
<td>That, to ensure written reasons are provided in small claims, the VCAT Act be amended (in the alternative) to:</td>
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<td>34.1. require all Tribunal Members to provide written reasons for decisions in all matters; or</td>
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<td>34.2. repeal Clauses 11 and 76 of Schedule 1 to the VCAT Act; or</td>
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<td></td>
<td>34.3. require Tribunal members to advise parties of the requirement to request written reasons under Clauses 11 and 76.</td>
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<td>35.</td>
<td>That VCAT review its discretionary power to grant adjournments and provide clearer guidance materials on the matter.</td>
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<td>36.</td>
<td>That VCAT undertake a review of fees in consultation with key justice system stakeholders and implement measures to reduce fees.</td>
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<td>37.</td>
<td>That VCAT consider waiving fees altogether for applications to certain Lists.</td>
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<td>38.</td>
<td>That VCAT consider implementing measures to ensure that costs follow the event for commercial matters.</td>
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<td>39.</td>
<td>That the government amend section 109(3)(c) of the VCAT Act to clarify whether parties bringing a complex case will have the same standing as parties bringing a strong and meritorious case, with respect to a costs award.</td>
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<td>40.</td>
<td>That clause 91 of Schedule 1 of the VCAT Act be amended to remove the bar to costs in the Taxation List and that section 109 be amended to allow for discretionary costs awards.</td>
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<td>41.</td>
<td>That VCAT establish a position on costs awards and publish it in a Practice Note.</td>
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<td>42.</td>
<td>That VCAT to consider and implement active case management in all matters.</td>
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<td>43.</td>
<td>That the VCAT Act be amended to set out VCAT’s Tribunal Members’ and other VCAT staff’s responsibilities and obligations to users.</td>
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<td>44.</td>
<td>That VCAT develop formal Professional Development programs for Tribunal Members and staff, with a particular focus on an inquisitorial approach and assistance for self-represented litigants.</td>
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<td>45.</td>
<td>That VCAT clarify in the relevant Practice Note that the obligation for Tribunal Members to provide assistance to self-represented litigants does not extend to providing legal advice.</td>
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<td>46.</td>
<td>That VCAT play a more active role in providing notice to parties, particularly to the elderly, those with a disability or reduced capacity.</td>
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<td>47.</td>
<td>That VCAT incorporate protocols for emailed written decisions in VCAT Practice Notes.</td>
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<td>48.</td>
<td>That VCAT review its policies around the use of technology and adopt new technologies using leading Australian tribunals as benchmarks.</td>
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<td>49.</td>
<td>That VCAT implement a consistent IT platform across all Lists.</td>
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<td>50.</td>
<td>That the VCAT Act be amended and existing VCAT practices reviewed to allow use of the internet for the creation, filing and service of documents.</td>
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<td>51.</td>
<td>That VCAT develop a regional engagement strategy, including establishment of regular circuits and video conferencing facilities.</td>
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<td>52.</td>
<td>That VCAT provide the option for parties to choose their own venues with scope for VCAT to determine appropriate venues on balance of convenience.</td>
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<td>53.</td>
<td>That a comprehensive review of the VCAT website be conducted.</td>
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<td>54.</td>
<td>That VCAT publish Practice Notes for ADR protocols and procedures in each VCAT List.</td>
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<td>55.</td>
<td>That section 88(6) of the VCAT Act be reinstated to prohibit a member who has acted as a mediator from being the Tribunal Member who hears the final hearing.</td>
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<td>56.</td>
<td>That VCAT remove the mandatory ‘two clear business days’ cooling off period that applies to self-represented parties after mediation.</td>
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<td>57.</td>
<td>That VCAT review timeframes for processes in all Lists to match the expedited processes available in the Major Cases List and Short Cases List of the Planning and Environment List.</td>
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<td>58.</td>
<td>That VCAT consider the abolition of a user pays system in the context of the Major Cases List and Short Cases List of the Planning and Environment List.</td>
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<td>59.</td>
<td>That VCAT conduct a review of the Guardianship List to ensure that current practices, procedures and policies contain appropriate levels of access for vulnerable users, disadvantaged users, and users suffering disabilities.</td>
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<td>60.</td>
<td>That VCAT create a Koori List for tenancy matters to ensure the availability of culturally competent duty lawyers.</td>
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<td>61.</td>
<td>That VCAT adapt its Koori Inclusion Action Plan to allow more time per matter and to provide opportunity for discussion with the client.</td>
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<td>62.</td>
<td>That in reviewing pro bono service delivery, the government does not treat pro bono work as a substitute for the provision of adequate funding for free and accessible legal services.</td>
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<td>63.</td>
<td>That the government provide secure funding to Justice Connect for the LIVLAS program scheme to facilitate effective pro bono referrals, rather than using economic and other levers to increase the hours of pro bono work undertaken by the legal profession.</td>
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<td>64.</td>
<td>The government should provide further funding to CLCs to facilitate targeted referrals through Justice Connect.</td>
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<td>65.</td>
<td>That the government seek amendment to the Legal Profession Uniform Law and the Australian Solicitors’ Conduct Rules to explicitly support the provision of unbundled legal services.</td>
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<td>66.</td>
<td>That the Victorian courts allow limited scope for representation by solicitors in legal matters.</td>
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<td>67.</td>
<td>That the Supreme Court General Civil Procedure Rules be amended in accordance with recommendation 13.4 of the Productivity Commission’s Inquiry into Access to Justice Arrangements Report (2014; PC Access to Justice Arrangements Report) so that parties represented on a pro bono basis are entitled to seek an award for costs.</td>
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<td>68.</td>
<td>That the government invest at least an additional $24 million immediately per year in civil justice services in accordance with the recommendation of the PC Access to Justice Arrangements Report.</td>
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<td>69.</td>
<td>That, in addition to the $24 million, the government increase funding to legal assistance services to the equivalent level per capita as New South Wales.</td>
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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; and
- options for expanding existing incentives for law firms within the Victorian Government Legal Services Panel.

6. The availability and distribution of funding amongst legal assistance providers by the Victorian and Commonwealth governments to best meet legal need.
| 70. | That the government increase funding to criminal law, child protection matters and family violence matters to meet increasing demand for legal assistance services in these areas. |
| 71. | That the government work with the Commonwealth government to ensure funding to Victorian CLCs is maintained at at least $9.7 million per year from 2017-18 to avoid funding shortfalls that will arise in 2017-18 under the new National Partnership Agreement on Legal Assistance Services. |
| 72. | That in addition to maintaining CLC’s funding, the government work with the Commonwealth government to increase CLC’s funding in response to increasing demand for services. |
| 73. | That the government maintains the mixed-model approach to delivery of legal assistance services and that any changes to the distribution of funding ensure that multiple entry points to legal assistance services are preserved. |
| 74. | That the government and VLA ensure that the LIV and the legal profession’s expertise is drawn upon in decision making around the most efficient and effective allocation of legal aid funding and any associated system reforms on an ongoing basis. Specifically, that the LIV and Victorian Bar are represented on the:  
  74.1. VLA Board; and  
  74.2. VLA Community Consultative Committee. |
| 75. | That the government, together with the LIV, conducts a survey of members of the LIV and the Victorian Bar to gather up-to-date figures on:  
  75.1. Legal Aid rates compared to market rates for the provision of legal services; and  
  75.2. the actual cost of conducting legally aided matters compared to the amount paid by VLA. |
<p>| 76. | That government, together with the Commonwealth government, provides additional funding to service providers such as VALS and the Family Violence Prevention Legal Service (FVPLS) to ensure uninterrupted access to culturally appropriate services for Aboriginal and Torres Strait Islander peoples in Victoria. |</p>
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<th>77.</th>
<th>That the government makes a proposal to Council of Australian Governments (COAG) to:</th>
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<td>77.1.</td>
<td>develop a national ‘justice target’ to reduce Aboriginal and Torres Strait Islander peoples’ rates of offending, incarceration, recidivism and victimisation,</td>
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<td>77.2.</td>
<td>develop an agreement to direct coordination across levels of government to most effectively coordinate culturally appropriate strategies, and</td>
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<td>77.3.</td>
<td>improve data collection on imprisonment across jurisdictions.</td>
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<td>78.</td>
<td>That the government calls upon the Commonwealth government to remove the prohibition on advocacy in the National Partnership Agreement on Legal Assistance Services.</td>
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<td>79.</td>
<td>That the Commonwealth government properly fund a full IAAAS scheme, in particular for those subject to the fast-track scheme, to ensure access to justice for asylum seekers.</td>
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<td>80.</td>
<td>That the government approach the Commonwealth government in relation to the above funding.</td>
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<td>81.</td>
<td>That the government works with the Commonwealth government to ensure the appropriate funding of CLCs, VLA and other community groups, including Migrant Resource Education Centres and the Red Cross, so that they have the resources to continue to support this client group.</td>
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<td>82.</td>
<td>That the government increases funding to specialist CLCs and other agencies that provide services directly to people with a disability to ensure they are able to adequately meet demand.</td>
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<td>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</td>
<td>83. That the government support the production of community legal education resources by service delivery organisations and investigates technological solutions for coordination and distribution of these resources.</td>
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<td>84.</td>
<td>That the government increase funding to the National Association of Community Legal Centres (NACLC) for the CLEAR database.</td>
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<td>85.</td>
<td>That the government promotes the Victorian Legal Assistance Forum (VLAF) Online Legal Information Guidelines to community legal education providers.</td>
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<td>86.</td>
<td>That, in assessing duplication in legal services and the provision of legal education material, the government is mindful of the needs of varied audiences and the issue of conflicts of interest.</td>
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<td>87.</td>
<td>That the service delivery mix should be informed by an independent and accurate assessment of the cost-efficiency of delivering legal aid services through in-house lawyers compared with private practitioners. This assessment should be informed by quality and cost considerations and stakeholder consultation. Accordingly, the LIV supports the transitional model for reform as outlined above and recommended by PwC’s Service Delivery Report.</td>
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<td>88.</td>
<td>That the government develop financial key performance indicators, to be included in the Legal Aid Act 1978, to measure the delivery of publicly provided legal aid services against privately provided legal aid services.</td>
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<td>89.</td>
<td>That VLA should release detailed data currently being gathered in response to the 2014 report of the Victorian Auditor General should be released immediately to enable independent and transparent analysis.</td>
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<td>90.</td>
<td>That, given the significant differences per unit found by PwC in the delivery of legal aid services between public legal aid services and private legal aid services, the government refers VLA to review by the Commissioner for Better Regulation to ensure that legal aid funding is being used as effectively and efficiently as possible, including an assessment of competitive neutrality between public and private services.</td>
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<td>91.</td>
<td>That the government work with the Commonwealth government to increase funding to VLA’s Migration Team.</td>
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<td>92.</td>
<td>That the Victorian and Commonwealth governments consider instituting a legal funding scheme similar to the IAAAS for organisations and firms to tender to provide legal assistance for asylum seekers applying for judicial review.</td>
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<td>93.</td>
<td>That VLA’s funding be increased for representation of people with cognitive impairment who are facing restrictions on their fundamental rights to liberty or freedom of movement.</td>
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<td><strong>9.</strong> Options for providing better support to self-represented litigants throughout the Victorian justice system.</td>
<td><strong>94.</strong> That the government collects data on the numbers of self-represented litigants and the reasons they are self-representing.</td>
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<td><strong>95.</strong> That, as part of this data collection, the government considers funding a snapshot study of self-represented litigants in Victorian courts in conjunction with the Australian Centre for Justice Innovation and the LIV.</td>
<td><strong>96.</strong> That the government fund a self-representation service in the Victorian courts and tribunals, to be established in consultation with the Victorian Courts, Justice Connect, the LIV and the Victorian Bar.</td>
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<td><strong>97.</strong> That this service should be extended to Victorian cases as a proven model of assistance. The LIV would be pleased to work with the government in operationalising this approach. Additional funding to the $360,000 already provided through the LIV (LIVLAS program) from the public purpose fund should be considered as a source of funding. A pilot mirroring the scope and numbers for federal funding for the first year should be introduced for state court matters.</td>
<td><strong>98.</strong> That the Victorian and Commonwealth governments adequately resource the Victorian registry of the Federal Circuit Court to deal with an increase in demand in the next few years, including appointing new Judges.</td>
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<td><strong>99.</strong> That the Victorian and Commonwealth governments ensure appropriate funding of VLA to continue to operate an efficient, effective duty lawyer and referral service for unrepresented asylum seekers at the Federal Circuit Court.</td>
<td><strong>100.</strong> That the government urge the Commonwealth government as a high priority to introduce legislation to end dual regulation of migration lawyers, as per the Kendall Report recommendation.</td>
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<td><strong>101.</strong> That greater focus on training for judicial officers to accommodate the needs of people with a disability is needed.</td>
<td><strong>102.</strong> That specialised independent support persons should be available at court and tribunals to assist people with a disability to navigate the legal system.</td>
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<td><strong>103.</strong> That the Victorian Government conduct a review of the appointment process for litigation guardians and consider establishing a government funded litigation guardian service. In the alternative, the LIV supports the amendment of rule 15.02 of the <em>Supreme Court Civil (General Civil Procedure) Rules 2016</em> to:</td>
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<td><strong>103.1.</strong> remove the personal liability of a litigation guardian for any adverse cost orders made against them; and</td>
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<td><strong>103.2.</strong> set off adverse costs against any costs that the Court has ordered that other party or non-party pay to that litigation guardian.</td>
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<td><strong>104.</strong> That the body investigating complaints about disability services (either the Disability Services Commissioner or a new body under the NDIS) needs to be independent, properly funded and allow an avenue for complaint to go to a relevant State or Federal Tribunal.</td>
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The nature and delivery of legal services is evolving rapidly. These changes provide an opportunity to influence and expand access to justice in Victoria. In reviewing access to justice, the LIV urges the government to invest in, and create a regulatory environment which supports, the following:

- technology driven solutions with the potential to reduce legal costs;
- market based responses that increase consumer purchasing power; and
- an efficient and fair regulatory framework to support a competitive and innovative legal profession.

Technology and innovation

In her report, *Disruption, Innovation and Change*, Katie Miller comments that “innovators fill the access to justice gap through a combination of business models and technology.” As innovators take advantage of technological change and innovative business models, the cost of providing legal services is likely to reduce and therefore increase affordability for consumers.

There are a range of legal service providers, facilitators and intermediaries that have reduced the cost of legal services. Notable examples include:

- legal analytics, cognitive computing software and ODR;
- virtual law firms and legal service procurement websites; and
- assisted document creation.

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18 For a summary of technologies that are increasingly being used in the legal services market, see Katie Miller, President Law Institute Victoria, *Disruption, Innovation and Change: The Future of the Legal Profession* (2015), 30-32.
The role of lawyers and technology

While technology is a useful tool that can make legal services more efficient and accessible, it will not replace lawyers. Innovation is successful when it focuses on a problem and seeks to find a solution. It generally does not work when it finds a ‘tool’, technological or otherwise, and then seeks to find a problem to solve. Lawyers play a key role in identifying their client’s problems and finding solutions. Technology can assist in creating those solutions.

As discussed below in relation to ‘Legal Analytics or Artificial Intelligence’, lawyers’ skills are still needed to interpret and use information generated by technology. Further, the application of technology involves moral and ethical questions concerning what tasks are assigned to people compared to technology. Being a lawyer involves the application of legal skills, human interaction and exercising judgement. Lawyers’ practice involves ethical considerations that reflect their duties to their clients and to the courts. Technology can support the role of lawyers, but ultimately cannot, and should not, be expected to replace it.

Further, as innovation in the delivery of legal services expands to fill the access to justice gap, more lawyers will be needed to service a broader range and greater number of clients. The services lawyers provide may become more specialised or targeted at particular points in the process. However, lawyers’ roles in providing trusted advice to clients at key decision points, and representing their client’s interests through the legal process, will not change.

The use of technology in dispute resolution

The use of technology in dispute resolution is already widespread. It includes appearances via videolinks, e-filing of court documents, e-discovery, e-case management, online forms and sharing of court documents in the cloud. For example, the Kilmore East bushfire trial was conducted as an electronic trial. During the trial, court trolleys were banned and only the occasional folder was brought into the courtroom. It was an almost entirely paperless trial. It involved:

- 26 counsel;
- 100s of solicitors;
- Over 100 witnesses;
- Over 400 pages of pleadings;

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19 Ibid.
83 orders;
- 23,000 documents in the e-court book;
- 21,000 pages of transcript;
- 500 pages of closing submissions; and
- 208 sitting days.\textsuperscript{21}

The LIV supports the use of a breadth of technologies to support dispute resolution. In particular, LIV members have recommended the use of videolinks and similar technology to support ‘virtual’ appearances for simple matters, such as mentions. A virtual list could be established for lawyers to login to from their offices at an appointed time. This approach would save significant time for lawyers, reduce costs for clients, and consequently increase the affordability of accessing justice.

**Online dispute resolution**

All dispute resolution processes that use an online platform to facilitate the resolution of a dispute between parties can be characterised as online dispute resolution (ODR). ODR can involve parties in mediation, arbitration, and negotiation. Parties may use internet based technologies as part of the dispute resolution process (for example, for document sharing), or may conduct the entire dispute resolution process online.

ODR encompasses rapidly evolving negotiation settlement systems and online environments such as Modria. According to Professor John Zeleznikow: “Negotiation support systems propose solutions for a conflict based on the information available on a case at hand.”\textsuperscript{22} Specifically, as stated in Katie Miller’s report, *Disruption, Innovation and Change*:

The systems help the disputants to reach agreement though guided information, identifying areas of dispute and referral to experts where appropriate. If the disputants cannot agree, the system can refer the matter to a human being to resolve the dispute. The system can assist the human being in this task by suggesting an outcome based on knowledge of previous similar disputes and how they were settled (ie what is a fair outcome).\textsuperscript{23}

Graham Ross, CEO of ClaimRoom and European Advisor to Modria, argues “that conducting mediations wholly online provides the opportunity to extend the benefits of mediation to many disputes that otherwise would not be able to benefit, including:


\textsuperscript{23} Katie Miller, President Law Institute Victoria, *Disruption, Innovation and Change: The Future of the Legal Profession* (2015), 32.
- disputes between parties who are geographically too distant to enable a meeting to take place;
- disputes where the value of the subject matter is not sufficiently high to justify the cost of face-to-face meetings (such as consumer disputes); and
- disputes where there is a need for a cooling off period between the parties.\textsuperscript{24}

**ODR in Australia**

According to Professor Tanya Sourdin of the Australian Centre for Justice Innovation: “Within Australia ODR growth in most sectors has been primarily directed at e-commerce and consumer based schemes that operate as first-tier complaints handling and dispute resolution mechanisms.”\textsuperscript{25} Increasingly, the private sector is implementing ODR as a means to increase efficiency and consistency in response to consumer concerns. Negotiation support systems are being applied to online commercial transactions to analyse relevant information, including customer information, to offer resolutions without necessarily requiring human intervention. Similarly, they are being used by government departments (eg to process tax objections), by private parties to disputes and for low value, high volume disputes.\textsuperscript{26}

ODR has the potential to expand into online courts. For example, in British Columbia, Canada, an online tribunal will commence in June 2016, called the Civil Resolution Tribunal.\textsuperscript{27} There is no fully operational online court in Australia. Some courts use online facilities, for example for appearances via video link and for e-lodgement of court documents. The Federal Court e-Courtroom is an example of this approach. Some jurisdictions, including Victoria, use videolinks from chambers to hear civil matters in regional locations.

ODR is used in the family law sector. This is in part due to changes to the *Family Law Act 1975* (Cth) requiring that mediation is undertaken before a parenting order is sought. In this context, SS Raines and MC Taylor note that there are advantages to using ODR where “one parent has moved out of state and/or when there are concerns about past incidence of violence between the parties.”\textsuperscript{28} These advantages equally apply in other legal contexts where face-to-face dispute resolution involves additional resources or security concerns. In particular, in the cases involving family violence, the use of ODR has the potential to reduce interpersonal contact between the parties, which may otherwise aggravate the perpetrator and re-victimise the victim of the violence.

\textsuperscript{24} United Nations, The Fourth UN Forum on Online Dispute Resolution Report and Recommendations, 22-23 March 2006
\textsuperscript{25} Tania Sourdin and Chinthaka Liyanage, ‘The Promise and Reality of Online dispute Resolution in Australia’: Online Dispute Resolution: Theory and practice, 489
\textsuperscript{26} Katie Miller, President Law Institute Victoria, Disruption, Innovation and Change: The Future of the Legal Profession (2015), 32
\textsuperscript{27} Civil Resolution Tribunal Act 2012 (Brit Col, Can)
**ODR in the United Kingdom**

The United Kingdom’s (UK) Civil Justice Council “strongly advocates for the introduction of ODR” into the court system of England and Wales.\(^{29}\) The Civil Justice Council argues “that to improve access to justice, it is vital not just to have better methods of resolving disputes but also have effective ways of avoiding and containing disputes” and posits that ODR can assist in this regard.\(^{30}\)

The concept of an online court for low value civil claims has begun to gain traction in England and Wales. An online court for claims under £25,000 was the principal recommendation of the ODR Advisory Group in its “Online Dispute Resolution for Low Value Civil Claims” Report. The Advisory Group recommends a three tiered model:

- tier one provides an online evaluation to help users classify and evaluate their problem;
- tier two provides for online facilitated mediation or negotiation; and
- tier three provides for online judicial hearings and decision making, with submissions largely being made on the papers and supported by tele/video conferencing.

The recently released Civil Courts Structure Review (the Review), authored by Lord Justice Briggs, has adopted the recommendation of the Advisory Group.\(^{31}\) The Review takes the position that lawyers would not be involved in the online court.

The LIV has concerns about a process that does not allow for legal representation. As an example, the LIV has long held concern regarding the restriction of legal representation at the Australian Fair Work Commission. The LIV has previously submitted that “legal representation should be allowed as of right; that it streamlines the process; provides efficiency; and ensures informed input on behalf of the parties.”\(^{32}\) The critical role of lawyers is further discussed in relation to VCAT in the section on Term of Reference 4.

While removing legal representation may appear to reduce costs upfront, it can lead to unjust outcomes and higher downstream costs. In relation to the tiered approach recommended by the UK Civil Justice Council, the LIV notes that at each tier lawyers should be permitted to be involved to ensure both fairness and efficiency in outcomes. Specifically:

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\(^{29}\) United Kingdom Civil Justice Council Online Dispute Resolution Advisory Group, ‘Online dispute resolution for Low Value Claims’ (2015) 3

\(^{30}\) Ibid 3


\(^{32}\) Law Institute of Vitoria, Submission No 195, to Productivity Commission, *Inquiry into Workplace Relations Framework*, March 2015, 2
• tier one: classification and evaluation of a problem requires legal knowledge and experience. Lawyers should be involved in assisting and advising clients at this initial stage to ensure an efficient and fair process;
• tier two: during this mediation process, parties will require independent legal advice to ensure they are aware of their rights and responsibilities. Lawyers will also be able to independently advise on the likelihood of success if these matters are pursued further; and
• tier three: lawyers will be required to assist in the judicial process, to ensure that submissions are targeted, accurate, efficient and represent their client’s interests.

The tiered approach has the potential to streamline the processes, particularly in low value matters. It also has the potential to improve access to justice in low value matters where clients are not currently accessing ODR or lawyers. However, it is essential that lawyers are permitted to be involved to assist and guide parties through the process as efficiently and fairly as possible.

As discussed above, the role that lawyers play will evolve as systems like ODR develop. However, lawyers should remain their client’s trusted advisers and advocates at key points in the decision making process.

The future of ODR

ODR environments are often supported by artificial intelligence (discussed below) and can provide cost effective and timely resolution to disputes. It is likely that ODR environments will increasingly be paired with systems that assist in the analysis of legal problems and negotiation.33 The Civil Justice Council has predicted that advances in artificial intelligence, big data and machine learning will enhance the usefulness of ODR systems.

The LIV submits that ODR will continue to increase in prevalence and importance. The LIV supports the United Nations Forum on ODR’s Report and Recommendation that government should support and recognise the importance of ODR systems.34

Infrastructure planning

Consideration of digital platforms for court and legal services is a critical part of long-term infrastructure planning. The consequences of insufficient infrastructure and investment include disparities in access to services, information asymmetries and heightened power disparities, which all lead to less accessible justice for different groups.

In March 2015, the UK Courts and Tribunals Service embarked on a review of the administration of justice in England and Wales. Matters for consideration include:

the opportunity to use digital tools and modern IT to improve the issues, handling, management and resolution of cases of all kinds; and

- reducing the reliance on buildings, and rationalising the court estate.\(^{35}\)

Infrastructure Victoria is currently preparing a 30-year infrastructure strategy for Victoria. This strategy is based on population growth over the next 30 years of approximately 54 per cent, growing from 6.1 million today to 9.4 million.\(^{36}\) The draft objectives and needs in a recent discussion paper released by Infrastructure Victoria include the objective to ‘reduce disadvantage’, matched by the need to "support changing approaches to social service and justice delivery through infrastructure."\(^{37}\) In relation to this need, the discussion paper states:

> Improving social service and justice delivery must not be constrained by the existing asset base or delivery approach. Developments in technology are also likely to make connections between government and citizens more targeted and efficient, which could render current services and their related assets redundant.\(^{38}\)

It is essential that Victoria is equipped to meet the increased demand on its justice services. Technology, such as ODR, should form a key part of that planning.

The LIV understands that Court Services Victoria is currently developing a Strategic Asset Plan, which is due for completion in the first half of 2016. In setting the direction for planning and investment in the courts portfolio, the use of online and other digital processes to facilitate access to justice must be considered and incorporated.

In addition to court infrastructure planning, providing infrastructure to enable all members of the public to access this technology is essential to support access to justice. This is particularly important in rural and regional areas where internet connections can be problematic. The National Broadband Network may address this issue in the long-term. However, there will still be groups of people who have difficulty accessing online services due to cost, skills, confidence or other vulnerability. In 2014-15, 86 percent of Australian households had access to the internet.\(^{39}\) In remote areas, this figure is 79 percent.\(^{40}\) Any planning should ensure that assistance is provided to vulnerable groups to access online services, particularly in rural, regional and remote areas where the value of online services is even greater in overcoming geographic isolation.


\(^{36}\) Infrastructure Victoria, *Laying the Foundations: Setting objectives and identifying needs for Victoria’s 30-year infrastructure strategy*, (February 2016), 36.

\(^{37}\) Ibid 7.

\(^{38}\) Ibid 47.


\(^{40}\) Ibid.
Evaluation of ODR

As with any new technology or process, it is important that it is subject to evaluation to ensure that it is meeting the needs of its users as effectively and efficiently as possible. If ODR is introduced in Victorian Courts, the LIV believes that it should be formally reviewed by government, for example after a period of 12 to 24 months to determine:

- levels of satisfaction regarding access to, usability of and outcomes from the system;
- sustainability of agreements or other outcomes from the system; and
- unit costs of disputes resolved using the system.

**Recommendations:**

1. That the government:
   1.1. reviews impediments to the development and implementation of innovative dispute resolution mechanisms, such as ODR. Impediments may include overloaded or out-dated infrastructure, barriers to investment (such as tax rules) and court rules.
   1.2. undertakes further research, with the LIV, to examine how to ensure that users are able to engage with ODR services in a fair and efficient manner. Mechanisms to promote engagement may include:
       1.2.1. professional legal advice;
       1.2.2. psychological counselling; and
       1.2.3. financial counselling.
   1.3. works with the legal profession to institute measures of fairness, efficiency and accessibility and does not limit legal representation at any level of ODR in order to manage the inconsistencies in capacity to engage with ODR, except if measures show poor dispute outcomes;
   1.4. identifies with the LIV the pivotal points in ODR processes where legal representation is critical to avoid unnecessary escalation of case costs both direct and indirect;
   1.5. conducts regular independent evaluation of the application of ODR in the justice system, including instances of legal representation, specifically against the following evaluation criteria:
       1.5.1. levels of satisfaction regarding access to, usability of and outcomes from the system;
       1.5.2. sustainability of agreements or other outcomes reached; and
       1.5.3. unit costs of disputes resolved using the system.
   1.6. considers the role of technology in infrastructure planning for the courts, in particular to enable simple hearings, such as mentions, to be conducted electronically.
Legal analytics or artificial intelligence

The accelerated growth in computational power and legal analytic software has wide reaching implications for every aspect of the law, including legal practice, jurisprudence and legal education.\(^{41}\) The UK Civil Justice Council has commented that it expects the use of artificial intelligence systems to be widespread in the 2020s. Cognitive computational systems have the capacity to revolutionise the way in which legal research is undertaken, and significantly reduce the cost of legal work. The LIV notes that cognitive computing software is already able to make sense of unstructured data, i.e. text and documents, and provide answers to legal questions in plain English. These technologies have the potential to reduce the cost of legal work and open up the justice system to those who formerly would not have had the financial capacity to seek legal redress.

Examples of existing cognitive computing used in legal services include Watson, Ravel Law and Kim. IBM describes Watson as “a technology platform that uses natural language processing and machine learning to reveal insights from large amounts of unstructured data.”\(^{42}\) Recently, it has been used as a platform to develop a legal research application called ROSS.\(^{43}\) Ravel Law is a data driven research engine that mines an immense legal information database to provide case analysis.\(^{44}\) It was originally developed by Stanford University’s Law School, Computer Science Department and Design School. Ravel is able to identify pertinent paragraphs in a case, provide supporting authorities, and indicate whether a certain judge has cited the case before or looked upon a particular argument favourably in the past. Kim is a ‘virtual paralegal’ developed by a UK law firm, Riverview.\(^{45}\) According to Riverview, Kim can be tailored to suit individual businesses. It has the potential to perform tasks such as reporting, systems management and, increasingly, tasks using artificial intelligence. The difference between cognitive computing compared to other platforms based on keyword searching, is that cognitive computing has the capacity to learn from feedback over time and begin to understand the law.

These technologies have great potential to identify and sort relevant information. They are already being used to make legal processes such as discovery, due diligence and contract review, more efficient. However, they will not replace lawyers. Lawyers are still required to apply legal knowledge and skill to interpret and use that information.\(^{46}\)

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\(^{44}\) Ravel website <https://www.ravellaw.com/about>.


Adoption of these technologies raises ethical and moral questions. In 2008, Richard Susskind considered the future of lawyers in his book *The End of Lawyers?*. Recently, he called for “a public debate on the ethical and moral commitments of next-generation AI-enabled machines, including who owns and controls the knowledge and expertise of machines.” Specifically, he said: “We need to think about what tasks we want to keep for people.” As the adoption of legal analytic technology is inevitable, it is important that government regulation not only facilitates its development, but also regulates how we use it, and who owns and controls the technology, and associated data. The LIV urges the government to engage in broad consultation on these moral and ethical issues.

**Recommendation:**

2. That the government conducts a broad-ranging consultation on the moral and ethical issues associated with the use of these technologies to determine the appropriate balance between potential efficiency gains and protections regarding the use, ownership and control of these technologies and associated data.

**Legal start-ups**

The traditional partnership structure has been described in the recent *LexisNexis Innovation Inertia Report* as an “innovation killer with too many layers of decision making and committee consent blocking the speed and fluidity of creativity and opportunity.” The LIV acknowledges that the regulation of the Victorian legal profession supports ‘non-traditional’ structures, noting that non-lawyers are able to invest in incorporated legal practices (ILPs). ILPs play an important role in fostering innovation. As reported by Katie Miller, structures like ILPs enable lawyers to collaborate with other service providers to provide multiple skill sets to service client’s needs. ILPs have been preserved under the *Legal Profession Uniform Law Application Act 2014* (Vic).

The Commonwealth government has recently announced its innovation agenda. The LIV suggests the state government seek funding to support innovation by legal start-ups in Victoria. This work could be done in partnership with Victorian universities and law students and graduates. In addition, the LIV recommends that the Victorian government allocate funds from Business Victoria’s Future Industries Fund to support professional services delivered by emerging legal start-ups with assistance from Victorian universities.

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49 Quoted in ibid.
The LIV notes that there are Commonwealth tax, reporting and compliance implications arising from incorporation. These implications may be a hindrance to innovation in the legal start-up environment.

**Recommendations:**

3. That the government:

   3.1. works with the Commonwealth Attorney-General’s Department and the Australian Tax Office to identify tax consequences which are prohibitive to emerging legal start-ups;
   
   3.2. investigates funding and other opportunities arising from the Commonwealth government’s National Innovation and Science Agenda to promote research into and support innovative legal start-up models, potentially in collaboration with Victorian universities;
   
   3.3. allocates funds from Business Victoria’s Future Industries Fund to support professional services delivered by emerging legal start-ups with assistance from Victorian universities; and
   
   3.4. works with the LIV to develop regulatory models that enable and accelerate legal start-ups including firm accreditation systems and the freeing up of on-line fee arrangements where customers are not seen by on-line firms as in traditional models of practice envisaged by the Legal Profession Uniform Law.
Market based responses

The Access to Justice Inquiry identified a number of market based responses that have the potential to increase access to justice by improving the economic capacity of the ‘missing middle’. The LIV submits that the following initiatives should be further explored and pilots developed where appropriate:

- Legal Expense Insurance;
- Legal Expenses Contribution Scheme;
- Alternative Billing Practices; and
- Social Impact Bonds.

Legal Expense Insurance

The LIV recognises that access to justice is expensive and is presently unaffordable for many. The LIV supports the introduction of LEI in Victoria as part of the solution to make justice more affordable. Like health insurance, LEI can act as a safety net to encourage people to undertake coverage for legal needs as they arise. The LIV considers that there are no public policy impediments to LEI.

The concept of LEI has existed in the UK and in Europe more generally for several years. As detailed in the Productivity Commission’s Report, the LIV acknowledges the previous Australian experiences with LEI have not been successful for the following reasons:

- at the time LEI was introduced into the Australian market, there was limited data for proper actuarial assessment of the financial feasibility of LEI;
- further at that time, the financial services market was vastly different to what it is today. For example, superannuation was not compulsory and the use of credit cards was limited; and
- finally, LEI was considered as optional insurance and therefore coverage was not seen as a priority.

The LIV considers that current financial, industry and insurance service products offer appropriate vehicles to which LEI may be offered as a right or at an additional charge. For example, LEI products could be bundled with other insurance or superannuation products.

As a means of reducing risk associated with an LEI scheme, the LIV recommends that practices providing services under the scheme be accredited. As the existing provider of the accredited specialist scheme in Victoria together with the LIV’s delegated regulatory

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functions, the LIV is in a good position to provide accreditation of risk-controlled legal practices to perform insurer-auspiced services.

The operation of an LEI scheme would be enhanced by the recognition of unbundled legal services (discussed further below in relation to Term of Reference 5). If unbundled services were available, insurance could be targeted at covering particular services. This approach is similar to health insurance, which provides core cover and optional extras, giving consumers extra choice to suit their budget and potential needs.

The LIV is investigating the feasibility of an LEI scheme through actuarial modelling. A key component of this process is obtaining relevant data. The LIV would welcome the opportunity to discuss with the government the feasibility of LEI as a market-based product.

**Recommendations:**

4. That the government together with the LIV, investigates the feasibility of LEI and, subject to that assessment, facilitates its introduction in Victoria through appropriate self-regulation. Specifically, by:
   4.1. facilitating LIV recognition of risk controlled practices to perform insurer-auspiced services; and
   4.2. recognition of unbundled legal services, as recommended in relation to Term of Reference 5.

**Legal Expenses Contribution Scheme**

A significant proportion of middle-Australians are precluded from pursuing access to justice because their income level is insufficient to meet the financial costs of legal services at the time it is required. To address this gap in access to justice, the LIV considers that a Legal Expense Contribution Scheme (LECS) may be an appropriate investment for government. Increased savings are likely to be achieved downstream for other government services.

The LIV recognises that the Higher Education Contribution Scheme (HECS) has not impacted either on the quality of education or essentially the independence of academia. Further, the financing of HECS is widely recognised as a modest investment by government in Australia’s future. The LIV has submitted to governments on various occasions arguments for justice reinvestment. A report undertaken by PwC in 2009 (commissioned by National Legal Aid) ascertained that each dollar spent on legal
assistance returns between $1.60 and $2.25 in downstream savings to the justice system.\(^5^3\)

However, the LIV’s support for investigating the feasibility of a LECS is subject to the caveat that LECS should not be made available to low income earners as an alternative to direct legal assistance funding. Further disadvantaging low income earners with a debt owed to the government must be avoided. The LIV strongly advocates that the development of LECS should not in any way detract from the need for governments to provide funding for legal assistance.

The LIV notes that HECS is a federal scheme that operates through the Commonwealth pay as you go tax system. LECS could operate federally and be repaid in the same way. Alternatively, if Victoria wished to pilot LECS at a state level, repayments could potentially be collected and paid by the employer to the state government as a deduction from an employee’s pay or through motor vehicle registration levies. Alternatively an investment scheme held by VLA or other government-auspiced fund could be used as another source of legal aid funding.

The LIV welcomes the opportunity to further discuss investigation of such a scheme. Issues to be determined include what would constitute ‘triggers for repayment’ including levels of taxable income, extent of realised assets, access to government entitlements, how repayments are collected and security for repayment.

**Recommendations:**

5. That the government, together with the LIV, investigates the feasibility of introducing LECS (subject to the inclusion of protections for low-income earners), either as:

   5.1. a federal scheme that collects individual contributions through the federal income tax system; or

   5.2. a state based pilot that collects contributions through the best of available methods of levy collection such as voluntary payroll deductions from employees or motor vehicle registration levies. Alternatively an investment scheme held by VLA or other government-auspiced fund can be used as another source of legal aid funding.

**Alternative billing practices**

The LIV has long advocated for the introduction of contingency fees. The LIV contends that alternative billing methods are required so clients who do not qualify for legal aid can

access the services of private law practices. The LIV echoes and endorses Recommendation 18.1 of the Productivity Commission Access to Justice Inquiry Report that restrictions on contingency fees should be removed.  

A competitive and progressive legal environment is enhanced when consumers of legal services are provided with a choice of legal cost options which best suit their particular circumstances. Having access to a range of legal cost alternatives enables consumers to make more informed assessments as to whether or not engaging those legal services will benefit them. Removing the prohibition on law practices charging contingency fees would facilitate access to justice by providing another method by which legal costs can be agreed upon, thus enabling some claims to be brought which would otherwise not be brought due to lack of funding.

The LIV refers to its recently released report on Contingency Fees. The LIV notes that the existing prohibition on contingency fees is part of the Legal Profession Uniform Law, and urges uniform change across participating jurisdictions. The LIV notes, however, that it would be possible to introduce contingency fees in Victoria initially, potentially as a pilot if the Legal Profession Uniform Law Application Act 2014 was appropriately amended. The LIV supports reform of the Legal Profession Uniform Law in accordance with the following recommendations, which are contained in the LIV report on Contingency Fees.

**Recommendations:**

6. That the government allows for contingency fee billing arrangements to be entered into in Victoria as follows:

   6.1. The prohibition on contingency fees be removed (with some exceptions, set out below) to allow law practices to charge legal fees on the basis of an agreed percentage of what is recovered by the client in the matter (award of damages or settlement monies), or on the basis of some other outcome specified in the contingency fee agreement. In assessing the amount recovered by the client:

       6.1.1. damages, interest and standard party/party costs would be included; and

       6.1.2. medical costs (past or future), amounts the client is required to pay to the Health Services Commission or Centrelink, or amounts awarded but not actually recovered would be excluded.

   6.2. There be a cap of 35 percent on contingency fees for personal injury matters, i.e. law practices should not be permitted to charge contingency fees at a rate higher than 35 percent of damages or settlement monies received in personal injury matters.

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6.3. In matters that do not involve a dispute or litigation, the prohibition on contingency fees be removed to allow law practices to charge legal fees on the basis of a percentage of an agreed factor (such as the value of the property in a joint venture agreement) upon a specified outcome occurring or being achieved in the matter.

6.4. In matters where a law practice charges contingency fees, they should not be permitted to also charge hourly rates for work done on that matter.

6.5. Contingency fee agreements should not be permitted in family law, criminal law or migration law matters.

Social impact bonds

The LIV submits that the government should investigate the utility of social impact bonds (SIBs) (also called social benefit bonds and social impact investments) to promote access to justice to vulnerable individuals. SIBs leverage private investment to fund programs that lead to downstream savings for government. Investors are paid dividends contingent of the performance of the initiative.

The viability of SIBs has been demonstrated by the NSW Government’s commitment to expanding the number of social impact investment transactions and growing the social impact investment market.\(^\text{56}\) The NSW government has recently established an Office of Social Impact Investment as a joint initiative of the NSW Department of Premier and Cabinet and the NSW Treasury.\(^\text{57}\) The Office is currently undertaking a second round of requests for proposals.

The LIV recommends that the government support an SIB pilot, in collaboration with the LIV and a university, to estimate dividends that might be paid through an SIB scheme. Based on this information, and other information drawn from LIV members’ experiences, the LIV recommends that the government work with the market and Institute of Public Affairs to develop a prospectus for an SIB. As part of this process, it is important that the government collects data on pivotal points in the criminal and family law systems to identify where intervention by lawyers offsets downstream costs.

Social impact bonds and access to justice

As SIB is a contract between the public and private sector. Under the contract, the public sector agrees to pay dividends for improved social outcomes that result in public sector savings. Funds are contributed by private investors to provide capital to a public sector


service, usually a particular program, to achieve a defined outcome. Generally, SIBs are directed at early intervention programs to achieve downstream savings.

There is merit in introducing social impact investment in Victoria to areas which will reduce the burden on legal assistance services. SIBs can be developed that aim to provide early legal intervention, reduce recidivism or address family violence.

SIBs could be used to invest in legal assistance services directly. Numerous studies have found that there is a clear and quantifiable economic incentive to invest in legal assistance services. These studies include:

- Judith Stubbs and Associates, ‘Economic Cost Benefit Analysis of Community Legal Centres 2012’: found that “Community Legal Centres have a cost benefit ratio of 1:18; that is for every dollar spent by government they return a benefit to society that is 18 times the cost.”

- PwC, ‘Economic value of legal aid’ found that each dollar spent on legal aid returns between $1.60 and $2.25 in downstream savings to the justice system alone. The PwC report did not take into consideration the “other significant benefits that result from legal aid services” and downstream savings that are realised outside of the justice system.

- Allen Consulting Group, ‘Review of the National Partnership Agreement on Legal Assistance Services, Working Paper three: Market analysis 2013’: reported that that there is a $6 return on every dollar spent on community legal education offered by the Southwark Law Centre.

- The UK Citizens Advice Bureau: undertook research in 2010 into the cost benefits of providing legal advice and found:
  - For every £1 of legal aid spent on housing advice, the state potentially saves £2.34.
  - For every £1 of legal aid spent on debt advice, the state potentially saves £2.98.
  - For every £1 of legal aid spent on benefits advice, the state potentially saves £8.80.
  - For every £1 of legal aid spent on employment advice, the state could save £7.13.

More broadly, SIBs could have a role in reducing demand in the justice system and therefore reduce pressure on the finite resources available. For example, in the context of

family violence, a recent PwC report found that the cost of violence against women in Australia is approximately $21.7 billion per year.\textsuperscript{62} The majority of this cost is borne by women and children. The federal, state and territory governments bear approximately one third of the costs ($7.8 billion).\textsuperscript{63} $1.72 billion is attributed to administrative costs, which is primarily costs associated with the criminal justice system (approximately 15 percent of the total costs arising from violence against women, excluding pain and suffering).\textsuperscript{64} The costs to the justice system arising from family violence are increasing. Between the year ending September 2011 and September 2015, family incidents recorded by Victoria Police increased by 62.7 percent.\textsuperscript{65} In the past year up to September 2015, family incidents increased by 9.6 percent.\textsuperscript{66} The upward trajectory of family incidents over the past five years has been constant, and does not appear to be slowing.

**Case Study: Uniting Care SIB**

The UnitingCare Burnside’s Newpin (New Parent and Infant Network) Program is an intensive child protection and parent education program that works therapeutically with families under stress to break the cycle of destructive family behaviour and enhance parent-child relationships. The Newpin pilot centres on a performance based contract with the NSW government. The Newpin program restores children in care to their families or prevents children from entering care.

The NSW government claims an annual saving of $66,000 for each child out of foster care.\textsuperscript{67} The Newpin program saves the government money and aims to provide a minimum 5 percent return to the investors. Investment is raised through Social Ventures Australia. Social Ventures Australia reported in their 2015 Annual Report that the program has successfully restored 66 children to their families, supported an additional 35 at risk families and delivered an 8.9 percent per annum financial return to investors.

**Recommendations:**

7. That the government considers developing a Social Impact Bond policy to support access to justice initiatives, similar to that in New South Wales. In particular, that the government investigate the viability of arrangements aimed at reducing recidivism and family violence.

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\textsuperscript{63} Ibid.

\textsuperscript{64} Ibid 11-12.


\textsuperscript{66} Ibid.

That in supporting such an approach, the government work with the LIV and Monash University or other universities to:

8.1. develop a data set showing pivot points in the criminal and family law systems where intervention by lawyers will offset downstream costs;

8.2. undertake a pilot with a legal service associated with the relevant university to test the assumptions of such a scheme and better estimate dividends that might be paid by following through a cohort of assisted persons; and

8.3. work with the market and the Institute of Public Administration to develop a prospectus based on this information and other information drawn from the experience of LIV lawyers.
Regulatory framework

The LIV submits that the current regulatory framework under the new Legal Profession Uniform Law has not yet achieved the appropriate balance between promoting efficiency, competitiveness, innovation and consumer protection. The LIV is keen to work with government to revise the existing system to create a more efficient and fair regulatory framework that supports a competitive and innovative legal profession. Competition and innovation ultimately reduce the cost of legal services. Reduced costs enhance affordability of these services, particularly for the missing middle.

It is critical that the correct balance between minimising transaction costs and enhancing consumer protections is achieved. However, shifting the balance too far in favour of consumer protection can have the perverse effect of pricing a larger number of consumers out of the legal market. This, in turn, reduces their access to justice, while a smaller number of consumers enjoy additional, and arguably unnecessary, protections.

As the Legal Profession Uniform Law has been implemented over the past seven months, a number of issues of concern for the legal profession have emerged. In particular, issues associated with the costs provisions have prompted concerns regarding the cost of compliance compared to the protection conferred on consumers. The chart below shows a breakdown of Legal Profession Uniform Law inquiries received by the LIV from members on its practice support line. It shows the level of concern and uncertainty regarding the new costs provisions, with 55 percent of enquiries relating to costs.

LIV members have reported that compliance with these provisions is contributing to higher transaction costs (of up to 15 percent for smaller practices) which in most cases will be passed on to consumers of legal services. Some members have indicated that concern regarding the potential consequences of being found not to comply with the cost disclosure provisions under the Legal Profession Uniform Law has prompted a more conservative approach in selecting clients. Some members have suggested that the new cost estimate requirements require lawyers to provide estimates that may overstate the true legal costs, leading to a reduction in access to justice. Some legal practices report restricting legal services to low risk clients who are able to demonstrate their ability to pay. This shift reduces higher-risk clients’ ability to pursue legal avenues of redress.
The level of concern regarding costs indicates that the Legal Profession Uniform Law has not yet achieved a sustainable balance between transaction costs and consumer protection. The LIV is working with other agencies including the Victorian Legal Services Board and Commissioner, the Legal Services Council and Commissioner and the LCA to address these concerns. However, the LIV believes that a review of the economic impact of the Legal Profession Uniform Law and its effect on access to justice is warranted.

A further risk arising from overly burdensome regulation is the entry into the market of non-legal service providers who purport to provide legal assistance at a lower price compared to lawyers. As discussed above, the LIV is concerned that regulation that drives up transaction costs will price more consumers out of the legal services market. In seeking assistance, consumers may turn to cheaper alternatives. These alternative service-providers are not bound by appropriate regulation. Nor are they subject to the same professional duties as lawyers. This can expose clients to poor advice, which may ultimately lead to greater costs in the long run. The LIV believes that the government should investigate the growth of non-legal service providers offering legal services in the guise of advisory work.
Another area of increased transaction costs is the increasing number of obligations placed on lawyers to perform compliance and investigatory functions as part of day-to-day transactions. For example, the new Verification of Identity requirements that apply to property transactions inevitably increase the cost of those transactions, which must be either absorbed by the legal practice or passed on to the consumer. Similarly, the new requirements regarding foreign resident capital gains withholding payments, which received Royal Assent on 25 February 2016, will effectively place lawyers in the position of investigators and tax collectors, again increasing transaction costs.\(^6^8\)

**Recommendations:**

9. That the government continues to work with the legal profession to:

9.1. identify the economic impact on legal transactions arising from the Legal Profession Uniform Law, including the effect of increased transaction costs (estimated by smaller practices to be approximately 10 – 15 percent) on access to justice;

9.2. identify any perverse outcomes arising from the Uniform Law, including:

9.2.1. the anecdotal emergence of restrictive client selection practices, whereby legal practices select lower risk clients to avoid lengthy costs disputes under the Legal Profession Uniform Law;

9.2.2. the impact of the new costs estimate regime on transaction costs and any reduction in access to justice owing to the requirement that lawyers provide estimates that may overstate the true legal costs; and

9.2.3. the anecdotal rise of non-legal service providers offering legal services at a lower rate and subject to less protections;

9.3. develop a fair and efficient regulatory framework that supports a competitive and innovative legal profession; and

9.4. examine and monitor the impact of new legislation including recent verification of identity requirements and foreign investment checks that limit the capacity of legal practitioners to effectively service clients due to additional unfunded investigative tasks.

\(^{6^8}\) Tax and Superannuation Laws Amendment (2015 Measures No. 6) Act 2016 (Cth).
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.

The LIV submits that accessible legal information empowers individuals to make informed decisions at an early stage once a legal issue or problem arises. This has the potential to relieve pressure on legal assistance services and the Victorian justice system by early intervention and prevention. As stated above in relation to Social Impact Bonds, there is a clear economic impetus for investing in services that improve an individual’s capacity to resolve a legal problem at the earliest possible stage.

The Legal Australia Wide Survey (LAW Survey) “indicates a need to enhance the legal knowledge and legal capability of the Australian public.” The LAW Survey found that:

- awareness of some free legal services was consistently poor;
- many people who ignored their legal problems did not know how to obtain assistance; and
- some groups may fail to recognise that their problems have legal implications and solutions.

Training and referral pathways

The LIV supports the Productivity Commission finding that: “not everyone has the same ability to develop legal capacity and acknowledges a need for effective referral pathways for vulnerable groups.” As submitted to the Productivity Commission, the LIV considers that organisations responsible for social service delivery and legal assistance providers need to create more effective referral pathways, including pathways that are tailored to meet the needs of specific groups. The need for specific pathways is discussed further.

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70 Ibid.
71 Ibid.
below in relation to Aboriginal and Torres Strait Islander people, asylum seekers and people with disabilities.

Social service providers often encounter individuals with emerging legal issues. To avoid escalation of these legal issues, such organisations have a role in identifying and triaging those issues. To achieve more effective referral pathways, staff of organisations responsible for social service delivery should be provided with training and up-to-date information to enable them to direct an individual to an appropriate legal service. This may include directing the individual to seek assistance through a legal aid commission, and if they do not qualify, to other avenues through which assistance could be sought, such as CLCs, the LIV referral service or pro bono assistance.

The LIV has considerable expertise in providing training on legal issues to the legal profession, other professions and the broader community. The following resources and services are provided by the LIV to educate and support the legal profession to ensure legal practice is as efficient and effective as possible:

- the LIV CPD program provides a comprehensive program of CPD opportunities to enable members of the profession to enhance their professional development and to meet their CPD obligations;

- LIV events alert the profession to key legislative changes, and key practice updates and resources are made available such as checklists, guides and factsheets. For example, the LIV prepared comprehensive resources for the legal profession to support the implementation of the Legal Profession Uniform Law. Similarly, at the time the Powers of Attorney Act 2014 (Vic) commenced last year, the LIV co-hosted a launch with the Department and OPA. At the time, the LIV launched its Capacity Guidelines for practitioners to assist practitioners in assessing whether a client has capacity to give instructions;

- the LIV library also provides affordable research services for members, which minimises the costs passed on to consumers of legal services. This service is particularly useful for suburban and regional law practices with more limited research resources, and consequently enhances their clients’ access to justice;

- the LIV Practice Support line is an invaluable resource for members who have legal or practice management enquiries. For example, between 1 June 2015 and 19 September 2015, the Practice Support line fielded 639 enquiries relating to the Legal Profession Uniform law;

- the LIV website is a key resource for practitioners for information on LIV products and services. Between April and September 2015, the website received 90,000 clicks on pages relating to the Legal Profession Uniform Law. The website also includes links to information for the public and online access to the LIV’s Find Your Lawyer referral service discussed below;
• the LIV Ethics line provides members with free and confidential advice to enable them to better fulfil their duties to their clients and the court; and
• the network of LIV committees provides practical and legal support to a wide range of members.

The LIV also prepares resources to assist the community directly. For example, in November 2015 the LIV released a Procedural Fairness Guide to assist organisations in the community to ensure that decision-making complies with procedural fairness requirements. Similarly, the Find Your Lawyer referral service and LIV website resources and links aimed at the public enable the community to access legal information and services. As noted above, the information and services provided to practitioners ultimately improves the quality of legal advice provided by lawyers to the community, and therefore improves the community’s access to justice.

Given its expertise in education and training, the LIV is well-placed to prepare and provide training and up-to-date information for legal and social service providers. The LIV is keen to work with government to assist in providing training and information to these services.

**Single versus multiple entry points to legal assistance services**

In Victoria there is a vast range of information available on how to obtain legal assistance but no single entry point. The LIV notes that in New South Wales LawAccess provides a single entry point. A single entry point model has merits, such as simplicity and potentially greater visibility. However, this model risks excluding groups for whom a one-size-fits-all approach is inappropriate. Members of the community access legal information through multiple entry points. The point of entry varies due to factors such as age, location, cultural background and level of education. For example, a teenager may rely on Google as a starting point accessing information from their home that is tailored to a youth audience. By contrast, an older person in a country town may wait to visit the drop in clinic of the local lawyer who visits the town once a week. Someone from a different cultural background, who may distrust government, may rely on word of mouth to seek out legal assistance. The example of family violence below demonstrates the array of entry points to the justice system in that context.

The LIV submits that a visible entry point to Victorian legal assistance services is desirable. However, the funding of such a service should not detract from services that are already being provided. Otherwise, individuals who use different entry points may be overlooked, and may lead to the escalation of legal issues. Further, greater coordination of legal assistance services from whichever entry point a person chooses is needed to ensure that the choice of entry point does not detract from the services the person ultimately receives. As discussed above, appropriate training and information provided to staff of social service providers is an important part of ensuring that individuals follow effective referral pathways.
**LIV Find Your Lawyer Legal Referral Service**

The availability of legal information includes the provision of minor assistance and advice. The Productivity Commission notes that “minor assistance and advice services are generally ‘one-offs’ and are not intended as a first step to ongoing representation”. Many individuals will be unsure whether a matter can be dealt with through minor assistance or whether further assistance will be required. It is important that such individuals are encouraged to seek accurate initial advice to determine the scope of their legal issues, and whether ongoing assistance is required.

The LIV currently operates its own Find Your Lawyer Legal Referral Service (Legal Referral Service). The Legal Referral Service provides users with a referral letter listing up to three firms practicing in the relevant area of law. All law firms included in the Legal Referral Service provide a thirty minute enquiry interview free of charge, which can be used to determine the nature of the legal issue, discuss the available options and receive an estimate of costs to proceed with the matter if ongoing assistance is required. The Legal Referral Service operates as a free entry point and triage service for legal issues.

Between July 2014 and June 2015, the Legal Referral Service made 64,558 referrals across at least 16 different practice areas. If all referrals were taken up, this equates to 32,279 hours of pro bono assistance provided by Victorian solicitors. This is a significant contribution to the provision of legal information in Victoria, and highlights the importance of multiple entry points through both public and private service providers.

Similar services that provide initial advice and triage exist across Victoria, operated by VLA, CLCs, and Justice Connect, ranging from face-to-face, over the phone and online advice. A core part of these services is early advice provided by lawyers. Legal knowledge and experience is essential to the effective identification of legal issues and appropriate triage.

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Referrals by area of law by LIV Find Your Lawyer Legal Referral Service, 2014-2015

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<th>TOTAL</th>
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Publication of typical legal fees

It has been suggested in the past that the publication of typical legal fees for various types of legal matters will improve transparency and inform clients’ decision-making when seeking legal assistance. The LIV does not support this approach. The cost of a legal matter will depend on the circumstances in each case. Consequently, publishing ‘typical’ legal fees may be misleading and not assist a consumer to make informed decisions. The
LIV notes that there already exists advertised market rates for some legal services (for example, wills and conveyancing) that can be treated as more standard transactions. Under the Legal Profession Uniform Law, lawyers are obliged to provide an estimate of costs tailored to the client’s matter. While the LIV has concerns about some aspects of the approach to estimates of costs under the Legal Profession Uniform Law, the LIV believes that costs information tailored to individual clients is sufficient to enable clients to make an informed choice about whether to engage legal services and, if so, the parameters and terms of that engagement. Further, LIV members report that clients often seek costs information from multiple providers, which further enhances their ability to make an informed choice.

If, despite these concerns, publication of typical legal fees is considered appropriate, the LIV believes the information should be collected, analysed and published by the ABS. Any such calculation should take into account market fluctuations, complexity of service and levels of expertise.

**Family violence: example of the need for multiple entry points and coordinated referrals**

Families experiencing violence and relationship breakdown commonly find themselves dealing with at least two different courts (federal for family law matters and state for both civil and criminal matters), with different procedures, locations, legislation, areas of concern and, at times, different lawyers in each court.

While some of these matters are federal, the issues cross over jurisdictions and so ultimately affect parties’ access to justice in Victoria. A coordinated, cross-jurisdictional response is required to address the multiple legal and non-legal needs that arise in this context.

Those with complex needs may find themselves dealing with the:

- Magistrates’ Court for intervention orders and some property matters;
- County or Supreme Court for matters involving criminal violence;
- Federal Court or Federal Circuit Court for family law matters;
- VOCAT for compensation claims arising from the violence;
- Children’s Court on child protection issues; and
- VCAT for employment claims (where a party may have lost their employment as a result of being affected by family violence, e.g. taking time off to attend court, appointments or fleeing their home) or small claims and debt recovery (where the violent party has left their spouse with debts they cannot repay and the victim is seeking relief from third party debtor).
A wide range of professions and services play a part in assisting parties affected by family violence, notably:

- Victoria Police;
- Department of Human Services;
- Child Protection Services;
- Corrections Victoria;
- Men's behaviour change programs (including the Men's Referral Service);
- Indigenous and culturally and linguistically diverse support services;
- Family violence support and crisis accommodation services;
- Women and children's support programs;
- Family violence networkers, homeless and children's networkers;
- Other generalist or community services which offer family violence crisis and victims services; and
- Other agencies identified at the local level, such as hospital emergency departments and community health services.

The range of services involved demonstrates the wide range of entry points through which families experiencing violence may access the justice system. It is critical that the referral pathways that follow are coordinated to ensure the multiple needs of this group are addressed. It also demonstrates the need for training across these organisations to ensure legal issues are identified at an early stage and referred to an appropriate service.

**Family violence: specialisation and cross-skilling for lawyers**

The nature of the modern legal profession is that many lawyers work in areas of specialisation. The LIV supports specialisation and the development of high standards, through the accreditation of lawyers in areas of specialisation. Lawyers working in specialist areas (e.g. criminal law, family law, children’s law) may, within their area of specialisation, assist people who are affected by family violence or people who have been violent. However, the client is likely to have broader legal needs (as well as other support needs). In order to provide effective support to people affected by family violence, lawyers must have the skills and experience to:

- identify each separate legal need for that client (whether it be in the area of family law, personal safety protection orders, or criminal law);
- advise extremely stressed and often emotionally conflicted clients about each of the legal options; and
- refer the client to specialists in other fields of law and to non-legal support networks.
The LIV is currently examining ways to further enhance cross-skilling for lawyers and specialist professional development measures such as:

- a greater focus on cross-skilling lawyers so they can work across the child protection, family violence and family law systems. For example, rather than perceiving or promoting themselves as ‘criminal law’ specialists or ‘family law’ specialists, lawyers may specialise as ‘family violence’ specialists;
- enhanced family violence training, professional development and information for lawyers generally; and
- coordinated training offered to the community sector, police, judicial officers and court staff in all areas of family violence, including specific issues that arise for different groups of people, such as the elderly.

**Recommendations:**

10. That the government together with the LIV, improves training and information given to social service and legal service providers to ensure legal issues are identified early and triaged to an effective referral pathway. Professional development targeted to social service providers that concerns legal issues should draw on the expertise of the legal profession.

11. That the government maintains multiple entry points for legal information and access to legal services, while improving coordination of referral pathways once a person accesses an entry point.

12. That the government supports LIV initiatives to train lawyers and to participate in initiatives to educate police, judicial officers and court officers about family violence issues and to coordinate responses across the justice system.

13. That the government does not publish typical legal fees for various types of legal matters. Lawyers are subject to consumer protection legislation that ensures that clients are well informed of the costs arising from legal matters. If the government does undertake a review of legal fees with the intention to publish these fees, this review should be done through Australian Bureau of Statistics (ABS) data collection.
The role of lawyers in early intervention

Individuals should be provided with accurate legal advice by lawyers at the earliest stages of a potential dispute arising so that they are properly informed about whether civil litigation is appropriate for their situation. The LIV believes that the government should focus its efforts on ensuring that individuals have the capacity to seek legal advice from a lawyer as part of an early intervention and prevention strategy. Lawyers are well positioned to identify alternatives to litigation and advise their clients of these alternatives in appropriate circumstances. Lawyers already play a significant role in diverting disputants from litigation.

The PwC Service Delivery Report stated that:

Some stakeholders, including judicial officers, private practitioners and Community Legal Centres, suggested that more resources may need to be invested into upfront settlement, mediation and resolution of cases, and to connect litigants with social support and community services. Pilots such as the Dandenong Project, which was trialled in the Federal Magistrates Court from 2010-12, have shown that early intervention models can be effective in increasing opportunities for litigants to resolve disputes using settlement strategies rather than judicial determination.

Some parts of the justice system are already investigating and introducing models that increase early settlement of legal matters. The recent VLA Family Law Legal Aid Services Review made some commitments to implement early resolution models. Further work in this area may be warranted.73

The LIV submits that receiving legal advice from a lawyer is a critical part of early intervention models. Lawyers are able to identify and differentiate between legal and non-legal issues. Further, they are able to advise on options for redress of legal issues, including diversion from litigation. Informed legal oversight and involvement in triage at an early stage of a legal matter results in fewer downstream costs. In relation to complex cases, sophisticated legal services are required regardless of the subject matter of the dispute, particularly in developing resolution options and in assessing and cutting through to relevant information.

ODR

As discussed above, ODR has the potential to triage disputes at an early stage. The UK Civil Justice Council’s ODR Advisory Group, chaired by Professor Richard Susskind, advocates for a greater emphasis on dispute avoidance and containment as facilitated by ODR and online court architecture. The Advisory Group posits that “better containment and avoidance of disputes will greatly reduce the number of disputes that need to be resolved by judges.”

Better containment of disputes requires early intervention. As discussed above, the LIV supports the use of technology, such as ODR, to improve access to justice. As these technologies develop, lawyers have a key role to play at an early stage in guiding clients’ engagement with the options available, and can assist in avoiding disputes when appropriate. Lawyers should continue to have a role as key advisers and advocates throughout the dispute resolution process. For a more comprehensive discussion of ODR and related recommendations, see the section above on ‘Online Dispute Resolution’.

Victorian Legal Assistance Forum

The LIV submits that there is a high level of connectivity, communication and cohesion between legal assistance service providers. Victoria has a very strong legal assistance sector. The LIV notes the importance of the Victorian Legal Assistance Forum (VLAF) in facilitating connection and information sharing between legal assistance service providers. VLAF is comprised of representatives from the following government and non-government organisations:

- Aboriginal Family Violence Prevention Legal Service;
- Federation of Community Legal Centres;
- Justice Connect;
- Law Institute of Victoria;
- Victoria Law Foundation;
- Victoria Legal Aid;
- Victorian Aboriginal Legal Service; and
- Victorian Bar.

A recent example of collaboration between VLAF members is the Victorian legal assistance sector’s response to the legacy caseload of asylum seekers. As detailed in the section below on the Legacy Caseload, in mid-2015, the LIV convened a working group of

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more than 80 representatives from the legal assistance sector to coordinate the sector’s response to the critical legal needs of the legacy caseload in Victoria. Members of VLAF, including the LIV, VLA, Justice Connect, the Victorian Bar and the Federation of Community Legal Centres (FCLC), have actively coordinated the Victorian response. The response has included additional funding for a number of positions, judicial review training, preparation of information sheets, investigation of fixed fee arrangements, pro bono assistance and coordination of information across the sector. While the legal issues of the legacy caseload are federal issues, the response has required funding and significant pro bono assistance from the Victorian legal assistance sector. The resources of this sector are limited. Consequently, addressing the legal needs of the legacy caseload has an impact on the resources available to resolve Victorian legal matters.

Referral between legal service providers

As discussed in relation to Term of Reference 1, the LIV believes that multiple entry points for legal information and access to legal services should be maintained, while coordination of referral pathways once a person accesses an entry point should be improved. Existing collaboration between members of the legal assistance sector is strong. Programs that foster that collaboration, such as Justice Connect’s Unfair Dismissal Project, should be supported.

Legal assistance service providers often build upon existing relationships with other providers in the sector, entering into targeted arrangements aimed at facilitating effective referrals on an as needs basis. An example of this is the relationship between Justice Connect and a number of CLCs. Between July and September 2015, Justice Connect piloted an “Unfair Dismissal Project” in conjunction with JobWatch under a secondment arrangement. The project has since been evaluated, will continue and be expanded.75 The project aimed to “develop effective referral pathways from JobWatch to Justice Connect to assist unrepresented employees who have filed Unfair Dismissal Claims in the Fair Work Commission by connecting them with pro bono lawyers for representation at Conciliation.”76 The project assisted 15 priority clients, all of whom reported financial hardship, with 72% of matters being resolved at conciliation. The LIV commends the efforts of Justice Connect to continually establish and improve referral pathways to pro bono assistance within the legal assistance sector.

As noted above in response to Term of Reference 1, the LIV Find Your Lawyer Legal Referral Service is a common entry point for individuals seeking legal advice. In addition to the 64,558 referrals made to lawyers in the 2014/2015 financial year, the Legal Referral

Service provided a further 1591 referrals to other organisations. As noted in the LAW Survey, Legal Need in Victoria, “ignoring legal problems often resulted in unmet legal need. Respondents often reported multiple reasons for ignoring legal problems. In many cases, failure to take action was due to poor legal knowledge.” The LIV submits that referrals that result in the provision of legal advice together with referrals to other support services at an early stage of a legal problem arising are an extremely effective method of diversion and triage.

Pre-action protocols

The LIV submits that pre-action protocols are not an appropriate mechanism for resolving all disputes and mandatory pre-action protocols may not be appropriate in all circumstances. The LIV is of the view that it would not be appropriate to adopt a ‘one-size-fits-all’ approach to pre-action requirements. The LIV believes that doing so would, in many cases, increase the cost of dispute resolution and add an unnecessary layer of complexity.

The LIV submits that there are a number of important categories of civil disputes which should not be subject to mandatory pre-action protocols. The categories the LIV submits should not be subject to compulsory pre-action protocols include the following where:

- a limitation period is about to expire and the cause of action would be barred by statute if the civil proceeding is not commenced immediately;
- the civil proceeding involves an important test case or a public interest issue;
- a person involved in a civil dispute or civil proceeding has a terminal illness;
- the civil dispute involves allegations of fraud;
- expert opinion is required;
- multi-party civil disputes and civil proceedings are contemplated;
- mediation or other ADR processes would result in personal or financial hardship;
- the subject matter of the dispute or proposed civil proceeding has been dealt with at arbitration pursuant to a contractual (or statutory) obligation and such arbitration was not successful, provided that the arbitrator has provided the parties with a certificate that the dispute and/or proposed civil proceeding was not able to be resolved at such arbitration despite the best efforts of the parties to resolve the dispute;

the subject matter of the dispute or proposed civil proceeding has been dealt with at mediation pursuant to a contractual (or statutory) obligation and such mediation was not successful, provided that the mediator has provided the parties with a certificate that the dispute and/or proposed civil proceeding was not able to be resolved at such mediation despite the best efforts of the parties to resolve the dispute;

- civil disputes and civil proceedings involving allegations of medical negligence;
- mortgagee actions for possession of land;
- civil proceedings not involving a dispute;
- claims where there already exists a legislative or industry obligation to serve a notice or notices before taking action; and
- civil proceedings in which additional parties are brought in subsequent to the commencement of the proceeding.

**Recommendations:**

20. That when considering options for diversion from civil litigation, the government ensures that individuals have access to accurate legal advice provided by lawyers at the earliest stages so that they are properly advised on whether civil litigation is appropriate for their circumstances. In considering such approaches, the government should:

   20.1. build in accepted research that early informed legal oversight or direct legal involvement in triage decisions will result in fewer downstream costs;

   20.2. recognise that sophisticated legal services are required to deal with complexity regardless of the subject matter of the dispute particularly in developing resolution options and in assessing and cutting through to relevant information; and

   20.3. ensure that these functions apply in private mediation, other forms of ADR, arbitration or conciliation models.

21. That the government does not introduce pre-action protocols for resolving all disputes and that any requirement to engage in pre-action protocols excludes the scenarios listed in the LIV’s submission.
Term of Reference 3

Whether and how alternative dispute resolution mechanisms should be expanded so that more Victorians can make use of them.

ADR: General

Issues relevant to ADR mechanisms are discussed throughout this submission. Specifically, ADR and associated recommendations are discussed in the sections on:

- ODR concerning the use of technology to promote dispute resolution;
- Term of Reference 2 concerning pre-action protocols;
- Term of Reference 4 concerning ADR at VCAT;
- Aboriginal and Torres Strait Islander People concerning the need for culturally appropriate and accessible ADR; and
- People with disabilities concerning access to ADR processes.

Please refer to these sections for further details. More generally, the LIV notes the important role of lawyers in the early stages of dispute resolution to identify and triage legal issues, as discussed throughout this submission. This role equally applies in the ADR context.

The LIV supports accreditation and training for mediators. In its capacity as a Recognised Mediator Accreditation Body the LIV is responsible for accrediting mediators under the National Mediator Accreditation System. Mediators accredited by the LIV are lawyers with current practising certificates who have at least five years post-admission experience in legal practice. The LIV’s Accredited Specialist Program includes a specialty in mediation.

Matters involving family violence

As discussed above in relation to Term of Reference 1, parties who have experienced, or at risk of experiencing, family violence usually find themselves with various legal and non-legal needs which span across federal and state jurisdictions and across many professions. While the family law dispute resolution system is federally mandated, it is important to include it in the discussion about access to justice options in Victoria as it affects Victorians. Their unresolved family law disputes directly impact on the state resources those parties will access to meet their legal and non-legal needs.

In the family law context (federal jurisdiction) parties are currently exempted under the Family Law Act 1975 (Cth) from participating in compulsory family dispute resolution (FDR) if they have experienced, or at risk of experiencing, family violence. These
requirements stem from wide shared concerns about using facilitative methods of FDR in cases involving family violence. Specifically, “the reasons why FDR may be inappropriate in the context of family violence include:

- safety concerns: the FDR process may place women and children in danger because the offender may use FDR as an opportunity for violence or intimidation;
- power imbalances: the sometimes extreme imbalance of power in relationships characterised by family violence undermines the fairness of the negotiating process in facilitative methods of FDR;
- mediation requires honesty, a desire to settle the dispute and some capacity for compromise: perpetrators of violence are often not capable of or willing to demonstrate such behaviours toward the target of their violence;
- mediation places too great a burden on the party who has been the victim of violence and who may, for example, be afraid to be in the same room with the perpetrator; and
- FDR is a private and confidential process, with the effect that violence against women is shielded from the public eye.”

On the other hand, there are potential benefits of using facilitative methods of dispute resolution in cases involving family violence including:

- it is usually a more accessible method of resolving family disputes, as it is arguably both cheaper and faster than going to court;
- provided it is conducted by an experienced practitioner with appropriate safeguards, it may have positive outcomes for people who have experienced family violence. For example, some studies of FDR have identified high rates of participant satisfaction where there are well–trained, problem–solving FDR service providers with effective intake processes; and
- it may offer the parties more involvement in resolving their dispute, and may give victims more opportunity to speak about matters which are important to them.

Such a program has the potential to level out the playing field in terms of power imbalance. Appropriate protections must be in place, including independent legal advice and potentially an independent observer overseeing the process. The independent observer should be sufficiently trained in family violence to be able to identify when a party is using the program itself as a means of maintaining control and effecting family violence on the other party. Using the ODR programs discussed above could facilitate this process by ensuring that the party who has experienced family violence does not need to have

79 Ibid [21.3]-[21.34].
direct face-to-face contact with the other party, and consequently is likely to feel more secure through the process.
**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.

Whilst the LIV understands that this Review will only be addressing issues in relation to small civil claims in VCAT, it is of the view that small civil claims issues cannot be meaningfully addressed unless reforms to the jurisdiction, practices and procedures of VCAT are looked at holistically. VCAT’s lists are interconnected and are bound by a common piece of legislation in the VCAT Act, as well as various VCAT Practice Notes. In light of this, the LIV submits that a broader review of VCAT is necessary in order to appropriately capture and address all the issues raised below.

**Recommendation:**

27. That the government conduct a broad review of jurisdiction, practices and procedures at VCAT as well as broader legislative reform of the Victorian Civil and Administrative Tribunal Act 1998 (the VCAT Act).

Notwithstanding the above, the LIV provides the following comments which address the questions from the VCAT small civil claims Background Paper\(^80\) and Term of Reference 4 of the Review.

**VCAT Appeals Division**

In its 2009 submission to the President’s Review of VCAT,\(^81\) the LIV put forward its recommendations for the establishment of an appeal division of VCAT. The LIV considers that the comments made in that submission are still relevant when discussing small civil claims and reiterates that:

- appealing to the Supreme Court is intimidating and potentially cost prohibitive for many parties;
- appealing to the Supreme Court nullifies any advantages of taking a matter to VCAT in the first place, as the process is complicated, costly, time consuming, legalistic, and often beyond the reach of unrepresented individuals;

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\(^81\) Law Institute of Victoria, Submission to the President of the Victorian Civil and Administrative Tribunal, President’s Review of the Victorian Civil and Administrative Tribunal, 22 June 2009, 16–18.
appeals to the Supreme Court should be retained, but only exercisable following an appeal within VCAT, or where an appeal is on a question of law; and

• internal appeals should be restricted for appeals on questions of law, and be conducted in accordance with clear and unambiguous guidelines. This will still permit appeals in deserving cases, particularly where consistency of tribunal decision-making is required or there is reluctance to take the matter to the Supreme Court.

The LIV refers to the Internal Appeal Panel of the NSW Civil & Administrative Tribunal, as well as the Internal Appeal Tribunal of the Queensland Civil & Administrative Tribunal (which specifically deals with “minor civil disputes”), as appropriate internal appeal models which have been successfully operating for some time in other jurisdictions.

The LIV otherwise continues to support the implementation of guideline judgements and other initiatives to improve consistency, predictability and quality of decision-making in VCAT.

**Recommendation:**

28. That VCAT establish an internal appeals division with jurisdiction to hear appeals on questions of law, or otherwise on leave.

**VCAT expanded jurisdiction: real property**

In February 2014, the LIV approached the President of VCAT seeking feedback on a proposal to expand VCAT’s jurisdiction in relation to property law related disputes, beyond its current jurisdiction in the Building and Property List, Planning & Environment List and the Residential Tenancies List. Examples of appropriate areas for expanded jurisdiction included: disputes arising under the *Fences Act 1968*, adverse possession, modification or removal of restrictive covenants and caveats, and disputes between vendors and purchasers arising from contracts of sale of real estate.

The LIV notes that VCAT already has jurisdiction in a number of property related areas (often with substantial amounts at stake) including partition applications, valuation/rating disputes and planning appeals, yet it does not have jurisdiction for other property law matters, including those listed above, where often the issues are no more complicated and the amounts at stake can be small.

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The LIV has in the past advocated for the establishment of a property court – similar to the NSW Land and Environment Court. Although, it is conceivable that an expanded real property list of the Civil Division of VCAT could accommodate most of these disputes – provided it was appropriately staffed with property lawyers. It is understood that expanding VCAT’s jurisdiction is more in line with Government policy than creating a multiplicity of specialist bodies for different types of issues, which can be confusing. If legislation is enacted which permits such matters to be heard by VCAT at first instance, a speedier, less costly avenue to justice would be opened. Provided the legislation also provides a right of appeal to the Courts (hearing the matter *de novo*) the risks of incorrect decisions arising out of less formal proceedings would be slight.

**Recommendation:**

29. That VCAT consider expanding its Civil Division’s Real Property List.

**Legal representation**

Clause 19(e) of the VCAT Practice Note PNVCAT1 on Common Procedures provides that parties in the Civil Claims List will not ordinarily be permitted to be represented by a professional advocate. The LIV observes that some parties are more likely to be able to present a case than others. It is suggested that this provision may operate to unfairly restrict access to justice for people in need of assistance to present their case. The LIV submits that the threshold amount for parties seeking permission to be represented be reduced from $10,000.00 to $5,000.00. That is, the threshold for what should be considered as a ‘small civil claim’ should be reduced from $10,000 to $5,000.

The LIV notes that it may be beneficial for the Practice Note to be amended to incorporate examples of where and when representation might be allowed for amounts under the threshold (for example where parties have disabilities that affect their ability to represent themselves).

**Recommendations:**

30. That the threshold for a “small civil claim” in VCAT be reduced from $10,000 to $5,000.

31. That VCAT amend PNVCAT1 to incorporate examples of where and when lawyers are allowed to represent parties for amounts under the threshold.

**Why lawyers are necessary**

The LIV makes the following observations to support its view that legal practitioners are the most appropriate parties to represent clients in VCAT:
• Legal practitioners have professional duties and obligations to the Tribunal and their clients.

• Removing legal practitioners from the hearing and ADR processes in certain VCAT lists will not address the power and resource imbalance between a professional litigant and an individual.

• Preventing legal practitioners from appearing in matters in the Civil Claims List where the amount in dispute is less than $10,000.00 does not accurately reflect the serious effect this amount can have on people’s lives and livelihood, particularly those who are most disadvantaged.

• Legal practitioners are necessary in the relevant Lists to assist parties in interpreting technical legislation such as the *Fair Trading Act 1999* (Vic) and *Domestic Building Contracts Act 1995* (Vic), and other complicated issues such as the proportionate liability regime, and domestic warranty policies, plans and specifications.

• Improving access to legal representation at VCAT will better resolve the imbalance of power between self-represented parties and legally represented parties. This includes establishing a Self-Represented Litigants Co-ordinator, increasing access to information about available legal services, increasing the resources and capacity of duty lawyers and lobbying for legal aid funding for civil matters.

In light of the above, the LIV notes the importance of the Legal Aid duty lawyer service offered to self-represented parties. However, the LIV has also previously expressed concern that duty lawyers at VCAT are inadequately resourced to cope with the demand and in this regard strongly support further resourcing of the duty lawyer services at VCAT.\(^\text{84}\) Members have reported that the duty lawyer service (with administrative assistance) is provided on a regular basis at the Melbourne Registry only, and on an ad hoc basis at other locations across Melbourne.

In addition, LIV members have previously reported that lawyers opposing a self-represented litigant in VCAT are often put in a position where they are acting as a de facto legal representative, explaining the process and procedures to the self-represented litigant\(^\text{85}\). In light of this situation, and to avoid conflicts of interest, the LIV believes that there is need for further research into the introduction of a non-lawyer assistance service at VCAT to co-ordinate self-represented parties and provide relevant information. It is considered that this kind of service would support VCAT’s informal nature and increase access to justice for parties who would not otherwise be represented. The LIV has suggested that VCAT adopt a ‘Self Represented Litigant Co-ordinator’s similar to the Victorian Supreme Court, to assist all unrepresented parties to manage their cases, explain the processes and refer them to sources of free or low-cost legal advice and/or

\(^\text{84}\) Law Institute of Victoria, Submission to the President of the Victorian Civil and Administrative Tribunal, *President’s Review of the Victorian Civil and Administrative Tribunal*, 22 June 2009, 26.

\(^\text{85}\) Ibid.
representation. The LIV submits that such a scheme would be of particular assistance to VCAT applicants who experience disability.

**Recommendations:**

32. That the government provide further resources to fund VCAT Duty Lawyer services and to expand the availability of this service.

33. That VCAT consider implementation of “self-represented litigant coordinator”, or other non-lawyer assistance services for self-represented litigants.

**Written reasons**

In its submission to then Attorney-General, the Hon. Robert Clark, dated 21 May 2012 the LIV expressed its concern that VCAT Members were relying on clauses 11, 28HH and 76 of Schedule 1 to the VCAT Act in order to refuse providing written reasons in small claims where the request is made after the giving or notification of the Tribunal’s decision, contrary to section 117(2) of the VCAT Act.

The LIV’s view remains that a failure to inform parties of the effect of clauses 11, 28HH and 76 prior to making a decision and a subsequent reliance on those clauses by a Tribunal Member to deny parties – especially self-represented parties – with written reasons, is contrary to the right to a fair hearing under section 24 of the Charter of Human Rights and Responsibilities, is inconsistent with VCAT Practice Note (PNVCAT3) – Fair Hearing Obligation and is inconsistent with general rights to fairness.

Furthermore, written reasons are necessary for any potential VCAT Appeals Division, as recommended by the LIV above, to carry out its objectives.

The LIV notes that since its submission, clause 28HH has been repealed. However, its concerns with regards to clauses 11 and 76 remain.

The VCAT Act should be amended to require all Tribunal Members to provide written reasons for their decisions in all matters. This is even more important if VCAT is given a review or appeal function. A litigant should not have to make a formal request for this to occur, even under section 117(2) of the VCAT Act. In simple matters, for example debt collection and routine matters in the Residential Tenancies List, it may be possible for a standard form of reasons to be provided, which a Tribunal Member can easily complete.

Alternatively, Clauses 11 and 76 of Schedule 1 to the VCAT Act should be repealed so that section 117(2) of the VCAT Act applies with respect to all VCAT matters, including

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86 Law Institute of Victoria, Submission to the Victorian Attorney-General, *Requests for Written Reasons in VCAT*, 21 May 2012.
credit matters, small claims and residential tenancies. Further, section 117(2) should be amended to require Tribunal members to inform self-represented parties of the need to request written reasons within 14 days of a decision.

As a third option, the LIV requests that the VCAT Act be amended to require Tribunal members to advise parties, at the beginning of a proceeding, of the requirement to request written reasons in clauses 11 and 76.

Recommendations:

34. That, to ensure written reasons are provided in small claims, the VCAT Act be amended (in the alternative) to:
   34.1. require all Tribunal Members to provide written reasons for decisions in all matters; or
   34.2. repeal Clauses 11 and 76 of Schedule 1 to the VCAT Act; or
   34.3. require Tribunal members to advise parties of the requirement to request written reasons under Clauses 11 and 76.

Adjournment applications

The LIV is concerned about the tougher approach that VCAT has adopted towards granting adjournments for hearings. It notes that VCAT does not encourage applications for adjournment and advises parties that they should not expect an adjournment to be granted even if all parties consent. This is reflected in much of the feedback the LIV has been receiving from its members.

The LIV considers that the discretionary power VCAT has in refusing adjournments, even where there is consent, when it considers that an adjournment is:

- not in the public interest;
- prejudicial to the interests of one or more parties or the expeditious determination of the proceeding;
- contrary to efficient case management; or
- “otherwise not justified”,

is inconsistent with objectives for streamlined processes, certainty and access to justice. The LIV submits that VCAT should provide clearer guidelines around the exercise of its discretionary power to grant adjournments.
VCAT fees

The LIV acknowledges that VCAT is in a difficult position, with an expanding jurisdiction that is not met by an equally expanding budget. The LIV is supportive of efforts to increase VCAT’s budget and has made, and will continue to make, representations to government for this to occur. VCAT is responsible for discharging its duties and functions within its budget, but this should not come at the price of access to justice or the purpose of VCAT as a low-cost alternative to courts.

The LIV is concerned that the extension of the ‘user-pays’ model for fixing VCAT fees will inhibit VCAT’s ability to provide a genuine alternative to higher-cost court processes. The shift to a user-pays model will potentially erode access to justice in Victoria. The breakdown of the Planning & Environment List into the Major Cases List and the Short Cases List is a good example of how a user-pays system may pose problems from an access to justice standpoint (please refer to comments below under ‘Planning & Environment List’).

The LIV has been highly critical of increased fees at VCAT and restates its grave concerns over recent fee increases which are far in excess of inflation. In a Regulatory Impact Statement issued by the Department of Justice in 2013, it was apparent that VCAT fees and charges would increase in most lists by an average of 56 percent and in some cases up to more than 5000 percent, and then indexed each year. This would have a significant negative impact on access to justice for Victorians, especially in planning and environment reviews.

Fee waivers

The LIV has consistently expressed concern about fee waiver and has previously submitted that to reduce administrative work for legal practitioners and an additional burden on unrepresented litigants, VCAT and other courts and tribunals should streamline their fee waiver procedures and adopt a similar single application form for consideration of fee exemption and waiver to that of the Family, Federal and Federal Magistrates’ Courts.
The LIV note that some responses to the criticism of increasing fees rely on the availability of fee waivers to ameliorate the effects of increased fees. However, the LIV acknowledges that VCAT took steps to address serious access to justice issues regarding its previous fee waiver policy where receipt of a Centrelink benefit did not necessarily entitle an applicant to a fee waiver.

Notwithstanding the above, the LIV reiterates its concerns in relation to financial detriment suffered by users who want to access VCAT:

The LIV notes that there is no fee for applications to the Administrative Appeals Tribunal (AAT) in matters such as Commonwealth workers' compensation, social security, family assistance payments or veterans' pension decisions. This model enables an AAT applicant to access the tribunal without incurring any financial detriment. Similarly, the LIV submits that applicants should not be subject to any financial detriment in order to gain access to the VCAT. 

**Recommendation:**

37. That VCAT consider waiving fees altogether for applications to certain Lists.

**Costs**

The LIV reiterates comments made in its previous submissions in relation to the appropriate exercise of the power to award costs at VCAT, which remain relevant and outstanding:

- different lists should be considered individually in relation to costs, and there is no costs rule that is appropriate to apply across all of the lists;
- costs should follow the event for commercial matters in VCAT, subject to the merits of the case, so that the strength of a party's legal position is the primary influence for early settlement;
- section 109(3)(c) and (d) of the VCAT Act, should be amended to clarify whether parties bringing a complex case will have the same standing as parties bringing a strong and meritorious case, with respect to a costs award;
- the current bar to costs in the Taxation List, under clause 91 of Schedule 1 of the VCAT Act, should be removed and the VCAT Act should be amended to allow for discretionary costs awards under section 109; and

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87 Law Institute of Victoria, Submission to the President of the Victorian Civil and Administrative Tribunal, *Fee Waiver at VCAT*, 1 October 2013
88 Law Institute of Victoria, Submission to the President of the Victorian Civil and Administrative Tribunal, *President’s Review of the Victorian Civil and Administrative Tribunal*, 22 June 2009, 6.
• if VCAT establishes a position on costs awards to be adopted for certain matters, then it would be useful for this position to be specified in a Practice Note.

**Recommendations:**

38. That VCAT consider implementing measures to ensure that costs follow the event for commercial matters.

39. That the government amend section 109(3)(c) of the VCAT Act to clarify whether parties bringing a complex case will have the same standing as parties bringing a strong and meritorious case, with respect to a costs award.

40. That clause 91 of Schedule 1 of the VCAT Act be amended to remove the bar to costs in the Taxation List and that section 109 be amended to allow for discretionary costs awards.

41. That VCAT establish a position on costs awards and publish it in a Practice Note.

**Procedural delays**

Over the past few years, the LIV has consistently expressed its concerns regarding procedural delays experienced in VCAT and the impact of such delays, particularly in Freedom of Information applications and submissions in respect of Planning and Environment List matters. Feedback received from LIV members suggests that procedural issues remain and are causing consternation amongst VCAT users.

In light of the above, the LIV recommends that consideration be given to increasing active case management in all VCAT matters.

**Recommendation:**

42. That VCAT to consider and implement active case management in all matters.

**Obligations of Tribunal Members and staff**

The LIV calls for VCAT to go further than its requirements to act fairly (s 97 VCAT Act) and comply with the rules of natural justice (s 98(1)(a) VCAT Act). The LIV reiterates its call to seek amendments to the VCAT Act which expressly set out VCAT’s responsibilities to parties. The LIV believes that enshrining the responsibilities and obligations of Members and other VCAT staff into the VCAT Act will have a significant impact on providing all members of the community, including self-represented parties and those with a disability or diminished capacity, with a fair hearing.
Furthermore:

- The LIV supports the additional training of VCAT Members and registry staff and the development of a more effective Professional Development program within VCAT. In particular, Members at VCAT should receive further education and training in adopting a more inquisitorial style approach to proceedings, in order to assist self-represented litigants to make out their case.

- The LIV restates its understanding that the obligation for members to provide assistance to self-represented litigants on identifying legal issues does not extend to providing legal advice on those issues.

- The LIV considers that VCAT, including registry staff, has obligations to ensure that fair hearings are given and note that this is likely to be relevant across all Lists. To facilitate this, VCAT should provide additional training of registry staff in substantive and procedural issues, and work to increase the communication between the Members and the registry staff to ensure VCAT is an efficient, fair and cost-effective forum.

**Recommendations:**

43. That the VCAT Act be amended to set out VCAT’s Tribunal Members’ and other VCAT staff’s responsibilities and obligations to users.

44. That VCAT develop formal Professional Development programs for Tribunal Members and staff, with a particular focus on an inquisitorial approach and assistance for self-represented litigants.

45. That VCAT clarify in the relevant Practice Note that the obligation for Tribunal Members to provide assistance to self-represented litigants does not extend to providing legal advice.

**Capacity of relevant parties**

VCAT must ensure effective notice of hearings is given to the elderly and those with a disability or reduced capacity. This requires VCAT to play a more active role in providing notice to parties, and ensuring that the relevant person and their close relatives or contact persons are informed of the content of the notice.

**Recommendation:**

46. That VCAT play a more active role in providing notice to parties, particularly to the elderly, those with a disability or reduced capacity.
Technology at VCAT

In its submission to the Productivity Commission’s Inquiry into Access to Justice Arrangements the LIV noted that the introduction and adoption of technology in Victorian tribunals has been disappointing and slow. Victorian courts and tribunals do not operate on consistent IT platforms, which duplicate expenditure and potentially limit innovation. Despite this, the experience of LIV members is that where such technology has been adopted, the efficiency gains have been significant which has in turn enhanced the user-friendliness of the tribunal.

By way of example, the LIV observed that VCAT’s Small Civil Claims and Residential Tenancy lists have benefited from the introduction of technology. However by contrast, in VCAT’s General List, regional participants and their legal representatives do not always have the ability to appear by video link or by simple technology such as Skype. Further, the experience of LIV members is that up until 2013, regional practitioners and participants could not obtain tribunal rulings or decisions by email and were required to physically collect them.

The LIV considers that useful benchmarks for improved information and communication technologies in tribunals are the current systems that operate in:

- the Federal Court;
- the Court of Appeal in Western Australia; and
- the Commercial Court of the Supreme Court of Victoria.

Recommendations:

47. That VCAT incorporate protocols for emailed written decisions in VCAT Practice Notes.

48. That VCAT review its policies around the use of technology and adopt new technologies using leading Australian tribunals as benchmarks.

Online processes

The LIV also calls for amendments to be made to the VCAT Act to allow the use of the internet in the creation, filing and service of documents and the delivery of decisions across all Lists and matters. The LIV is, however, mindful that many users may not have the skills or technology available to access online services. It therefore suggests that the introduction of broader online services should take user technology-literacy into account.

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The VCAT Act must be carefully examined to ensure that VCAT can conduct its online processes and disseminate electronic communications in accordance with the Electronic Transactions (Victoria) Act 2000, particularly in relation to the filing and service of documents.

**Recommendations:**

49. That VCAT implement a consistent IT platform across all Lists.

50. That the VCAT Act be amended and existing VCAT practices reviewed to allow use of the internet for the creation, filing and service of documents.

**Regional access**

In addition to the above comments regarding access to electronic materials by regional practitioners and participants, the LIV submits that there needs to be further consideration about the ability for applicants to choose where their matters are heard.

The LIV supports delivery of VCAT services in non-traditional settings, and the development of a regional engagement strategy, including the establishment of regular circuits and video conferencing.

Furthermore, applicants should be able to indicate on the application to commence proceedings where the applicant seeks to have the matter heard. VCAT should then have scope to determine the hearing venue on the balance of convenience. The LIV does not consider that all parties and witnesses residing in the regional location should be a prerequisite to the matter being heard in that regional location. If the subject matter (for example, the retail premises the subject of the proceedings) is in a particular regional location, then it seems appropriate that the applicant have the ability to seek that the matter be heard in that location.

**Recommendations:**

51. That VCAT develop a regional engagement strategy, including establishment of regular circuits and video conferencing facilities.

52. That VCAT provide the option for parties to choose their own venues with scope for VCAT to determine appropriate venues on balance of convenience.

**VCAT website**

LIV members have consistently expressed concerns over the usability of VCAT’s website. In particular, members have pointed out inconsistencies, out-dated information and gaps in information in relation to civil claims, planning and environment and retirement village matters. For example, the Civil Claims List homepage contains more procedural and
explanatory information about making an application compared to the Planning and Environment List. Similarly, video guides are available for Civil Claims, but not for the Planning and Environment List.

In light of the above, the LIV calls for a broad review of the VCAT website. The LIV acknowledges that a survey about the VCAT website was recently conducted, however feedback received from members suggested that this survey was not sufficiently comprehensive and failed to deal with existing website content which is out-dated, inconsistent or incorrect.

**Recommendation:**

53. That a comprehensive review of the VCAT website be conducted.

**Alternate Dispute Resolution**

The LIV recommends that VCAT adopt consistent, clear and unambiguous guidelines in relation to the appropriate conduct of ADR at VCAT. Such guidelines should take into account:

- VCAT’s flexible approach to ADR, and the ability for Members to have discretion in ordering ADR; and
- the ability of Members to take into account whether ADR processes have taken place in another forum prior to reaching VCAT, and ensure there is no unnecessary duplication of the process.

A Practice Note for the ADR protocols and procedures in each list would be useful and could be circulated to the user group of each list as well as published on the website for public access.

**Recommendation:**

54. That VCAT publish Practice Notes for ADR protocols and procedures in each VCAT List.

**Mediation**

The LIV notes that section 88(6) of the VCAT Act, which explicitly prohibited a member who has acted as a mediator from being the Tribunal Member who hears the final hearing, was repealed by the *Courts Legislation Miscellaneous Amendments Act 2014.*
The LIV restates its opposition to Tribunals for final hearings being constituted by members who mediated at a proceeding. The position set out in the previous section 88(6) of the VCAT Act should be reinstated.

The LIV is concerned that the current practice compromises fundamental concepts of mediation, for example, openness, confidentiality and moderator independence (to name a few). Accordingly, parties will have reservations at mediation, further hindering genuine good faith attempts to settle.

**Recommendation:**

55. That section 88(6) of the VCAT Act be reinstated to prohibit a member who has acted as a mediator from being the Tribunal Member who hears the final hearing.

**Mandatory cooling off period**

The LIV reiterates its concerns regarding the implementation of a mandatory two clear business days cooling off period for self-represented parties after mediations:

- the cooling off period removes the incentive to settle;
- allows for the party to be influenced after mediation by family members and other third parties; and
- leads to further rounds of mediation or progression to a hearing, which has severe implications on the efficiency and costs of VCAT.

The LIV submits that allowing all parties at VCAT to have legal representation at mediation would also obviate the need for any cooling off periods.

**Recommendation:**

56. That VCAT remove the mandatory ‘two clear business days’ cooling off period that applies to self-represented parties after mediation.

**Planning & Environment List: Major Cases and Short Cases Lists**

In 2010, the Major Cases List (MCL) and the Short Cases List (SCL) were introduced within the Planning and Environment List at VCAT with a view to expedite decision making in the List. A user pays model was subsequently introduced for applications to the MCL.

The LIV reiterates its comments made in previous submissions in relation to the Lists, which remain relevant and outstanding:
• In its submission of 15 April 2011⁹⁰ the LIV expressed its concern that the continued operation of both the MCL and the SCL would undermine the perception of VCAT as a ‘fair’ forum. At the time, the MCL was confined to applications involving developments worth $5 million or more; the threshold has since increased to $10 million. The SCL was established to deal quickly with ‘shorter, less complex cases involving limited parties’.

• Given their limited scope, applications which fall outside the criteria for inclusion in the MCL or SCL would not be able to enjoy the benefits of expedited decision making which is a characteristic of the two Lists. Furthermore, as the threshold for the MCL has increased, the gap between the MCL and SCL has also widened.

• In the interests of promoting fairness, the LIV reiterates that there should be a consistent approach to timeframes for matters in the general Planning and Environment List, the MCL and the SCL. The principles of effective, efficient and expedited decision making in the MCL and SCL should apply to all matters in the Planning and Environment List (and indeed all VCAT Lists).

• In the same submission, the LIV objected to a user pays system being implemented for applications to the MCL. The LIV expressed its serious concerns about the fairness of a system which enables well-resources private operators to fund applications to the MCL and in turn gain expedited resolution of their matters. The LIV reiterates that this results in a perceived lack of fairness, as the justice system should be accessible to all.

Recommendations:

57. That VCAT review timeframes for processes in all Lists to match the expedited processes available in the Major Cases List and Short Cases List of the Planning and Environment List.

58. That VCAT consider the abolition of a user pays system in the context of the Major Cases List and Short Cases List of the Planning and Environment List.

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⁹⁰ Law Institute of Victoria, Submission to the President of the Victorian Civil and Administrative Tribunal, The Major Cases List and the Short Cases List within the Planning and Environment List at the Victorian Civil and Administrative Tribunal, 15 April 2011.
Guardianship List

By its nature, VCAT’s Guardianship List frequently deals with parties who are experiencing disabilities, disadvantage or other hardships. Therefore, it serves as an example of how VCAT can provide better access to its users who are experiencing such difficulties.

In previous submissions\(^9\) the LIV provided the following recommendations with regards to the operation of the Guardianship List. The LIV considers that these recommendations are relevant to other lists under certain circumstances and should therefore be applied across VCAT where appropriate:

- VCAT should be primarily responsible for the attendance of persons with a disability at Guardianship List hearings and that it should use all reasonable endeavours to encourage persons with a disability to attend hearings;
- measures should be taken by the Guardianship List registry to explain the importance of attending hearings and to follow up whether the person with a disability has received notice of a hearing (for example hearing officers at the Tribunal could be responsible for contacting persons with a disability to confirm they have received notice of the hearing, and to explain the content of the notice);
- VCAT should take measures to ensure that those who are listed as interested parties, including close relatives and legal representatives, are informed of developments in an application (subject to privacy considerations);
- independent representation is desirable in Guardianship List matters, to ensure that the wishes of the person with a disability are adequately conveyed to VCAT;
- where a person with a disability does not attend a hearing and VCAT is not satisfied that all reasonable endeavours have been made to contact the person and assist them to attend, the Member hearing the application should adjourn the matter;
- in any case, only interim orders should be made (under s33 or s60 of the Guardianship and Administration Act 1986 (Vic) (the Guardianship Act)) until the Tribunal is satisfied that the person with a disability has been afforded a reasonable opportunity to attend the hearing. A Practice Note on this matter would provide consistent guidance to Members about appropriate procedures in the Guardianship List;
- VCAT should bear primary responsibility for ensuring that orders made are explained to persons subject to an order (represented persons under the Guardianship Act). They should also be told about the right to a rehearing or reassessment;

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\(^9\) Law Institute of Victoria, Submission to the President of the Victorian Civil and Administrative Tribunal, President’s Review of the Victorian Civil and Administrative Tribunal, 22 June 2009, 7.
• there should be additional training of VCAT members about people’s experience of hearings and ways of improving it. The LIV refers to the findings of the 2008 report *Lacking Insight – Involuntary patient experience of Victoria’s Mental Health Review Board*;  

• daily listing of reassessments of orders should be reviewed, to ensure that there is proper consideration of the ongoing need for an order. VCAT should also ensure that decisions are made on the basis of recent medical reports; and  

• VCAT should not require a party to indicate reasons for a reassessment hearing, under hearing opt-in provisions. This is because the current requirement to give reasons has a disproportionate effect on disadvantaged and vulnerable individuals who are represented in the guardianship and administration system.

The LIV remains supportive of any proposals to provide greater resources to VCAT in order to facilitate the functions of the Guardianship List.

**Recommendations:**

59. That VCAT conduct a review of the Guardianship List to ensure that current practices, procedures and policies contain appropriate levels of access for vulnerable users, disadvantaged users, and users suffering disabilities.

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92 Vivienne Topp, Martin Thomas and Mim Ingvarson, 'Lacking Insight – Involuntary Patient Experience of Victoria’s Mental Health Review Board (Report, Mental Health Legal Centre Inc., October 2008),
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

Legal profession’s pro bono contribution

The legal profession has a strong tradition of pro bono representation and “these services are playing an important role in expanding access to justice.”93 However, the LIV does not consider pro bono work to be a substitute for the government’s responsibility to provide adequate funding for free and accessible legal services.94

The LIV acknowledges the large volume of pro bono work that is provided by lawyers in Victoria every year and draws the DJR’s attention to the National Pro-Bono Resource Centre’s submission to the Productivity Commission Inquiry. The National Pro-Bono Resource Centre noted the following studies and surveys:

- The ABS legal services survey undertaken in 2008. The survey found that lawyers undertook an estimated 955,400 hours of pro bono legal work in the 2007-2008 financial year.
- The National Pro-Bono Resource Centre National Law Firm Pro-Bono Survey undertaken in 2012, targeting firms with 50 or more full time equivalent lawyers. The 36 firms that participated collectively reported undertaking 343,058 hours of pro bono work in the 2011 – 2012 financial year.
- The National Pro-Bono Aspirational Target, 6th Report. The report found that 8,741 legal professionals (or approximately 15 percent of the profession) undertook 294,321 hours of pro bono work in the 2012 – 2013 financial year.
- The NACLC survey undertaken in 2012 of approximately 200 CLCs in Australia, of which 106 responded. The survey found that 3,637 volunteers contributed an average of 8,369 hours of work per week.

While these figures are significant, the LIV considers that pro bono hours are vastly under reported by the legal profession. In LIV members’ experience, many lawyers are contributing at least half a day a week in pro bono work. Nor do lawyers necessarily choose the extent of the pro bono work they engage in, as they are often required to provide assistance out of a sense of ethical obligation.

Pro bono legal service is delivered in a variety of ways. It may involve full representation for an entire legal matter. Alternatively, the service may be one-off advice on a particular issue. This may involve an assessment of legal issues leading to triaging of legal and non-legal issues and corresponding referrals. The LIV’s Find a Lawyer Referral Service is an example of initial pro bono advice and triaging of legal and non-legal issues (see further detail in response to Term of Reference 2). Pro bono services may also encompass additional unpaid services provided to legally aided clients. LIV members report that they provide a significant level of cross-subsidisation of legal services in legal aid matters. Cross-subsidisation is a ‘hidden’ form of pro bono provided by the private legal profession. The extent of this cross-subsidisation is set out below in relation to Term of Reference 6.

A coordinated pro bono referral service is a key part of ensuring equitable and efficient distribution of pro bono services. Justice Connect is an example of a coordinated referral service. The LIV funds Legal Assistance Service (which is delivered by Justice Connect. The LIV contributes approximately $360,000 per year to this service. LIVLAS offers facilitated meritorious pro bono referrals in diverse areas of law for members of the community who do not have sufficient funds to retain a solicitor through existing relationships with practitioners who are members to the scheme. LIVLAS consistently makes approximately 100 referrals per year to solicitors to represent clients on an ongoing pro bono basis. In addition, referrals are made to the Victorian Bar through the Victorian Bar pro bono scheme to perform discrete tasks. The LIV supports continued funding and expansion of the Justice Connect model.

Further, to make the Justice Connect model more effective, funding to CLCs should be increased to provide services in areas of unmet legal need. The recently established Human Trafficking Resource and Assistance Centre is an example of a new CLC which is being established through private funding to meet an area of unmet need. If funding to CLCs is increased and new services are provided, Justice Connect will be able to use this expertise, combined with the pro bono contribution of the private profession, to make more referrals. The recent partnership between Justice Connect and JobWatch discussed above in relation to Term of Reference 2 is an example of this approach.

LIV members have raised concerns regarding increases to pro bono requirements under the government’s Legal Services Panel arrangements. The LIV notes that the pro bono contribution required from panel firms has recently been increased from five to 10 percent of the value of their fees generated from panel services. It is important that panel

arrangements and similar economic incentives achieve a sustainable balance between pro bono contributions and associated economic benefits. Increasing the levels of pro bono required under current panel arrangements risks deterring firms from participating and may undermine the volunteerism that underpins pro bono. It may also disadvantage smaller firms with lower profit margins from seeking to participate in the Legal Services Panel. The LIV does not support further increases in the proportion of pro bono services required under panel arrangements.

The LIV also has concerns with regards to linking CPD requirements to pro bono. The LIV submits that the objective of CPD is distinct from pro bono work. Pursuant to Rule 7.1 of the Legal Professional Uniform Continuing Professional Development (Solicitors) Rules 2015, CPD activity undertaken by a solicitor must be an activity:

- of significant intellectual or practical content and must deal primarily with matters related to the solicitor’s practice of law;
- conducted by persons who are qualified by practical or academic experience in the subject covered; and
- that extends the solicitor’s knowledge and skills in areas that are relevant to the solicitor’s practice needs or professional development.

If pro bono were to be counted as CPD, it would need to fulfil these criteria. Further, consideration would need to be given to how many hours could be counted towards CPD. If linking CPD and pro bono is being considered, the LIV would seek to be consulted further on this issue.

**Expanding pro bono: unbundled legal services**

The LIV supports the unbundling of legal services and submits that all courts should allow for limited scope representation. The LIV notes that the Legal Profession Uniform Law Application Act 2014 (Vic) and Legal Profession Uniform General Rules 2015 (Vic) do not explicitly prevent a lawyer from entering into a limited retainer with a client. However, the LIV notes that current court rules are inflexible to the notion of limited scope representation as, once a lawyer/firm is on the record as acting for a client, they generally remain on the record. In this regard, court rules should be amended to allow for the flexibility for a firm/lawyer to indicate that they are acting in a limited scope.

The LIV submits that the increasing amount of unmet legal need can be in some part attributed to individuals being unwilling to engage with legal services due to the inability to afford all costs related to retaining legal assistance. The ability for a lawyer/firm to act in a limited scope is likely to have a positive effect of increasing access to justice as individuals can choose and pay for the select services that they require, rather than taking full responsibility for their case.
The LIV notes that professional indemnity insurance for lawyers will need to be carefully considered as there is likely to be various consequences associated with lawyers acting in a limited scope and not having to think about future consequences when they will be ceasing to act for the client. In this regard, it will be necessary to clarify the scope of a retainer for the benefit of the client and court to properly ascertain when duties commence and cease.

The LIV notes that if unbundled services and limited scope representation are to become mainstream practice, then the court management powers in Part 4.4 of the *Civil Procedure Act 2010* (Vic) will require review. Further, it will require courts to be flexible in their approach to litigants who engage lawyers on a limited retainer.

The LIV believes that an appropriate vehicle for the provision of unbundled legal services / limited scope representation is the Australian Solicitor’s Conduct Rules which are a common set of professional obligations and ethical principles for lawyers when dealing with their clients, the courts, their fellow legal practitioners and other persons.

**Expanding pro bono: award of costs in pro bono matters**

The LIV supports Recommendation 13.4 of the Productivity Commission that parties represented on a pro bono basis should be entitled to seek an award for costs, subject to the cost rules of the relevant courts. Under the current system a pro bono represented litigant may not be able to recover costs even if a claim is successful, whilst still being liable for costs if the claim is unsuccessful. Opponents of a pro bono represented litigant may benefit from not having to pay costs, even if they are unsuccessful, creating a perverse incentive to not settle. The LIV has endorsed the Victorian Bar’s position supporting the introduction of new rule under the *Supreme Court General Civil Procedure Rules*.

**Recommendations:**

62. That in reviewing pro bono service delivery, the government does not treat pro bono work as a substitute for the provision of adequate funding for free and accessible legal services.

63. That the government provide secure funding to Justice Connect for the LIVLAS program scheme to facilitate effective pro bono referrals, rather than using economic and other levers to increase the hours of pro bono work undertaken by the legal profession.

64. The government should provide further funding to CLCs to facilitate targeted referrals through Justice Connect.

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65. That the government seek amendment to the Legal Profession Uniform Law and the Australian Solicitors’ Conduct Rules to explicitly support the provision of unbundled legal services.

66. That the Victorian courts allow limited scope for representation by solicitors in legal matters.

67. That the Supreme Court General Civil Procedure Rules be amended in accordance with recommendation 13.4 of the Productivity Commission’s Inquiry into Access to Justice Arrangements Report (2014) so that parties represented on a pro bono basis are entitled to seek an award for costs.
Availability of funding

The LIV strongly recommends that significantly increased funding is required to ensure the efficient and fair functioning for the Victorian justice system. The LIV acknowledges the state government provided $85 million in 2014 – 2015, an increase of $2 million from the previous year and $10 million increase from 2012 – 2013. However, the LIV contends that the current level of funding is still not sufficient to meet the demands faced by the legal assistance sector.

The LIV echoes the Productivity Commission’s Recommendation 21.4 which called for an immediate $200 million in additional funding across Australia per year for civil legal assistance, including $60 million for Victoria. The LIV calls for the State of Victoria to contribute 40% of this amount, equivalent to $24 million per year for civil legal assistance. This funding is needed in order to:

- better align the means test used by VLA with that of other measures of disadvantage;
- maintain existing frontline services that have a demonstrated benefit to the community; and
- allow legal assistance providers to offer a greater number of services in areas of law that have not previously attracted government funding.

Further, the LIV understands that the level of state legal aid funding in Victoria is significantly less per capita than in NSW. The LIV calls upon the government to review its level of funding in comparison to NSW and to increase funding to a level commensurate with NSW.

In addition to civil legal assistance services, further funding is urgently needed to address increasing demand in criminal law and family law services, including child protection matters. Between October 2010 and September 2015, recorded offences in Victoria have increased by approximately 26 percent, with a 4 percent increase in the past year. As noted in the introduction, the number of people incarcerated in Victoria has also increased significantly in recent years. Demands on child protection legal services are also

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increasing. Between 2009/10 and 2013/14, the number of substantiated child protection notifications increased by 81 percent overall, and by 70 percent per 1000 children.\(^{100}\)

Similarly, reported incidents of family violence have increased by more than 60 percent in the past five years, as discussed above in relation to SIBs. This may be in part due to an increase in reporting of family violence. The LIV welcomes the increased focus on and response to family violence in recent years by Victoria Police and other justice agencies. However, the increase in reported incidents nevertheless has a significant impact on the justice system. It is important that the most disadvantaged Victorians receive legal assistance. Such assistance benefits the whole system, including victims and witnesses.

**The value of investing in legal assistance funding**

It is broadly recognised that under-funding legal assistance can lead to increased costs in other areas of government spending, in addition to the more obvious costs to the community and the unrepresented individuals who are unable to get access to legal assistance.\(^{101}\) As stated by the Productivity Commission:

Advocating for increases in funding (however modest) in a time of fiscal tightening is challenging. However, not providing legal assistance in these instances can be a false economy as the costs of unresolved problems are often shifted to other areas of government spending such as health care, housing and child protection. Numerous Australian and overseas studies show that there are net public benefits from legal assistance expenditure.\(^{102}\)

As discussed in relation to SIBs above, numerous studies demonstrate that an investment in legal aid saves money within the justice system and in other areas of government spending.\(^{103}\) The 2009 PwC study of the economic benefits of legal aid funding found that the provision of legal aid offers significant benefits:

- it provides for a human right;
- it promotes the rule of law;
- it increases public confidence in the fairness and accessibility of the justice system;
- it allows for better outcomes for individuals accessing legal information and the justice system by providing for better justice outcomes;
- it avoids costs to the community;

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\(^{103}\) Sharon Matthews, *Making the Case for the Economic Value of Legal Aid: Supplemental Briefing Note*, Canadian Bar Association British Columbia Branch, 1.
• it provides for information and direction to ensure the most appropriate pathway is taken in pursuit of the client’s goal; and
• it increases efficiency of the justice system and the courts.  

In the criminal jurisdiction the value of lawyers is recognised in not only achieving a just outcome by preventing an imbalance between the parties, but also achieving efficiency by enabling the court to conduct an efficient and fair hearing with a just and reliable result. This also applies in civil cases where a lack of legal representation is likely to result in a longer trial, thereby placing greater time and resource burdens on the courts as well as making a just outcome less likely. Hence, lawyers ‘value-add’ to the justice process by improving efficiency and thereby shortening hearings, which reduces costs to the state.

Direct efficiency benefits arising from lawyers’ involvement include:

• provision of legal advice, information and education resulting in earlier resolution of legal issues and streamlining of matters;
• cases are diverted away from the courts; and
• having representation for individuals who would otherwise be self-represented increases efficiency of court processes.

As noted above, the 2009 PwC report found that there was a return of $1.60 to $2.25 for every dollar of Commonwealth money spent on legal aid funding. Judges have expressed concerns about the false economy created by cutting legal aid to save money given that they find that cases run by unrepresented parties take longer and are more difficult and hence costly. Former Chief Justice Gleeson of the High Court has commented that there are ‘real and substantial’ costs resulting from an absence of legal representation causing delay, disruption and inefficiency, and much of the burden of this is borne by the government.

The absence of advice about the likely prospects of success and available options is likely to lead to protracted disputes, and there are likely to be other non-legal problems associated with being a self-represented litigant. Self-represented litigants increase the pressure on court resources and time as a result of their inexperience and lack of resources which prevent them from following procedures efficiently and presenting their case effectively, thereby increasing the time the court has to spend on explaining

104 PwC, Economic value of legal aid: Analysis in relation to Commonwealth funded matters with a focus on family law, National Legal Aid 2009, i-ii.
105 John Doyle, ‘Are lawyers part of the solution or part of the problem?’ [online]. BULLETIN (LAW SOCIETY OF S.A.); 35 (10) November 2013: 18-19,18.
106 Ibid 18-19.
107 Ibid 19.
109 Ibid ix.
112 Ibid 21.
procedures and waiting for the self-representing litigant to present their case.\textsuperscript{113} There is also an increased risk of errors leading to delays and further hearings and appeals.\textsuperscript{114} This is supported by a 2009 study which found that self-representation frequently led to longer and more frequent appearances and delays, especially as they were less likely to settle, which resulted in increased costs for the represented party.\textsuperscript{115}

\section*{Funding for CLCs}

The LIV believes it is essential that funding is increased for CLCs. CLCs are federally funded from 2015-2016 under the current National Partnership Agreement on Legal Assistance Services. Under the new National Partnership Agreement, CLCs are facing cuts of nearly 30\% in 2017-2018, with some Victorian centres facing cuts of up to 70\%. Next year the federal government will provide $9.7 million to Victorian CLCs. In 2017-18, this will reduce to $6.8 million. Neither amount is sufficient to support the important work of CLCs is providing access to justice for the Victorian community.

As discussed throughout this submission, CLCs provide a range of services to disadvantaged Victorians, ranging from preliminary advice, legal education, advocacy and pro bono referrals. They provide an important point of access to the justice system for many Victorians which should be expanded into further areas of unmet legal need.

\section*{Distribution of funding, consultation and governance}

The LIV reiterates its support for the public/private mixed model of service delivery and notes that 70\% of legally aided services are delivered by the private profession. The LIV acknowledges the important roles played by the private profession, VLA and the community legal sector in Victoria’s legal assistance landscape. The LIV notes the findings of the Productivity Commission that “individuals have different capabilities and face different legal problems and so the nature and extent of assistance they require varies. In line with differing needs of clients, Legal Aid Commissions and CLCs provide a continuum of services.”\textsuperscript{116}

The LIV submits that it is critical that the expertise of the LIV and the legal profession is drawn upon when making decisions about the distribution of funding. The PwC Service Delivery Report called for enhanced consultation processes concerning the delivery of legal aid services. PwC recommended that: “VLA could give consideration to adopting

\begin{footnotesize}
\textsuperscript{113} PwC, Economic value of legal aid: Analysis in relation to Commonwealth funded matters with a focus on family law, National Legal Aid 2009, 27.
\textsuperscript{114} Ibid.
\textsuperscript{115} Ibid; J Dewar, B Smith \& C Banks, Litigants in Person in the Family Court of Australia, Research Report No. 20, (2000), Family Court of Australia.
\textsuperscript{116} PwC, Criminal and Family Law Private Practitioner Service Delivery Model (2015), iii.
\end{footnotesize}
consultative arrangements that ensure stronger representation of the LIV and Victorian Bar, as well as other justice system representatives.\footnote{Ibid iii.}

The LIV believes that the VLA Board should include representatives from the LIV and Victorian Bar. This approach accords with that in NSW, where the Law Society of NSW and the Bar Association are both represented on the Legal Aid NSW Board. Section 11 of \textit{Legal Aid Act 1978} (Vic) addresses the composition of the VLA Board, providing for it to be composed of a Chair, Managing Director, and three directors nominated by the Attorney-General of whom—

- at least one must have experience in financial management,
- at least one must have experience in either business or government operation.

Section 12 charges the VLA Board with responsibility to manage the affairs of VLA and to achieve its objectives.

The objectives, set out at section 4, are:

- to provide legal aid in the most effective, economic and efficient manner;
- to manage its resources to make legal aid available at a reasonable cost to the community and on an equitable basis throughout the state;
- to provide to the community improved access to justice and legal remedies; and
- to pursue innovative means of providing legal aid directed at minimising the need for individual legal services in the community.

The LIV believes that there is a misalignment of the skillset articulated for the Board in section 11 and the objectives in Section 4. This creates a gap in the skills matrix of the VLA Board when measured against the objectives of the organisation. The composition requirements in Section 11 only address two of the objectives at most; that is, a person 'experienced in financial management' would assist VLA to meet the objective concerning the management of its resources, and perhaps the objective to provide services in an 'economic manner'.

The objectives in the Legal Aid Act place a particular emphasis upon effective delivery of the service, on the related matter of innovation in doing so, and on equitable distribution of the legal aid resource. These are matters of equity and fairness in the operation of the organisation. The LIV and Victorian Bar, as representatives of the legal profession, are expertly placed to assist VLA meet these objectives, as intended by the Victorian Parliament.

If the LIV is not represented in VLA’s governance structure, the LIV believes that it should be represented on VLA’s Community Consultative Committee. The Consultative Committee is well placed to identify ways to target services effectively for people who are
most in need. It is made up of representatives that are able to provide an evidentiary basis to the allocation of resources. The LIV notes that the Consultative Committee does not include representatives from the LIV or Victorian Bar. The LIV recommends that the Consultative Committee should include representatives from the LIV and Victorian Bar.

**Legal aid rates compared to market rates for the provision of legal services**

The LIV submits that, over time, legal aid funding has continued to decline in real terms and has not kept pace with inflation or with the increased costs of running a legal practice. Although fees have not substantially increased, there has been a large increase in the complexity and significance of legally aided matters being conducted by private practitioners. This means that the work required for each aided matter has increased. A number of factors have contributed to this increasing complexity. The eligibility for legal aid in summary matters has been tightened to provide that aid is only available where there are serious consequences for the defendant.118

In 2008, the Victorian Bar commissioned PwC to conduct a *Review of Fees Paid by Victoria Legal Aid to Barristers in Criminal Cases*.119 The report found that on average, barristers undertaking legal aid work are paid approximately 50 percent below the median salary of their contemporaries.

In August 2008, the LIV surveyed LIV member criminal law practices, representing approximately 40 criminal law firms, to determine an average private rate for a range of different matter types as a comparison to VLA rates. This research indicated that private clients are effectively subsidising legally aided clients. While this may be manageable in the short-term it is not a viable long-term strategy and it cannot take the place of a properly funded legal aid scheme.

The rates that are paid by VLA for criminal law matters are significantly below the market rate for equivalent matters. Traditionally, legal aid fees have been set at approximately 80 percent of fees charged to private clients. Criminal law practitioners have historically performed work at a discount for legal aid matters, however, it has been reported by LIV members that rates are now so low that practitioners are finding it increasingly difficult to justify continuing to do legal aid work.

Legal aid matters are likely to be complex in nature and have serious consequences for the accused. Legally aided clients are also more likely to present with complicated personal histories including intellectual disability, mental health issues, drug and alcohol

118 Aid may be provided where conviction is likely to result in imprisonment, an Intensive Corrections Order or a suspended term of imprisonment. Aid may also be provided in serious or complex matters where there is a likelihood that a community based order will be imposed either requiring more than 200 hours of unpaid community work or where the defendant will have difficulty in communicating his/her needs to the court by reason of psychiatric or intellectual disability, lack of education or difficulties in understanding English.

problems or illiteracy (and often a combination of these). Practitioners spend a great deal of time assisting their clients with logistical issues, and explaining the court process to them – which can often be a difficult task. Practitioners have also expressed concern that it is difficult to meet their professional obligations because they cannot afford to spend the time required on legal aid matters.

The table below shows the range of fees charged to private clients in each matter and the average private rate in comparison to VLA’s payment for the same matter in the year 2008. These figures demonstrate that by 2008, legal aid fees had fallen far short of the 80 per cent that has been considered a fair proportion of private fees in the past. At their highest in 2008, legal aid rates did not even reach 50 percent of average private fees and in most areas fell significantly short of this.

<table>
<thead>
<tr>
<th>Matter type</th>
<th>VLA rate payable</th>
<th>Range of fees for private client</th>
<th>VLA rates as a percentage of the range of private fees</th>
<th>Average fees for private client</th>
<th>VLA rates as a percentage of average private fees</th>
<th>80% of average private fees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Magistrates’ Court plea</td>
<td>$602</td>
<td>$1100-$3850</td>
<td>16 - 54%</td>
<td>$2370</td>
<td>25%</td>
<td>$1896</td>
</tr>
<tr>
<td>Magistrates’ Court contest</td>
<td>$721</td>
<td>$2000-$8450</td>
<td>9 - 36%</td>
<td>$3884</td>
<td>18%</td>
<td>$3107</td>
</tr>
<tr>
<td>Bail application (Magistrates’ Court)</td>
<td>$444</td>
<td>$1100-$4400</td>
<td>10 - 40%</td>
<td>$2821</td>
<td>15%</td>
<td>$2256</td>
</tr>
<tr>
<td>County Court plea</td>
<td>$2720</td>
<td>$3000-$10756</td>
<td>25 - 91%</td>
<td>$6145</td>
<td>44%</td>
<td>$4916</td>
</tr>
<tr>
<td>County Court - 5 day trial – solicitor/client costs only</td>
<td>$5077</td>
<td>$6500-$19500</td>
<td>26 - 78%</td>
<td>$11290</td>
<td>45%</td>
<td>$9032</td>
</tr>
</tbody>
</table>

These figures are now over seven years old. LIV members report that as a proportion of private fees, legal aid fees have actually worsened. LIV members further report that changes to VLA guidelines and processes since 2008 have led to many smaller practices leaving the legal aid market, particularly in rural and regional areas. This shift has an adverse impact on access to justice in those areas.

In determining the distribution and level of legal aid funding, it is important that decisions are informed by accurate and up-to-date data. The LIV is willing to work with the
government to update these figures (and those below) by conducting an appropriate survey of LIV members and the Bar.

**Actual cost of conducting legally aided matters**

Research conducted by the LIV establishes that legal aid rates do not adequately compensate private practitioners for the amount of work that is required on each legally aided matter. In 2008, the LIV had a number of randomly selected legally aided files professionally costed to provide an accurate view of the amount of work completed for a legally aided matter compared to VLA’s lump sum payments. These figures deal solely with solicitor/client costs and exclude counsel fees and other disbursements.

<table>
<thead>
<tr>
<th>Type of matter</th>
<th>Actual cost as assessed by costs assessor</th>
<th>Amount paid by VLA</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Magistrates’ Court plea</td>
<td>$4157</td>
<td>$721</td>
<td>17%</td>
</tr>
<tr>
<td>Bail application – Magistrates’ Court</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(2 day hearing)</td>
<td>$4360</td>
<td>$745</td>
<td>17%</td>
</tr>
<tr>
<td>Consolidated plea in Magistrates’ Court</td>
<td>$3090</td>
<td>$1405</td>
<td>45%</td>
</tr>
<tr>
<td>County Court trial A (10 day hearing)</td>
<td>$11789</td>
<td>$6632</td>
<td>56%</td>
</tr>
<tr>
<td>County Court trial B (13.5 day hearing)</td>
<td>$14502</td>
<td>$7919</td>
<td>55%</td>
</tr>
</tbody>
</table>

These figures demonstrate that private practitioners are, in effect, cross-subsidising legally aided matters. As discussed above in relation to Term of Reference 5, this is a form of hidden pro bono work, which contributes to the significant under-reporting of pro bono work contributed by private practitioners.

Legal aid fees are paid as a lump sum fee rather an hourly rate. This means that they are unable to account for the complexity of an individual matter. Additionally, legal aid fees do not take into account the seniority of the person conducting the work so that a recently admitted solicitor and a solicitor advocate with 20 years of experience are paid the same amount.

It is notable from the figures in both of the above tables that legal aid fees in Magistrates’ Court matters are particularly low. This is of particular concern as the majority of matters are heard in the Magistrates’ Court and these matters form the bulk of the work done by private practitioners.
The LIV also notes that in regional or rural areas, duty lawyer schemes in the Magistrates’ Court are often provided by private practitioners. Duty lawyers play a vital role in providing access to justice for a broad range of Victorians, particularly those who may narrowly miss out on being eligible for legal aid but who cannot afford to pay for private representation. LIV practitioners providing duty lawyer services in regional areas are reporting an ever-increasing demand for duty lawyer services.

**Recommendations:**

68. That the government invest at least an additional $24 million immediately per year in civil justice services in accordance with the recommendation of the Productivity Commission in its Inquiry into Access to Justice Arrangements Report (2014).

69. That, in addition to the $24 million, the government increase funding to legal assistance services to the equivalent level per capita as New South Wales.

70. That the government increase funding to criminal law, child protection matters and family violence matters to meet increasing demand for legal assistance services in these areas.

71. That the government work with the Commonwealth government to ensure funding to Victorian CLCs is maintained at least $9.7 million per year from 2017/18 to avoid funding shortfalls that will arise in 2017/18 under the new National Partnership Agreement on Legal Assistance Services.

72. That in addition to maintaining CLC’s funding, the government work with the Commonwealth government to increase CLC’s funding in response to increasing demand for services.

73. That the government maintains the mixed-model approach to delivery of legal assistance services and that any changes to the distribution of funding ensure that multiple entry points to legal assistance services are preserved.

74. That the government and VLA ensure that the LIV and the legal profession’s expertise is drawn upon in decision making around the most efficient and effective allocation of legal aid funding and any associated system reforms on an ongoing basis. Specifically, that the LIV and Victorian Bar are represented on the:

74.1. VLA Board; and

74.2. VLA Community Consultative Committee.

75. That the government, together with the LIV, conducts a survey of members of the LIV and the Victorian Bar to gather up-to-date figures on:

75.1. Legal Aid rates compared to market rates for the provision of legal services; and

75.2. the actual cost of conducting legally aided matters compared to the amount paid by VLA.
Legal assistance services: is there duplication?

The LIV supports efforts to ensure legal assistance is delivered as efficiently as possible to the greatest number of people. Identifying and minimising duplication is part of achieving more efficient services. In considering whether there is duplication in legal assistance services, it is important to consider what constitutes ‘duplication’. As discussed above, responding to a lack of access to justice requires a multi-faceted approach in responding to the needs of a diverse community. Not only do people access legal services through multiple entry points, the assistance they require differs according to their specific needs, such needs may include one-on-one advice, provision of legal education material, and ongoing representation.

The LIV submits that duplication is only a concern in instances where two or more services or resources have been provided or produced to target the same group and link to the same services and avenues for redress. In the case of legal assistance services, the LIV does not believe there is any duplication of services. Rather, the services available are not sufficient to meet the demand. Similar services may target communities and groups in different ways to address particular needs. This results in more effective referral pathways to resolve disputes and other legal issues.

In some cases, similar services need to be provided to similar clients by different legal assistance providers to avoid conflicts of interest. A simple example of this is duty lawyer representation for intervention order applications. In such cases, VLA is only able to represent one party. To avoid a conflict of interest, CLCs and pro bono services provided by private lawyers may be required to ensure the other party is equally represented. In such cases, the other party is often a woman who has experienced family violence and would otherwise be unrepresented. Additionally, conflicts of interest are particularly acute in rural, regional and remote areas.120 The Centre for Rural and Regional Law and Justice found that “there is strong support for more education, training and mentoring in response to conflict of interest issues.”121

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120 Centre for Rural and Regional Law and Justice, Conflicts of Interest in Victorian Rural and Regional Legal Practice (2014).
121 Ibid 111.
A reduction in services due to perceived duplication may inadvertently result in more self-represented litigants due to conflicts of interest. Concerns regarding self-represented litigants are further considered below in response to Term of Reference 9.

Community Legal Education: coordinated, targeted and informed

In the case of legal education resources, duplication only occurs if the resources include similar content, use a similar format and target the same audience. The LIV submits that instances of true duplication, as described above, seldom occur, if ever. The LIV attributes this to the following factors:

- the high level of coordination between legal assistance providers, as noted in response to Term of Reference 2;
- CLE resources are developed in response to the specific needs and targeted toward a particular audience or community; and
- CLE resources are informed by service delivery and therefore are able to accurately address the needs of specific groups in a timely way.

The LIV’s position is supported by research undertaken by the Queensland Association of Independent Legal Services (QAILS), which showed that in Queensland Community Legal Education (CLE) resources are not being duplicated by legal assistance providers.\(^\text{122}\) The report *Coordinating Community Legal Information and Publications* (2015) recognised that whilst there will often be numerous publications on the same topic of law, legal assistance providers produce resources that are tailored towards a specific audience or community.

Coordination between providers: CLEAR database and VLAF Guidelines

In ensuring that community legal education materials reach the right audience and are not duplicated, it is important that the creators of these materials are able to assess what is already available and can access effective distribution channels. The LIV submits that the Community Legal Education and Reform (CLEAR) database is a vital way to ensure that CLE resources produced in Victoria are not duplicated. The CLEAR database is a national centralised online resource that hosts content uploaded by the FCLC, thereby simplifying the task of identifying whether a CLE resource has already been created. The CLEAR database is hosted on the NACLC website.\(^\text{123}\) In addition to the CLEAR database, FCLC identify new publications and resources in their weekly newsletter.

The LIV also notes the VLAF Online Legal Information Guidelines that have been developed by the VLAF Online Legal Information Working Group.\(^\text{124}\) The guideline states that “all new online legal information projects should be thoroughly researched to

\(^{\text{122}}\) Queensland Association of Independent Legal Services, *Coordinating Community Legal Information and Publications* (2015) 22
determine if similar resources already exist and if there is a real need for the project.\textsuperscript{125} The Guidelines direct users to the CLEAR database and everyday-law website.\textsuperscript{126}

The LIV considers that providing further funding to CLEAR and promoting its use among legal and social service providers is an effective means to address any duplication and to improve distribution channels. Further, the VLAF guideline should be promoted broadly to community legal education providers to raise awareness of the guideline.

\textbf{Community Legal Education: responsive to needs}

As discussed above, community legal education resources are only duplicated if the resources include similar content, use a similar format and target the same audience. In the LIV’s view, the resources available in Victoria are targeted at particular audiences to address particular needs. For example, implementation of the Powers of Attorney Act required new forms. The forms created through regulation were a legislative instrument setting out the minimum requirements to comply with the legislation. The forms do not include guidance text. To assist members of the community, OPA created forms with considerable background information and guidance to negotiate the new requirements. These forms are not directed at the legal profession. To assist the legal profession, the LIV is preparing its own set of forms with targeted information and guidance to suit the needs of legal practice. In creating these forms, the LIV is responding to numerous requests from LIV members for forms tailored to their needs. The result is three sets of forms covering the same legal requirements, but targeted at different audiences. While, on its face, this may appear to be duplication, in fact it will make the system more efficient by ensuring that different groups have access to appropriate legal assistance.

\textbf{Community Legal Education: informed by service delivery}

The LIV submits that good legal information is informed by service delivery. Legal service providers are well equipped to create and distribute responsive and tailored legal education that meets the needs of a particular audience. Legal service providers quickly become aware of issues arising in practice and can prepare well-informed material in response. CLCs are a good example of legal services providers with ‘on the ground’ experience to inform the provision of targeted and timely legal information.

Similarly, the LIV creates legal assistance materials informed by the direct experience of its members. Through its extensive network of more than 70 committees, the Practice Support Line, member services, CPD program, accredited specialists, delegated regulatory functions and the LIV Find Your Lawyer Referral Service, the LIV is able to

\textsuperscript{125} Ibid at Guideline 1.
\textsuperscript{126} <http://www.everyday-law.org.au>.
quickly identify emerging legal issues and to prepare resources to support lawyers dealing with these issues. The LIV distributes this information to 19,000 members of the legal profession and associated services through:

- its daily news bulletin, LawNews;
- the Law Institute Journal;
- social media and media releases;
- the LIV website (currently undergoing redevelopment to ensure efficient and effective access for members and the community at a cost of $300,000);
- LIV committees that actively involve at least 1,300 member;
- an extensive CPD program and events;
- various discussion groups and working groups;
- the Practice Support Line;
- the LIV library, including an affordable research service; and
- the LIV Ethics Line.

As discussed above in relation to Term of Reference 1, the LIV also provides information to the broader community through its website, referral service and various publications.

By educating the legal profession and broader community, the LIV helps to ensure that legal advice is as accurate and up-to-date as possible, and that legal practices are managed as effectively and efficiently as possible. Both these aspects of the service provided by the LIV are informed by the direct experience of LIV members, and contribute to making justice more accessible in Victoria.

**Recommendations:**

83. That the government support the production of community legal education resources by service delivery organisations and investigates technological solutions for coordination and distribution of these resources.

84. That the government increase funding to the National Association of Community Legal Centres (NACLC) for the CLEAR database.

85. That the government promotes the Victorian Legal Assistance Forum (VLAF) Online Legal Information Guidelines to community legal education providers.

86. That, in assessing duplication in legal services and the provision of legal education material, the government is mindful of the needs of varied audiences and the issue of conflicts of interest.
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

VLA service delivery model

In November 2014, the LIV commissioned PwC to prepare a scoping study on the current legal aid service delivery model in Victoria. The terms of reference for the scoping study included:

- to undertake an economic analysis of unmet legal need in the Victorian criminal and family law jurisdiction;
- to undertake a comparative analysis of current legal aid service delivery models nationally and internationally, in order to develop a service delivery model which does not disadvantage the private legal profession or result in constraints in access to justice for members of the community; and
- to work with VLA and other relevant stakeholders to design a service delivery model that provides access to justice and quality legal services within the constraints of the current funding envelope.

PwC’s Service Delivery Report, released in October 2015, developed an economic profile of current and predicted future demand based on data analysis and discussions with key stakeholders. The report considered potential changes to key elements of the service delivery model, including:

- **consultation**: a consultative mechanism to enable communication and dialogue, and enable continuous improvement in the way legal aid services are delivered;
- **panel arrangements and preferred barristers list**: the processes adopted for procuring services from private practitioners;
- **eligibility guidelines**: criteria that determine the types of services provided by private practitioners;
- **case work and service mix**: decisions that determine how matters are allocated between private providers and in-house practitioners;
- **fees**: the prices paid for the service delivered by private practitioners; and
compliance and review: a system to ensure quality and high standards.127

PwC considers that each of these elements is critical to designing a model that improves access to justice and delivery of quality legal representation. The range of options set out in the report ranges from maintaining the status quo (no change), through to transitional change, and transformation of the legal aid service delivery model.

PwC’s concluded that the transitional model is the option that VLA and its stakeholders should consider as a potential new service delivery model.128 This option retains some parts of the current model, while addressing matters raised by stakeholders. The key elements of the transitional model include:

1. A consultative stakeholder engagement framework that is inclusive of the LIV, Victorian Bar and other justice system representatives.
2. Retention of a similar model for procurement of services from private practitioners. PwC recommends that the LIV and the Victorian Bar play a role in advising on the process for selecting private solicitors and barristers to undertake legal aid services. This is a practice that occurs in other jurisdictions, including NSW.
3. Retention of a similar system for determining eligibility guidelines. However, PwC recommends that VLA set up a mechanism to consult justice system stakeholders on changes to the eligibility guidelines. This would assist in anticipating any downstream costs and access to justice issues that may arise from changes to the eligibility guidelines and VLA’s other policy levers.
4. The service delivery mix should be informed by an assessment of the cost-efficiency of delivering legal aid services through in-house lawyers compared with private practitioners. This assessment should be informed by quality considerations and stakeholder consultation and not just limited to cost considerations.
5. A mechanism should be instituted for regular and independent review of the fee structure to ensure private practitioner fees reflect the tasks they are required to undertake, enable and incentivise high-quality legal representation, and possible benchmarking to in-house costs.
6. PwC recommends no change to the current compliance and review system, although “follow the money” amendments to the Audit Act foreshadowed by the Victorian Government are likely to lead to changes in this area.129

Recent changes in eligibility criteria and consultation

The LIV welcomes recent changes to the VLA eligibility criteria coming into effect on 1 March 2016. The LIV believes these changes are a first, positive step towards making eligibility for VLA more equitable and servicing the needs of more Victorians. The LIV welcomes the opportunity to be consulted as part of a broader review of VLA eligibility.

128 Ibid 34-35.
129 Ibid 36-37.
criteria. The LIV also welcomes consultation on recent changes to the VLA guidelines in relation to child protection matters, and would appreciate being consulted as part of a broader review of these guidelines.

**Cost-efficiency of the service delivery model**

The Victorian Auditor-General delivered an audit report in 2014 which assessed whether VLA achieved its statutory objectives, and whether it performed its functions and duties effectively and efficiently. While the audit found that VLA was performing its role in delivering legal services, it also found limitations in calculating the costs of service provision limit measures in determining how effectively, efficiently and economically VLA is in providing legal aid services.

The PwC Service Delivery Report found that while VLA believes that bringing some legal services in-house is likely to contain or reduce costs and exposure to rising demand, it does not have sufficient evidence to demonstrate this. This is because VLA cannot break down the cost of its staff practice at a service level and is therefore not in a position to determine whether its staff practice is more or less cost effective than the private practice. Using publically available data, PwC estimated the average per unit cost of private practitioners compared with VLA in-house lawyers, finding that the average per unit costs for private practitioners are lower in both criminal and family law matters. As an indication:

- in family law matters the average per unit cost for private practitioners is $2,326, compared with $10,013 for in-house lawyers; and
- in criminal law matters, the average per unit cost for private practitioners is $2,170, compared with $5,417 for in-house lawyers.\(^\text{130}\)

Based on publicly available data, the PwC report shows a significant discrepancy between the average unit cost for private practitioners delivering legally aided services compared to services provided in-house (between two to four times greater for in-house services). Determining the reasons for this discrepancy is difficult without more detailed data. The LIV understands that VLA is collecting and analysing more detailed data following the recommendations made by the Victorian Auditor General in 2014. The LIV also believes that this data should be released as soon as possible to enable independent and transparent analysis.

As discussed above in relation to Term of Reference 6, surveys conducted by the LIV and Bar, together with reports from LIV members, indicate that legal aid fees paid to private practitioners are significantly less than fees paid for privately funded matters. This indicates that private practitioners are cross-subsidising legally aided matters, and

\(^{130}\) Ibid 16-17.
increasingly providing legal aid services is financially unsustainable for private practitioners.

The LIV believes that to enhance ongoing transparency and service delivery, the government should develop financial key performance indicators, to be included in the *Legal Aid Act 1978* (Vic), to measure the delivery of publicly provided legal aid services against privately provided legal aid services.

Given the significant differences per unit found by PwC in the delivery of legal aid services, the findings of surveys by the LIV and Victorian Bar, and recent reports from LIV members, the LIV requests that the government refers VLA to Commissioner for Better Regulation for review to ensure that legal aid funding is being used as effectively and efficiently as possible. This review should include an assessment of competitive neutrality to ensure that public and private providers of legal aid services are competing on a level playing field.

**Recommendations:**

87. That the service delivery mix should be informed by an independent and accurate assessment of the cost-efficiency of delivering legal aid services through in-house lawyers compared with private practitioners. This assessment should be informed by quality and cost considerations and stakeholder consultation. Accordingly, the LIV supports the transitional model for reform as outlined above and recommended by PwC’s Service Delivery Report.

88. That the government develop financial key performance indicators, to be included in the *Legal Aid Act 1978*, to measure the delivery of publicly provided legal aid services against privately provided legal aid services.

89. That VLA should release detailed data currently being gathered in response to the 2014 report of the Victorian Auditor General should be released immediately to enable independent and transparent analysis.

90. That, given the significant differences per unit found by PwC in the delivery of legal aid services between public legal aid services and private legal aid services, the government refers VLA to review by the Commissioner for Better Regulation to ensure that legal aid funding is being used as effectively and efficiently as possible, including an assessment of competitive neutrality between public and private services.
Term of Reference 9

The legal system has traditionally been perceived as a complex system that could be accessed only through the specialist knowledge of a lawyer. The LIV notes that reform over recent decades has sought to break down the barriers to accessing the legal system, including enabling individuals to access the legal system directly. This is evident through reforms such as the creation of tribunals, government regulation of consumer affairs and increased transparency and knowledge of government services and processes which has meant that individuals can now apply for and access a range of government services and pursue small monetary and consumer claims without necessarily needing a lawyer.

For small, low value claims, this approach may be appropriate provided that supports are in place to guide self-represented litigants through the system. For example, a SRL service (discussed below) can assist litigants to negotiate the system, and potentially seek advice at key points. Similarly, easy English guides and other accessible information can assist in directing claims through the system. For more complex matters, or for people who are disadvantaged or otherwise vulnerable, self-representation entails risks for the litigant and can make the justice system more efficient. A riskier and less efficient system does not promote access to justice.

The costs arising from SRLs are not limited to the justice system. Negotiating the justice system without the expertise of a lawyer to provide guidance, advice and representation can be extremely stressful and time-consuming. The LIV believes that the experience can have a significant impact on the well-being of the litigant, which can have significant health consequences and impact on the litigant’s ability to work. These consequences lead to greater costs for the health and social welfare system. As discussed above in relation to social impact bonds, investment in legal assistance services generates significant long-term savings in other areas.

A key barrier in responding to the question of how to provide better support for SRLs is a lack of data concerning:

- the number of SRLs in the Victorian court and tribunal system;
- the reasons why SRLs are choosing to self-represent; and
- the points in the system at which SRLs experience the most difficulty.

In 2012, Sourdin and Wallace reported that: “The perception that the numbers of SRLs are increasing and have been increasing over the past fifteen years is widespread and is largely attributed in the literature to increased legal costs and changes to legal aid
funding.” Despite this, “there is limited information about SRLs in Australia.” Sourdin and Wallace’s research found: “continuing data and research gaps about the demographics of those involved in court and tribunal processes and among those who are without representation.” Limited data on numbers of SRLs is available. For example:

- “In 2008, 3 percent of litigants at the County Court of Victoria and 4.5% of litigants in the Supreme Court of Victoria were self-represented.”
- “In the Court of Appeal 11.4 percent of cases commenced were cases involving one unrepresented person between May 2006 and April 2007.”
- A study conducted of the mention court in the Heidelberg Magistrates’ Court in 2002 found that 41% of cases on one day involved an unrepresented litigant.

The lack of data available about the experiences and characteristics of SRLs presents a significant policy challenge. The Australian Senate’s Legal and Constitutional Affairs References Committee recommended in 2009 that state and territory governments quantify the economic effects that SRLs have on the justice system. The LIV notes that the Department is conducting a survey of SRLs as part of the Access to Justice to Review. While this survey will add to the data available, the LIV believes a broader review of court users, including SRLs, will provide a deeper overview of court user’s experiences, including SRLs.

The LIV is currently engaging with the Australian Centre for Justice Innovation with regards to a proposed ‘Snapshot Study Project’. The project will involve reviewing and building on data that has been collected by various individual courts. It will be conducted via user interviews designed to better understand user perceptions of courts in respect of fairness, accessibility and effectiveness. The study will gather data to provide insight into the experiences of those navigating the court system, their perceptions about accessibility, and the impact of their experiences on their lives. In particular, the Snapshot will focus on the experiences of SRLs.

The LIV believes that the data to be gathered by the Snapshot Study is essential to building an evidence-base on which to respond to the question of how to better support SRLs through the Victorian justice system. The LIV is keen to partner with the government to conduct the study, and is seeking funding from the government to support the study.

133 Ibid 3.
134 Tania Sourdin, Mediation in the Supreme Court and County Courts of Victoria (Department of Justice of Victoria, 2009), 84.
Self-Representation Service

The LIV considers that the Self-Representation Service (SRS) model has proven to be of great value and assistance to self-represented litigants and the judiciary in all the courts in which it currently operates. The LIV believes that self-representation services offer assistance for matters that are generally not well serviced by duty lawyers and notes that there is equal merit to both the SRS and duty lawyer models of service delivery. The SRS operates by setting triaged appointments with volunteer lawyers to provide advice and assistance to self-represented parties involved or preparing to be involved in proceedings, and who are unable to afford private legal assistance and are ineligible for legal aid.

QPILCH SRS

In response to significant numbers of SRLs in the Queensland justice system, the Queensland Public Interest Law Clearing house (QPILCH) has operated a SRS in the civil division of the Queensland Supreme, Court of Appeal and District Courts since 2007. In 2010, QPILCH expanded its operation to include the Queensland Civil and Administrative Tribunal (QCAT). In 2011, it commenced in the Federal Court of Australia (Brisbane Registry).

The QPILCH SRS provides users with unbundled legal advice and assistance through the progress of civil litigation, including drafting and amending pleadings, disclosure, preparation of evidence and settlement negotiations.

The report Evaluation of Queensland Public Interest Law Clearing House Self-Representation Service (2014) found that: “SRLs who used the Service reported receiving a significant amount of both emotional and instrumental support from the Service.” The Productivity Commission’s evaluation of the SRS noted that: “almost half of all clients were dependant on Centrelink for income with 68% on incomes less than $26,000pa and 83% earning bellow $52,000.” The South Australian JusticeNet Self-Representation Service Pilot has also been evaluated. The evaluation found that the service was:

successful in achieving its stated objective...[and] is likely to be making overall savings for the Supreme Court, particularly in terms of reducing workload of and demand on the registry staff, and in preventing the commencement or continuation of proceedings in relation to unmeritorious matters.

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141 Ibid 2.
Federal Court SRS

Justice Connect operates a SRS is the Federal and Federal Circuit Courts in NSW, Victoria, Tasmania and the ACT. The Justice Connect SRS is based on the LQPILCH model described above and is staffed by a manager, two lawyers and two paralegals. The SRS provides SRLs with:

- legal advice about their issue;
- assistance in preparing documents including correspondence and court forms;
- advice about other options to resolve the issue;
- information about court procedures and court orders; and
- assistance to conduct their case in the best possible manner.

The SRS triages matters to assess:

- whether the person is eligible for the service;
- whether it is a legal issue that the service can assist with; and
- the urgency of the matter.

The Justice Connect SRS Eligibility Guidelines include the following considerations:

- whether the party is currently represented;
- area of law;
- merits of the matter;
- whether there is a conflict of interest, for Justice Connect or the member law firm; and
- ability to afford legal assistance.

If a client is eligible for assistance, an appointment is made with a lawyer from a Justice Connect member firm. The client is then booked for a one hour consultation with a volunteer lawyer who provides unbundled legal assistance. The volunteer lawyer is provided with a ‘volunteer brief’ which includes information such as client background, a summary of the legal issue, the tasks that are required to be completed, and any relevant legal resources. Volunteer lawyers are required to have at least 3 months experience in a litigation practice group, attend mandatory training sessions, read volunteer briefs in preparation for appointments and adhere to relevant policies and procedures, including file management procedures.

Justice Connect in Victoria in its 2014-15 Annual Report indicated that federal funding due to cease next year achieved the following for federal cases:

Justice Connect’s newest service, the Self Representation Service, provides legal assistance to people experiencing disadvantage who cannot access legal representation in the Federal Court and Federal Circuit Court. The Service currently assists with bankruptcy,
Fair Work, human rights, discrimination and judicial review matters in NSW, Victoria, Tasmania, and the ACT. Unrepresented litigants are provided with discrete task-focused assistance through appointments with pro bono lawyers, empowering the litigants to conduct their own matters, helping them resolve their legal issues and reducing anxiety and stress usually involved in being unrepresented in litigation.

This year the Self Representation Service has:

- Provided 263 appointments, comprising 141 for NSW and ACT clients, and 122 for Victorian and Tasmanian clients
- Provided 70 immediate advices
- Assisted 225 unrepresented litigants with legal advice
- Provided 133 other individuals with legal information.146

**Recommendations:**

94. That the government collects data on the numbers of self-represented litigants and the reasons they are self-representing.

95. That, as part of this data collection, the government considers funding a snapshot study of self-represented litigants in Victorian courts in conjunction with the Australian Centre for Justice Innovation and the LIV.

96. That the government fund a self-representation service in the Victorian courts and tribunals, to be established in consultation with the Victorian Courts, Justice Connect, the LIV and the Victorian Bar.

97. That this service should be extended to Victorian cases as a proven model of assistance. The LIV would be pleased to work with the government in operationalising this approach. Additional funding to the $360,000 already provided through the LIV (LIVLAS program) from the public purpose fund should be considered as a source of funding. A pilot mirroring the scope and numbers for federal funding for the first year should be introduced for state court matters.

98. That the Victorian and Commonwealth governments adequately resource the Victorian registry of the Federal Circuit Court to deal with an increase in demand in the next few years, including appointing new Judges.

99. That the Victorian and Commonwealth governments ensure appropriate funding of VLA to continue to operate an efficient, effective duty lawyer and referral service for unrepresented asylum seekers at the Federal Circuit Court.

A MULTIFACETED APPROACH: THE NEEDS OF SPECIFIC GROUPS

As discussed throughout this submission, specific groups have specific needs when accessing justice. A ‘one size fits all’ approach may appear to be available equally to all, but in practice discriminates against groups that have difficulty accessing ‘mainstream’ services. This submission has highlighted a number of areas where a multifaceted approach is needed, including:

- multiple access points and channels for accessing justice, including online services;
- a range of funding options ranging from free legal assistance (including pro bono), through to LEI, alternative fee arrangements, social impact bonds and a LECS;
- choice in the scope of legal representation through unbundled legal services;
- choice of avenues to pursue legal redress, including through ADR;
- a public/private mixed model of service delivery for legal assistance through a range of providers, including the private profession, VLA and CLCs; and
- a variety of sources of community legal education and training.

In addition, it is essential that the justice system responds to the needs of specific groups to help those groups access justice in Victoria. A broad range of groups require a tailored response their justice needs. The remainder of this submission considers the needs of the following three groups:

- Aboriginal and Torres Strait Islander people;
- the legacy caseload of asylum seekers; and
- people with disabilities.
ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE

*This submission refers to ‘Aboriginal and Torres Strait Islander’ peoples rather than using the term ‘Indigenous’. Where a reference is made to Aboriginal this should be taken to include Torres Strait Islander peoples.

Introduction

It is nearly 30 years since the Hawke government announced the Royal Commission into Aboriginal Deaths in Custody in 1987. It is 20 years since the Aboriginal and Torres Strait Islander Commission released the report, Indigenous Deaths in Custody 1989 to 1996. It is over ten years since the Victorian government published its Response to the Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody in 2005. Yet in over 30 years and following many reviews, little seems to have changed for Aboriginal and Torres Strait Islanders’ interaction with the justice system.

Aboriginal and Torres Strait Islander imprisonment has reached a crisis point. In Victoria, Aboriginal people 11.7 times more likely to be incarcerated than non-Aboriginal people.147 Nationally, Aboriginals make up 27% of the national prison population.148 This figure is a conservative estimate because current data does not measure prison flow-through or ‘churn’, meaning that prisoners serving short sentences are not captured in the census data.149 Consequently, available data on the over-representation of Aboriginal and Torres Strait Islander people in prison is significantly underestimated. The inadequacy of this information is one of the barriers preventing policy makers from more effectively responding to the over-representation of Aboriginal people in prison.

The rate of Aboriginal children placed in out-of-home care has similarly reached a crisis point. The Victorian Commission for Children and Young People’s annual report claimed “the rate of Victorian Aboriginal children in out-of-home care is among the highest in Australia, and higher than similar jurisdictions around the world. Victorian Aboriginal children are 16 times more likely than non-Aboriginal children to be in out-of-home care.”150 These statistics highlight the urgency of investing in access to justice measures for Victorian Aboriginal communities, specifically in early intervention mechanisms.

147 Australian Bureau of Statistics (2014) Corrective Services, Australia, September Quarter 2015, Cat no. 4512.0, Canberra.
148 Ibid.
Aboriginal and Torres Strait Islander people have complex legal and non-legal needs due to a long history of disadvantage, poverty and the effects of inter-generational trauma. Factors such as illiteracy and disability, geographic isolation and language barriers restrict Aboriginal and Torres Strait Islander peoples’ access to justice. Aboriginal and Torres Strait Islander people not only find it more difficult to access services, but often find that the services available may not be culturally appropriate or do not adequately address the myriad of legal and non-legal, criminal and non-criminal issues that people with complex needs experience.

In order to effectively meet the complex needs of disadvantaged groups, a holistic approach to legal service delivery is advisable. Often, disadvantaged people are experiencing multiple needs simultaneously, and in practice these issues cannot be addressed in isolation as legal issues cut across jurisdictions, ie: child protection issues intersect with a wide range of other legal issues, both criminal (particularly family violence) and civil. The LIV’s analysis of the access to justice arrangements in Victoria therefore expands beyond Victoria and into the Federal jurisdiction of family law. It is hoped that this holistic approach will assist the State to work in collaboration with the Commonwealth Government to address the inconsistencies and gaps in the current system. A collaborative approach will ensure that successful evidence based programs retain funding and services can be integrated where possible.

The recommendations in this submission focus on improving the cultural competencies and responsiveness of the justice system. The LIV supports the use of culturally competent services and initiatives including the VALS, the Aboriginal Family Violence Prevention and Legal Service Victoria (FVPLSV) and the Victorian Koori Court initiative.

The Koori Court has had a positive impact on recidivism rates and has increased positive engagement with Koori people and the justice system. The LIV considers that future initiatives learn from and harness the qualities and characteristics of the Koori Court which has made it so successful. Some principles from the Koori Court that the LIV find to be particularly important in advancing Aboriginal peoples access to justice in Victoria are to:

- make court processes culturally accessible, acceptable and comprehensible to the Aboriginal community;
- reduce perceptions of intimidation and cultural alienation experienced by Aboriginal defendants;
- promote greater awareness in the Aboriginal community of their civil, legal and political rights;
- increase positive participation by Koori offenders and community;
- increase accountability of Koori community families for Koori offender;
- promote and increase awareness about community codes of conduct/standards of behaviour; and
increase Aboriginal community ownership by Koori offenders and community.\textsuperscript{151}

The LIV strongly supports the Victorian Government’s commitment to Aboriginal self-determination\textsuperscript{152} and reiterates that outcomes for Aboriginal people will “only improve once practical gains in Aboriginal self-determination about children and families are achieved”.\textsuperscript{153} The LIV recommends that Aboriginal self-determination must be at the heart of any reform to access to justice arrangements.

\textbf{Recommendation:}

14. That when considering any reform to access to justice arrangements that will impact upon the Aboriginal and Torres Strait Islander community, the government prioritises the community’s self-determination.

\section*{The need for culturally responsive systems}

\textbf{Non-Koori specific systems compound exclusion and disadvantage}

In 2010, FVPLSV surveyed Aboriginal women and children about their experience with the family law system to explore the reasons for the lack of engagement by Aboriginal communities with available legal services. The results of the survey found that the current early intervention and court services were generally regarded by Aboriginal people to be:

- Too formal and intimidating.
- Too complex and difficult to understand.
- “[T]oo difficult to challenge a lack of cultural understanding if they didn’t have Koori-specific process”.\textsuperscript{154} Early intervention services for Aboriginal families, need to be culturally aware and should ideally be (in Victoria) Koori-specific so that potential care arrangements for children and settlement options for parties meet the needs of the child and the family, which are intrinsically connected with their cultural needs. Without these measures, options and care arrangements are perceived as being assessed by “white middle class standards” and not suitable to meet their needs. Consequently Aboriginal people will continue to disengage with services and employ informal and community based means of resolving disputes. For vulnerable Aboriginal families with complex needs, who are at risk of family violence, informal processes are often not appropriate as such outcomes cannot adequately protect those in the family who are at risk.
- Inaccessible for disputes involving children as often an Aboriginal mother with the primary care of children who has fled a violent relationship will have limited or no

\textsuperscript{151} Rudolph Kirby, ‘Koori Courts, A View From Victoria’ Brisbane, 21-22 November 2007.
\textsuperscript{152} The Hon Natalie Hutchins, ‘Aboriginal Victoria to Advance Self-Determination’, (Victoria Government Media Release, 1 December 2015).
support, and no means to obtain child care arrangements to allow her to attend early intervention services or court hearings to resolve the dispute.

A recent review of families with complex needs examined common themes in the UK, Australia and Canada and noted that families with complex needs have difficulty accessing and engaging with services, compounding the risk that their difficulties become increasingly entrenched over time.

In the Australian context, the review explains that for Aboriginal families with complex needs, there is a need for culturally responsive and empowering approaches that are strength-based, family-centred and focus on building trust by working in partnership with Aboriginal families and facilitating the provision of culturally competent service providers/facilitators. The report noted:

Mainstream agencies can fail to provide the requisite culturally safe environment, knowledge and skill set to build trust and meaningfully assist Aboriginal parties. Without appropriate cross-cultural knowledge and communication skills, mainstream services may also fail to appreciate the complexity of Aboriginal parties’ experience of family violence which can lead to them losing hope in the system and disengaging from legal processes and early intervention services.

To facilitate vulnerable Aboriginal families’ better access to early intervention services, a holistic and integrated culturally responsive and Koori-specific early intervention service needs to be developed together with the Aboriginal community to meet the needs of Aboriginal families in Victoria. In approaching work with Aboriginal families with multiple and complex needs, research suggests that effective practices include:

- facilitating Aboriginal leadership and participation in the development, delivery and evaluation of services and programmes;
- building relationships of trust;
- providing strengths-based approaches that recognise and respect Aboriginal culture;
- supporting family and kinship structures; and
- facilitating capacity for partnerships and collaboration with mainstream organisations.

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Examples of culturally responsive service initiatives

Ultimately initiatives need to be developed in collaboration with local Aboriginal communities to ensure the services are responsive and appropriate to the cultural needs of the intended clientele. Examples of potential methods for building trust and strengthening relationships between ADR and legal service providers and Aboriginal communities may include:

- Ongoing cultural awareness (and family violence) training for legal service providers, including ADR service providers and related professionals, particularly for ADR services involving disputes about children. For example, the family law and child protection systems do not cater well for extended or fluid family arrangements which are important to Aboriginal families. In Victoria, a Koori-specific process could assist by providing a better understanding about how many Aboriginal families work and ensure that settlement options are “…not assessed [or seen to be assessed] by white middle class standards”. 158

- Employing Aboriginal and Torres Strait Islander family liaison officers and Family Consultants to facilitate timely engagement of culturally responsive servicing and support for Aboriginal and Torres Strait Islander families in resolving family law disputes. For example, Aboriginal consultants or liaison officers could assist ADR service providers by providing expert input to explore culturally appropriate potential settlement options and care arrangements for children that are responsive to the cultural needs of the child (in family law or child protection disputes) and the other parties. An Aboriginal consultant could also assist in explaining to Aboriginal parties what to expect as part of the ADR process and in doing so increase education about the process within the Aboriginal community and what could be achieved by accessing available services. The FVPLSV have suggested that Aboriginal consultants be engaged in screening and risk management processes. Once a person has stated they identify as Aboriginal or Torres Strait Islander, they should be given the option to a direct referral to an Aboriginal and Torres Strait Islander or other legal service provider to obtain legal advice prior to engaging with FDR. The latter suggestion arose from FVPLSV’s concern that Aboriginal clients may not challenge an assessment that a lawyer is not required when, in their experience, cases with Aboriginal families “are very complex and always require specific advocacy involving cultural considerations.”159

- Events and community participation by local legal and ADR service providers and related professionals. Local community engagement is extremely important as an indication of commitment to learning and cultural respect. FVPLSV noted that in 1998 Family Court judges and other staff visited Aboriginal communities as part of cultural awareness training and this was viewed as a positive start towards strengthening relationships between the Aboriginal community and the courts, increased awareness and education to the community about the role of the Court. This is a possible method by which local ADR providers could strengthen their relationship with Aboriginal people and build relationships of trust.

158 ‘Improving accessibility of the legal system for Aboriginal and Torres Strait Islander victim/survivors of family violence and sexual assault’ (Policy Paper Series No 3 of 3, Aboriginal Family Violence Prevention and Legal Service Victoria, June 2010).
• Enhanced collaboration and understanding between different agencies and service providers in responding more effectively to the needs of Aboriginal families with complex needs.

• Use of secondment programs. Another example of strengthening relationships reported by FVPLS is the use of seconded staff from Aboriginal organisations to mainstream legal services (e.g. a family lawyer from VLA is seconded to three rural FVPLS offices to provide family law assistance through the Aboriginal organisation). A similar secondment program may be useful in the ADR context to provide education about family law and other civil services in the Aboriginal community, improve the cultural awareness of the ADR providers and in turn strengthen the relationship between Aboriginal people and service providers.

• Expanding the existing Client Services Officer (CSO) and Local Justice Workers program employed by VALS to provide culturally appropriate support to communities. Investment in existing service deliverers would ensure a consistent approach which helps build trust within the communities. CSOs are members of the local Aboriginal and Torres Strait Islander communities. The CSO is a unique role that works with community members to assist and support them as they are processed through the criminal justice system. CSOs often work on the weekend, public holidays and get called in the middle of the night. They also do Prison Support Work as a part of their role at VALS. VALS employs Local Justice Workers to assist people on community-based dispositions from the Court to complete their orders. They work with Corrections Victoria to develop culturally responsive work programs, and liaise between Courts, Corrections and Police to support community members. They also assist with Sheriff’s Office matters, and can support community members in making payment arrangements, liaising with the Sheriff’s Office regarding outstanding fines and refer people for special circumstances applications, where appropriate. These community driven models could be expanded to ensure the services are responsive and appropriate to the cultural needs.

• Dedicated legal assistance field officers across the state. In February 2016, VLA announced a new senior role within the organisation that will create a team of three Aboriginal field officers who will work across the state to develop relationships with organisations that support Aboriginal people and communities with problems that arise from disadvantage. This is as a good example of an initiative to provide targeted, early intervention legal assistance for Aboriginal people and a more coordinated response between organisations.

There is strong support in the sector for both the Commonwealth and State governments to see culturally competent Aboriginal Controlled Organisations as a conduit for service delivery in the instances where those organisations may not be the primary service deliverer. For example, if VALS were adequately funded for CSOs, Aboriginal Liaison Officers may no longer be needed, either in courts or prison. Families would have continuity of their CSO across jurisdictions including but not limited to the Magistrates’ Court, Federal Circuit Court, Children’s Court, Victims of Crime Assistance Tribunal and the Coroner’s Court. VALS have reported that cross-jurisdictional continuity would achieve better outcomes. This is particularly because Aboriginal Community Controlled Organisations such as VALS are not attached to the machinery of government and so clients are more likely to tell them their problems without fear of repercussions.
In the LIV’s view, a key challenge is to establish a service system that strengthens the capacity for early intervention support services and the identification of Aboriginal and Torres Strait Islander families with complex needs before problems escalate. The current CSO service is a strong model, and to-date has had relative success. The LIV recommends that the CSO service is provided with continued support and further investment to increase its reach and impact. The CSO service would greatly complement a future ADR/FDR service by advising on culturally appropriate settlement options, assist in explaining what to expect as part of an ADR process, in doing do increasing education within communities about what can be achieved by accessing available services. An ADR/FDR service, supported by CSO staff, would improve timely access to culturally appropriate and integrated programs by facilitating the engagement with specialised family support services including counselling, court-based services, and intervention programs, especially for families with complex needs who are at risk of entering the child protection system.\textsuperscript{160}

**Recommendation:**

15. That Government supports and invests in the expansion of community driven early intervention support services, specifically the VALS Client Services Officer service, and draws on the principles underpinning the Koori Court in the delivery of services.

\textsuperscript{160} A promising reform agenda has been recently adopted by the Queensland Government which has committed to implementing the Stronger Families reforms and better support for vulnerable families and children. This initiative, inter alia includes an Aboriginal and Torres Strait Islander Service Reform Project, which aims to reduce the over-representation of Aboriginal and Torres Strait Islander children and families in the child protection system and see Stronger Families. See, *Stronger Families*, Queensland Government <https://www.communities.qld.gov.au/resources/gateway/stronger-families/key-reforms.pdf>.
Term of Reference 1: Information on legal assistance services

The availability of accessible information on legal assistance services is a particular challenge for Aboriginal people. As noted in the Productivity Commission’s Access to Justice Inquiry Report, not only is Aboriginal peoples’ access to justice made difficult by the multiplicity and complexity of their legal problems, but Aboriginal people also face significant barriers in accessing services to resolve their disputes.¹⁶¹ Common barriers experienced by Aboriginal people include the following areas.

Legal education

In 2013, the Australian Indigenous Legal Needs Project released a report on the Civil and Family Law Needs of Indigenous People in Victoria (ILNP report).¹⁶² The study revealed a significant lack of knowledge within Aboriginal communities on legal rights, the law and appropriate legal remedies, specifically with regards to family and civil law. As an example, the Access to Justice Inquiry Report noted: “Aboriginal people commonly view racial discrimination as just a ‘fact of life’, rather than something unlawful that gives rise to rights of redress.”¹⁶³ Having basic legal knowledge to identify a specific legal issue and associated right or responsibility, and being aware of the types of services available to assist in prosecuting these rights, is a crucial step in seeking services.¹⁶⁴

**Recommendation:**

16. That the government works with the Commonwealth government to increase funding of Aboriginal Controlled Community Legal Services to provide community legal education.

Communication

Communication barriers are a significant issue for Aboriginal peoples’ access to justice. Aboriginal people may experience language barriers, and are often misunderstood as legal practitioners rarely interpret specific meaning behind particular body language, which is an integral part of communication for many Aboriginal people.¹⁶⁵

In addition to language barriers, Aboriginal people are more likely to suffer socioeconomic-related afflictions that contribute to communication barriers, such as hearing loss and low

¹⁶³ (Productivity Inquiry Report, QIFVLS, sub. 46).
levels of literacy. These barriers are significant yet preventable. All Aboriginal people should be able to access culturally literate legal services and/or qualified interpreters.

As noted in the Access to Justice Inquiry Report, the shortage of interpreter services impacts on Aboriginal people across Australia. One of the challenges in addressing this shortage is the limited pool of individuals with the necessary skill set to provide interpreting. As identified in the PC report, unmet legal need of a minor nature can often quickly escalate into more serious and complex legal needs. Addressing communication barriers is crucial for Aboriginal peoples’ access to justice.

**Recommendations:**

17. That the government:
   17.1. identifies and addresses gaps in existing interpreter services for Aboriginal and Torres Strait Islander people in Victoria; and
   17.2. provides appropriate training and funding to ensure that these services act as communication assistants to overcome not only language difficulties, but also cultural misunderstanding.

**Socioeconomic disadvantage and geographic isolation**

Socioeconomic disadvantage among Aboriginal people is widespread. Disadvantage is often cumulative, meaning that people who experience one form of disadvantage often experience another kind of disadvantage. Socioeconomic disadvantage is strongly linked with geographic isolation, which in itself acts as an additional barrier in access to justice.

Evidence indicates that regional applicants and respondents are less likely than their metropolitan counterparts to take legal action, or to consult legal advisers when they do take action. The ILNP report identifies serious gaps in legal services in the civil and family law area, and this gap is even more pronounced in regional Victoria. Of particular concern is the Melbourne-centric focus of legal service delivery and funding. For example, at the time of the ILNP research, VALS had funding for one civil lawyer who was required to service the entire State of Victoria while based in Melbourne.

**Recommendation:**

18. That the government increases funds for service delivery to Aboriginal communities in regional areas, specifically in the areas of civil and family law.

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Historical context and relationships

Another significant barrier, although less tangible, is the context of Australia’s colonial history and the deep mistrust and fears of some people in Aboriginal communities towards the Australian legal system, and more broadly, government in general. For many Aboriginal people, traditional lore and custom continues to be a controlling force in their life.\(^\text{170}\) This can be contrasted with their experience of the Australian legal system, which for many Aboriginal people is comparatively new and externally (and forcibly) imposed. The Judicial Council on Cultural Diversity put to the Productivity Commission Access to Justice Inquiry that “[t]he imposition of colonial law and the dismantling of Indigenous ‘Lore’ has resulted in significant mistrust of the legal system by many within Indigenous communities across the country.”\(^\text{171}\)

For many Aboriginal people, the Australian legal system is synonymous with deaths in custody, the removal of children and incarceration. Some of the fears faced by Aboriginal communities include:\(^\text{172}\)

- That they will not be believed, understood, or will be judged or treated unfairly by a service provider because they are Aboriginal. This extends beyond language and communication barriers and includes issues arising from a lack of understanding about personal and cultural factors (e.g. shame, guilt and fear) by a service provider that may cause an Aboriginal person to not engage with services.
- That a child may be removed from the community.
- That there will be repercussions or retaliation from members of the community for their having engaged with external service providers (services which have been externally imposed on them and with which they have not contributed to the development of) or by reporting family violence or child abuse to authorities.
- That they will be perceived and treated as guilty and therefore will feel they are unable to exercise their legal rights and protections. For example, there is often confusion about legal rights during interviews and investigations.
- That they need to protect perpetrators due to the high numbers of Aboriginal deaths in custody.
- That they need to leave their community to access necessary services, affecting Aboriginal people in geographically remote and isolated communities.

Aside from the barriers of language, communication and geographical isolation as noted above, this deep seated fear and mistrust of Aboriginal people towards the government and service providers creates additional barriers. Fear and mistrust affects how external


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services, for example, ADR, are viewed which directly impacts on the uptake of those services by that community. 173

**Example: how mistrust affects the uptake of services in the family law/child protection arena**

In all parts of Australia, including Victoria, Aboriginal children are overrepresented in state child protection systems. Statistics indicate that Aboriginal children are 6 times more likely to be removed by child protection than non-Aboriginal children. Across Australia, Aboriginal children are 7 times more likely than non-Aboriginal children to have been found by child protection authorities to have been harmed or to be at risk of being harmed (harm in this context includes abuse, neglect or otherwise physical, sexual or psychologically harmed).

The federal family law system provides mechanisms for any persons concerned with the care and welfare of a child to be able to apply for orders relating to the parental responsibility and/or care arrangements for that child. This includes applications by non-parent carers or anyone concerned with the safety and well-being of the child for temporary placement within a kinship community when the child’s parents are unable (even temporarily) to meet the needs of the child and/or where the child may be exposed to family violence or harm by staying with the parents. While the federal family law system provides this mechanism, historically, it has not been accessed by Aboriginal families who remain underrepresented in the federal family law system.

In 2012, the Commonwealth Family Law Council released a report examining the reasons behind the limited uptake of family law services by Aboriginal communities. The report found that the main reasons included a lack of understanding about the family law system, resistance to engagement arising from the painful history of forced removal of children and non-voluntary engagement with criminal justice and child protection agencies, as well as the lack of culturally responsive services – services that operate in a way that supports and affirms Aboriginal cultural identity.

Factors that have been identified by FVPLSV in Victoria that impact on the cultural responsiveness of services include physical environments and mode of service delivery; knowledge, understanding and respect for local cultural norms relating to gender, role of community members and Aboriginal concepts of family and kinship (based on collectivist principles) and methods of communication (verbal and non-verbal); and the number of Aboriginal people working or connected with the provision and/or development of the service.

In short, the report found that many Aboriginal people did not regard the federal family law system and services as a place for them to seek help. The limited uptake of this federal legal option has ramifications for the state system as the same vulnerable children who

could have been the subject of orders that they be cared for by a member of their kinship community end up in the state child protection system, where there is an preference, pursuant to the Aboriginal Child Placement principle, for them to be placed where possible within their kinship community. Improving the uptake of federal family law services for Aboriginal families would reduce the involvement of child protection authorities.

**Cultural awareness training and protocols**

It is clear that there is an urgent need for government, the legal profession and non-legal service providers to develop stronger and healthier relationships with Aboriginal and Torres Strait Islander communities to develop and deliver culturally responsive services and improve the uptake of such services, resulting in an increase in access to justice for Aboriginal people in Victoria.

Healthy relationships begin with cultural understanding and strong communication. Sadly, there is a general lack of cultural awareness in the broader community of Aboriginal culture. This is particularly problematic for those that deliver important services such as legal advice. For those lawyers who identify the benefits of enhanced cultural awareness, there are a limited number of cultural awareness training service providers (e.g. Intouch Multicultural Centre Against Family Violence and Centre for Cultural Competence Australia) which provide generalised cultural training. While very informative and useful as a starting point, there is a need for further training for lawyers and others in the service delivery to undertake cultural awareness training (and workshops) specifically targeted in their area of practice and their geographic area. For example, an Aboriginal mother who has been subjected to family violence and who attends a non-culturally responsive ADR service may not disclose (or fully disclose) details of the family violence to which she and the children have been exposed. In a paper on improving the accessibility of the legal system, the FVPLSV noted that comments made to their lawyers by Aboriginal women clients about this practice included:

- “I was not asked about it so didn’t think it was right to bring it up.”
- “It would have been a shame job telling the white lady about my problems.”
- “I didn’t want her looking down on me and thinking I’m a bad mum because he bashed me.”
- “I didn’t want him to think I was trashing their dad by bringing it up.”

A legal or justice representative who lacks an understanding of the customs and cultural practices of the Aboriginal communities in their local area may inadvertently contribute to the fear and mistrust experienced by Aboriginal people and their involvement with the legal system as a whole. This may cause that person, and others influenced by that person’s

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experiences, to disengage from the legal system and the available services, placing more people and children at risk.

Following on from the family law example referred to above, a lawyer who has an understanding of Aboriginal kinship norms and of local lore and customs regarding child rearing practices is likely to be much more effective at engaging their Aboriginal clients with culturally appropriate services.

In the LIV’s view, to address these issues a cultural awareness training program for lawyers is urgently needed to improve the understanding and communication skills of the profession and for those involved in early intervention services. This proposal is supported by the VLAF Indigenous Working Group, which consists of a number of community legal service organisations including VALS, FCLC and VLA.\textsuperscript{175}

It is important that this training not be limited to lawyers at VLA and CLCs but be extended to all members of the legal profession and related service professionals to ensure that all legal services, including ADR and early intervention services, are culturally responsive. The LIV recommends a cultural protocol be developed alongside a training program that replicates the Law Society Northern Territory Indigenous Protocols for Lawyers (the NT Protocols).\textsuperscript{176} The NT Protocols came about after consultations with Aboriginal organisations and the legal profession in the Northern Territory. The NT Protocols have had a significant impact on how non-Aboriginal lawyers in the Northern Territory communicate with their Aboriginal clients which is essential for lawyers to meet their professional and ethical obligations.

\begin{center}
\textbf{Recommendation:}
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22. That the government supports the LIV working with the Victorian Aboriginal Legal Service (VALS) to develop and promote a Continuing Professional Development program (CPD) on Victorian cultural awareness training and a cultural protocol for non-Aboriginal lawyers, specific to areas of practice where possible.

\textsuperscript{175} Victorian Legal Assistance Forum, Victorian Legal Aid http://www.vlaf.org.au/cb_pages/indigenous_working_group.

Terms of Reference 3: ADR

There are no culturally appropriate ADR services in Victoria for Aboriginal people

There are no culturally appropriate ADR services for civil matters in Victoria for Aboriginal people. There are individual practitioners providing culturally sensitive ADR services, but there is no Aboriginal-specific ADR service. Aboriginal-specific ADR services exist in other States, such as the Aboriginal Mediation Service in Perth; however, this service operates on a small scale. The evidence suggests a need for culturally appropriate mediation services in Victoria.

Different models of mediation should be considered in Victoria, such as the Family Relationships Centre in Alice Springs and the Model of Practice for Mediation with Aboriginal Families in Central Australia, which runs Territory-wide. The ADR programs offered by Native Counselling Services of Alberta, Canada, should also seriously be considered, as they offer an excellent model of Family Group Conferencing, among other culturally appropriate programs for Aboriginal people. These models could be applied in a range of civil law contexts, such as small civil claims and child protection disputes.

An illustration of the benefit of culturally appropriate mediation services in Victoria, and how it can improve access to services, can be found in the family law experience. Generally speaking, private family law mediation usually involves only the parties to the litigation (usually the parents) with their lawyers and the mediator. Other family members are usually not allowed to participate and are often explicitly or implicitly excluded, unless they are parties (or anticipated parties) to the proceedings, or both parties consent. A grandmother might attend the mediation to support her son, but be told she has no right to speak during the mediation. This practice does not reflect the concepts of kinship that are critical to an Aboriginal person’s sense of family and identity. VLA’s Family Dispute Resolution Service (FDRS) has improved by recognising the need to involve extended family members, not just for Koori families but in general, even when they are not parties or no specific order is being sought by a party for the child to spend time with them.

The LIV recommends that any proposed ADR service allow for interviews and an on-site visit by the mediator. Too often interviews happen from Melbourne and over the telephone which can often be very difficult for Aboriginal people for a number of reasons, some of which are outlined above. ADR services need to employ people across Victoria and base more ADR services in regional areas to ensure necessary support for participants to engage in the process.

Access to ADR/FDR for vulnerable Aboriginal families with complex needs at risk of family violence is needed

The LIV has made many recommendations in relation to improving how federal family law and state family violence and child protection systems interact as part of the Commonwealth ongoing consultation papers examining federal responses to families with complex needs.\textsuperscript{178} As noted in the introduction, it is important that these systems are approached holistically to better address the often complex needs of families, particularly those at risk of family violence. Early intervention through ADR can help to address those multiple needs in a holistic way.

It is not unusual for parties who have been exposed to family violence and abuse to not engage with the justice system so as to minimise ongoing trauma. If these parties do engage, they often do not fully disclose the extent of the family violence as a coping mechanism.

For Aboriginal and Torres Strait Islander families, the difficulties are compounded by the lack of culturally responsive service providers and the lack of specific awareness of Aboriginal culture in the legal profession and related early intervention services (ADR and FDR). The LIV proposes that effective mediation models will need to be Aboriginal community controlled and owned. ADR could become the link between formal legal systems and community to create as many opportunities as possible to divert away from formal court processes.

\textbf{Recommendations:}

23. That the government work with the Victorian Aboriginal community to develop Aboriginal-specific ADR services (including family dispute resolution services), similar to those used in the Northern Territory.

24. That Aboriginal-specific ADR services should be based in regional areas (such as Shepparton, Mildura, Sale, Wodonga and Warrnambool), as well as metropolitan areas.

\textsuperscript{178} See eg, Law Institute of Victoria, Attorney General Family Law Council, \textit{Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems, 6 May 2015.}
Terms of Reference 4: VCAT

VCAT Koori list for tenancy matters

The LIV has previously made submissions in support of courts that set up lists to manage their workflow as it allows judges to specialise in areas of law and makes more efficient use of the limited resources that community legal services possess. The ILNP report and PC report both highlight a major gap in service provision in Victoria for the non-criminal legal needs of Aboriginal people. The reports identified tenancy matters such as repair and maintenance, rent, overcrowding and eviction, as a key unmet legal need in Victoria. The VLAF Indigenous Working Group, which comprises representatives from the main legal assistance providers in Victoria including the LIV, has identified the need for a VCAT Koori List for tenancy matters. A Koori List will enable service providers to appoint a duty lawyer that is skilled in working with Aboriginal clients. The LIV notes that the commencement of the Koori List of the Victims of Crime Assistance Tribunal (VOCAT) has had great success in improving “the user friendliness and the responsiveness of the state legal system”.179

Recommendation:

60. That VCAT create a Koori List for tenancy matters to ensure the availability of culturally competent duty lawyers.

Better access to VCAT

In June 2015, VCAT launched its Koori Inclusion Action Plan aimed at improving the way VCAT provides services and engages with the Koori community at VCAT. As part of this, VCAT should adapt its model to take more time per matter, provide opportunity for discussion to engage the client, or at least explain what is being said particularly to members of the Koori Community who are unrepresented. Aboriginal Liaison officers should also be a priority.

Recommendation:

61. That VCAT adapt its Koori Inclusion Action Plan to allow more time per matter and to provide opportunity for discussion with the client.

179 Aboriginal Family Violence Prevention and Legal Services Victoria, Submission No 99 to Productivity Commission, Inquiry into Access to Justice Arrangements, November 2013, 8.
The National Partnership Agreement on Legal Assistance Services and the needs of disadvantaged Victorians, including Victorians from an Aboriginal and Torres Strait Islander background

Aboriginal custody rates in Victoria have more than doubled in the past decade. As a result, culturally appropriate services such as VALS have been unable to meet the continued demand. For example, VALS was forced to freeze its intake of new criminal law clients for an entire month in October 2015. While the Victorian Government’s $900,000 funding boost to VALS in July 2015 was welcomed, the increasingly high demand for legal services means that further investment is required to sustain the services VALS provides.

Inadequate funding of Aboriginal legal services, federal cuts and funding uncertainty undermine the efforts and investments already made in delivering culturally sensitive legal assistance to Aboriginal people. There needs to be stronger collaboration between the Commonwealth government and the states to promote cohesion of culturally responsive programs, funding, and the collection of data to ensure evidence based policy and law reform. Between 2009 and 2011, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs conducted an inquiry into the over-representation of Indigenous young people in the justice system and found that while the development and administration of criminal justice policy is the responsibility of the states:

A national approach is required to address the causes of young Indigenous people coming into contact with the criminal justice system. Overcoming Indigenous disadvantage is both a national responsibility and a significant national challenge … Currently this national approach is represented by the [COAG’s] Closing the Gap program of generational change … Indigenous rates of offending, incarceration, recidivism and victimisation are alarming. It is essential that reducing these rates is realised as a national target, and that the appropriate agreement is in place to direct coordination across levels of government to most effectively target intervention strategies. 180

The LIV urges the Victorian Government to call upon the Commonwealth government to make an ongoing commitment to fund Aboriginal Community Controlled Legal Services to continue delivering culturally competent services.

Further, the LIV urges the Victorian Government to match the funding of the Commonwealth government, particularly in the criminal jurisdiction because it is the States that are responsible for the majority of the criminal law contributing to the disproportionate over-representation of Aboriginal and Torres Strait Islander peoples.

Recommendations:

76. That government, together with the Commonwealth government, provides additional funding to service providers such as VALS and the Family Violence Prevention Legal Service (FVPLS) to ensure uninterrupted access to culturally appropriate services for Aboriginal and Torres Strait Islander peoples in Victoria.

77. That the government makes a proposal to Council of Australian Governments (COAG) to:
   77.1. develop a national ‘justice target’ to reduce Aboriginal and Torres Strait Islander peoples’ rates of offending, incarceration, recidivism and victimisation,
   77.2. develop an agreement to direct coordination across levels of government to most effectively coordinate culturally appropriate strategies, and
   77.3. improve data collection on imprisonment across jurisdictions.

3. Prohibitions on advocacy

The relationship between government and the not-for-profit (NFP) sector has important implications for the most vulnerable members of our society, especially in relation to the delivery of services by Legal Aid Commissions, CLCs, FVPLS and Aboriginal and Torres Strait Islander Legal Services. These service delivery organisations have the on-the-ground experience to inform government of the impact of key public policy decisions. They are able to quickly identify systemic issues that emerge from their day-to-day casework that create barriers to accessing justice.

The prohibition on advocacy in the National Partnership Agreement on Legal Services impedes the ability of service delivery organisations to inform government decision makers of systemic issues. The LIV is concerned that the Commonwealth government’s decision to limit the voice of CLC’s in public debate will diminish the quality of the public conversation on a myriad of different law reform issues. As a result, discriminatory or ineffective laws may not come to light. This prohibition therefore reduces the effectiveness of those decision makers to formulate, adopt, implement, evaluate, or change policies to improve equality and social justice outcomes for Aboriginals and Torres Strait Islanders and other vulnerable minority groups.

To ensure that systemic barriers to access to justice are quickly identified and addressed by policy makers, the LIV urges the Victorian Government to call upon the Commonwealth government to remove the prohibition on advocacy from the National Partnership Agreement.

Recommendation:

78. That the government calls upon the Commonwealth government to remove the prohibition on advocacy in the National Partnership Agreement on Legal Assistance Services.
Introduction: Access to justice for asylum seekers

On 5 December 2014, the Commonwealth parliament passed the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014. The new laws introduce key changes to the Migration Act 1958 (Cth), including removing permanent protection for boat arrivals, and introducing a new fast track refugee assessment process with no access to the Refugee Review Tribunal. The changes provide access for some asylum seekers to a limited review process under a new body, the Immigration Assessment Authority (IAA).

On 31 March 2014, the Commonwealth government announced the removal of all funding for people arriving in Australia without a valid visa, including arrivals by boat. The LCA opposed the removal of funding from the Immigration Advice and Assistance Scheme (IAAS). Until its removal, limited forms of migration and legal assistance were available to asylum seekers in Australia. The LCA has said that it considers the IAAAS to be a necessary measure to protect and promote the rule of law. The LCA also said that IAAAS was a mechanism that would help ensure that the fast track assessment process operated effectively, particularly given the complexity of the legislative reforms.\(^{181}\)

The LIV strongly opposed the removal of IAAAS funding, and wrote to the Minister for Immigration and Border Protection in a letter on 27 April 2015 to call for its reinstatement, saying in part:

> The funding cut means that asylum seekers, who are some of the most vulnerable people in our community, are not able to access independent legal representation. This undermines the fairness of Australia’s refugee processes and places additional burdens on organisations providing pro bono assistance, as well as the judicial system as a whole.

> The IAAAS was an important measure to promote the rule of law by providing for some limited funding for Australian lawyers and migration agents to provide limited assistance to asylum seekers to enable them to prepare their claims for refugee status or other protection.\(^{182}\)


Funding is now provided only to a small percentage of asylum seekers who are assessed to be particularly vulnerable, through a system known as Primary Application Information Service (PAIS). The Department of Immigration and Border Protection (DIBP) expected that around 20% of the group of people who arrived by boat between 13 August 2012 and 1 January 2014 would be referred for assistance through PAIS.\(^{183}\)

According to the Guidance a person may be eligible for PAIS if they are an unaccompanied minor at the time of assessment for PAIS eligibility, or assessed as being exceptionally vulnerable. However even if an adult is assessed as exceptionally vulnerable, they are excluded from PAIS if at the time of the assessment they have engaged a migration agent for assistance in relation to a visa application.\(^{184}\)

In the absence of IAAAS funding, the vast majority of asylum seekers to whom the ‘fast track’ system applies are left without funded legal representation, and are reliant on pro bono legal services or having to traverse the system on their own. Victorian legal assistance sector has responded to fill the gap.

Asylum seekers subject to the fast-track system are known as the ‘Legacy Caseload’. There are an estimated 30,000 asylum seekers in the Legacy Caseload cohort; approximately 11,000 of these reside in Victoria.

The LIV believes the Commonwealth cuts to legal aid funding for asylum seekers is a false economy. The Commonwealth government has effectively shifted the costs on to the Victorian legal assistance sector. In responding to the immediate legal needs of the Legacy Caseload, the Victorian legal assistance sector has contributed significant funding and pro bono/voluntary work to provide legal services to asylum seekers. The resources of the Victorian legal assistance sector are finite. Inevitably, shifting the costs of legal assistance to Victorian services reduces the resources available for other Victorians seeking legal assistance. Consequently, a policy change that may appear at first instance to concern only the Commonwealth jurisdiction, has in fact had an adverse impact on Victorians’ access to justice. For this reason, this submission considers the legal needs of the Legacy Caseload and asylum seekers generally.

The LIV has noted that the withdrawal of funding also impacts on the judicial system:

> The withdrawal of this funding, and the inevitable increase in asylum seekers presenting their claims without legal assistance or representation, also places a greater burden on the judicial system as a whole. As noted above, when applicants do not have legal assistance, they will find it difficult to clearly outline their claims and raise important issues in a timely fashion. It also means that resolution of the matter or parts of the matter is likely to occur later on in the process than if both parties were represented. It is more difficult for decision-makers to discharge their obligation to give a party procedural fairness when that party is


\(^{184}\) Ibid.
unrepresented and, furthermore, does not speak English and may have limited education. This leads to a greater use of court resources. Reinstating funding for legal assistance for asylum seekers would minimise this extra burden on the already stretched resources of the judicial system.¹⁸⁵

In making this submission, the LIV urges the Victorian government to hold the Commonwealth government to account for the cost of its policies regarding asylum seekers, and to fund legal services for this group appropriately, in accordance with the Commonwealth’s international obligations.

The legal needs of the Legacy Caseload and asylum seekers are substantial. The consequences of a lack of legal assistance and representation are generally severe. Asylum seekers in Australia face a range of obstacles to accessing justice. They experience severe difficulties accessing assistance from Victoria migration agents, lawyers and barristers to represent them in applications for protection, and obtaining access to tribunals or courts to apply for review when these applications are refused.

It is the LIV’s view that in order for asylum seekers to have genuine access to justice, they require appropriate access to free or low-cost legal assistance to support them in making applications for protection visas, to protect their rights and to ensure that their best interests are served.

CLCs in Victoria that provide free advice and assistance for asylum seekers are struggling under the current demands for legal assistance, and require better resourcing to do this effectively. VLA and pro bono migration law firms are also experiencing high demands on their services, which has a flow on affect for services available for the Victorian community.

Term of Reference 1: Information on legal assistance services

Current Commonwealth government policy to cut funding for legal assistance for asylum seekers has significantly diminished asylum seekers’ access to justice. As discussed above, a limited number of asylum seekers with particular vulnerabilities as assessed by the DIBP are able to access free legal advice from lawyers/migration agents through PAIS. The remainder must rely upon free assistance from under-resourced CLCs, government-published guides, information distributed by CLCs and migrant resources centres and others, and in some cases the assistance of community volunteers to fill in forms, or pay for representation by a private legal practitioner or agent if they can afford to do so. These services are primarily provided by the Victorian legal assistance sector. Given the particular vulnerabilities experienced by asylum seekers and the difficulty and complexity of the process of applying for a visa under the Commonwealth law, this is insufficient to meet the needs of most asylum seekers.

Government-funded legal assistance for asylum seekers

Asylum seekers who arrive in Australia with a valid visa (i.e. airplane arrivals), and meet specific eligibility criteria with respect to disadvantage, continue to have access to government-funded legal aid under the IAAAS. Registered migration agents or officers of legal aid commissions provide this assistance. The IAAAS scheme provides ‘application assistance’ for the completion and lodgement of asylum applications and ‘legal advice’ for visa applications which applies to the initial application stage, but not for merits or judicial review.186

Asylum seekers arriving without a valid visa do not have access to IAAAS funding as of June 2015. The assistance and advice provided under the IAAAS was replaced with Protection Application Information Guides, which provide instructions on making applications and assessment processes in various languages.187 Government-funded assistance is provided to a small number of the most vulnerable asylum seekers (such as unaccompanied minors and adults with intellectual or cognitive disability, mental illness or other incapacitating health conditions) under PAIS but this is limited to very few individuals who are judged by the DIBP to be ‘exceptionally vulnerable’.188

186 Department of Immigration and Border Protection, Fact Sheet – Immigration Advice and Application Assistance Scheme (IAAAS).
Lack of other services

Many asylum seekers in Australia are unable to access private representation as they are often on Bridging Visas with no work rights, or are in detention and unable to work, and so cannot afford private representation. Moreover, access to community-based or pro bono legal assistance in immigration matters is limited due to a number of factors, including the dual regulation of migration lawyers that prevents lawyers from providing legal advice about migration matters without also being registered as a migration agent, and the abolition of federally-funded legal assistance through IAAAS.

In Victoria, the only services that offer free immigration advice and assistance for asylum seekers are Migration Team at VLA, Refugee Legal (formerly the Refugee and Immigration Legal Centre) and the Asylum Seeker Resource Centre (ASRC). Since IAAAS funding was abolished, the LIV is advised that these centres have experienced an exponential increase in demand, due to the numbers of unrepresented asylum seekers subject to the ‘fast track’ system (discussed below), which they are struggling to meet. Another factor is the general chronic underfunding of CLCs. Government inquiries into CLCs have repeatedly shown that their funding does not meet the demand for services. The annual reports of CLCs for the 2013-14 period show that over 150,000 Australians are turned away by CLCs each year due to lack of funding; although the total figure is actually much higher as this only includes the 75% of legal centres who were able to report figures.

‘The ‘fast track’ process and the importance of legal assistance

As noted above, there are an estimated 30,000 members of the Legacy Caseload group subject to the fast-track system in Australia. The fast-track refugee processing system involves substantially reduced review rights with greater Ministerial discretion at the primary decision-making level, and a limited ability to introduce new material following the initial assessment. Fast-track applicants (as are all applicants for protection visas in Australia) are required to fill out more than 60 pages of forms including more than 180 questions. The difficulties and legal complexities of the fast-track system, combined with the removal of independent merits review by the tribunals of these decisions, makes it much more difficult for asylum seekers to access a fair procedure without the assistance of a legal representative.

The lack of funding assistance leaves vulnerable people with the difficult task of finding their way through a legally complex system on their own. The CEO of Refugee Legal,

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189 LIV 2015 ‘Call for Reinstatement of Legal Representation Funding for Asylum Seekers’ Letter Apr 2015
192 LIV 2015 ‘Call for Reinstatement of Legal Representation Funding for Asylum Seekers’ Letter Apr 2015.
David Manne, warned at a recent LIV event that asylum seekers, who are expected to complete at least 62 pages of forms with 180 questions about their life and then make a detailed submission about their fears of serious harm, all in English and without legal assistance, will face extreme difficulties.\textsuperscript{194} Given the vulnerability of asylum seekers, their lack of English literacy and knowledge of Australian laws, which makes it difficult to establish the relevant information at the time of the initial decision, it is likely many will not be able to adequately complete this within the expected time frame of 28 days without assistance. Further, given the restriction on introducing new evidence after an initial application, it is highly unlikely that many of these applicants will receive a fair and accurate decision.

In the LIV’s view, there is a significant risk that the combination of the lack of legal assistance funding and the increased burden on applicants in the fast track process to demonstrate their claims fully at the beginning of the process, will result in many asylum seekers failing to clearly articulate their claims - therefore those with genuine claims may be returned to their country of origin where they may face a real risk of serious harm.\textsuperscript{195} This would constitute a breach if the non-refoulement principle, one of the foundational rights protected in the Refugees’ Convention.\textsuperscript{196} The Parliamentary Assembly of the Council of Europe has found that it is particularly important to provide all asylum seekers under accelerated procedures with not only a personal interview in a language they understand, but also free legal aid at the first instance hearing and throughout appeal processes.\textsuperscript{197} The LCA views legal assistance and advice should be provided to all asylum seekers, particularly for those falling under the fast-track process, as a necessary means of ensuring that the rule of law is upheld, the fairness of the procedures is maintained and that Australia does not breach its non-refoulement obligations.\textsuperscript{198}

Refugee Council of Australia (RCOA) President, Phil Glendenning, has stated that the fast track changes put the most vulnerable asylum seekers at the greatest risk, as they are the ones most likely to be unable to navigate the legal system without the assistance of the IAAAS providers. The LIV shares LCA’s and RCOA’s concern about the combination of fast-track system and the removal of IAAAS funding. The LIV also sees this as likely to lead to increased chances of refoulement.\textsuperscript{199} Kon Karapangiotidis, CEO of the ASRC, has publicly voiced similar concerns, while the Kaldor Centre for International Refugee Law

\textsuperscript{194} Manne, David, 2015, speech at LIV Young Lawyers event ‘What can Lawyers do to assist refugees’, 2015.
\textsuperscript{195} Law Council of Australia 2014 ‘Submission on the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014’ submission.
\textsuperscript{196} Ibid 32 [121].
\textsuperscript{197} European Council on Refugees and Exiles Survey on Legal Aid for Asylum Seekers in Europe, (Oct 2010), 14; Council of Europe, Parliamentary Assembly, Report Committee on Migration, Refugees and Population, Accelerated Asylum Procedures In Council of Europe Member States, Doc. 10655, 2 August 2010. See also Council of Europe, Parliamentary Assembly, Resolution 1471(2005), Accelerated Asylum Procedures In Council of Europe Member States, para. 8.10.2.
\textsuperscript{198} Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, 25 [87], 31 [116]-[117], 32 [123].
\textsuperscript{199} LIV 2015 ‘Call for Reinstatement of Legal Representation Funding for Asylum Seekers’ Letter Apr 2015.
has repeatedly stated that legal assistance is necessary to prevent a breach of Australia’s non-refoulement obligations.\textsuperscript{200}

The British High Court has found a similar fast-track system in the UK to be unlawful because it involved an ‘unacceptable risk of unfairness’.\textsuperscript{201} The UK Parliament’s Joint Committee on Human Rights found it was clear that some asylum seekers, particularly those who had experienced torture or sexual abuse, would be unlikely to be able to reveal the full extent of their experiences to the authorities within the period of time allowed, and these revelations would be especially difficult where they were not able to access legal advice and representation.\textsuperscript{202} The Committee recommended that free legal advice should be provided to applicants falling under the fast-track and super fast-track processes.\textsuperscript{203}

Therefore, while there are serious questions around the legality and justice of the fast-track system as a whole, as long as it remains in place it is important for the maintenance of the rule of law, for meeting Australia’s international obligations, and for promoting efficiency and fairness, that the provision of legal assistance to asylum seekers who lack the means to provide for their own assistance be reintroduced. In the LIV’s view fully-funded legal assistance should be provided to all asylum seekers in the application process in Australia for a protection or safe haven visa.

**Recommendations:**

79. That the Commonwealth government properly fund a full IAAAS scheme, in particular for those subject to the fast-track scheme, to ensure access to justice for asylum seekers.

80. That the government approach the Commonwealth government in relation to the above funding.

81. That the government works with the Commonwealth government to ensure the appropriate funding of CLCs, VLA and other community groups, including Migrant Resource Education Centres and the Red Cross, so that they have the resources to continue to support this client group.

\textsuperscript{200} Kaldor Centre for International Refugee Law Factsheet – Legal Assistance for Asylum Seekers, 30 Nov 2015, 3
\textsuperscript{201} Detention Action v Secretary of State for the Home Department [2014] EWHC 245 (Admin) [220]-[221].
\textsuperscript{202} Joint Committee on Human Rights, (2007) Joint Committee on Human Rights - Tenth Report [226]
\textsuperscript{203} Joint Committee on Human Rights, (2007) Joint Committee on Human Rights - Tenth Report [228]
Term of Reference 2: Diversion and triage

It is extremely difficult for asylum seekers to act without legal assistance; this has been recognised by legal practitioners, human rights bodies and empirical studies. In the broad context of civil disputes lawyers support the efficiency of the legal system. In the context of asylum seekers, lawyers provide an important ‘triage’ service, which improves the efficiency and effectiveness of the application process. \(^{204}\) They achieve this in a number of ways as discussed below.

Efficiency and access to legal assistance – asylum context

The LCA and the LIV have strongly advocated in the past for the provision of legal assistance to appellants to reduce the time taken for judicial review proceedings and contribute to the efficient operation of the courts. \(^{205}\) Legal advice and counselling are acknowledged to play an important role in establishing relationships founded on trust between an asylum seeker and the authorities, which can contribute to overall efficiency. \(^{206}\) The absence of legal assistance for asylum seekers results in an increased burden on immigration officials, as on their own, asylum seekers are frequently unable to present their claims clearly or in the appropriate form, and are more likely to bring unmeritorious claims.

When legal advisors are involved they are able to prevent unmeritorious claims being brought by advising against bringing claims they know are without merit, \(^{207}\) and they are also able to help asylum seekers to understand the law, what evidence is required and to draw this out and then present this in an appropriate and coherent format. \(^{208}\) The LIV has been informed anecdotally that Department of Immigration and Border Protection officers are spending more time conducting longer interviews with asylum seekers in order to assess claims, because applications lack essential details due to asylum seekers’ inability to prepare them unrepresented.

There is also a greater burden on the courts. In the absence of legal advice, asylum seekers frequently fail to meet deadlines for merits review, such that they are forced to rely on judicial review. Because they are likely to struggle to get legal representation the


\(^{205}\) LIV New Protection Obligations Determination Process and Split Family Applications (2011) submission.


\(^{208}\) Law Council of Australia ‘Supplementary Submission on the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) 2014’, 2.
judicial review hearing is likely to be delayed, such that there are increased numbers of applications for urgent injunctions.\footnote{Submission on the Migration Maritime Powers Amendment Bill (No. 1) 2015 [28], [34]; LIV Memo Migration and Maritime Powers Amendment [31].}

Legal representation in court matters enables the court to conduct an efficient and fair hearing; the absence of legal representation is likely to result in a longer hearing, which places a greater time and resource burden on the courts.\footnote{Doyle, J. 2013 ‘Are lawyers part of the solution or part of the problem?’ Bulletin (Law Society of SA) 35 (10) November 2013 18, 18-19.} Therefore, it is clear that legal representation improves the efficiency of the court system and saves on costs to the state.\footnote{Ibid 19.} There is also the issue of the cost of detention for those asylum seekers who are detained while their claims are processed; extra time in detention is costly to the government.\footnote{Eagly, I. and Shafer, S. 2015 ‘A National Study of Access to Counsel in Immigration Court’, 164 University of Pennsylvania Law Review 1, 60.} Given that providing legal advice to asylum seekers from the beginning saves time, such provision would save significant resources expended on detaining individuals.\footnote{Ibid.}

Due to the issues with inefficiency, delay and uncertainty created by the process, even when claims are finally settled, the well-being of asylum seekers is affected by prolonged detention resulting from a lack of legal assistance. On the other hand, early legal advice can decrease the time spent in detention and alleviates some of the stress and anxiety associated with the application process.\footnote{LIV 2009 Inquiry into Immigration Detention in Australia submission.} Such inefficiencies and delays have resultant social and economic costs including the financial cost of keeping asylum seekers in detention and the cost to the community arising from the need to provide medical and psychological counselling services and medications, if they are later accepted as refugees.

\textbf{Quality legal representation and the IAAAS}

Refugee or immigration law specialists are able to distil key aspects of their client’s claim in pleadings, and advise clients of the processes and outcomes of a matter. They save courts significant time and resources that would otherwise be spent preparing for and running hearings in a manner that keeps the unrepresented litigant aware of the process and possible outcomes. Refugee specialists are also able to improve the efficiency of court process because they are experts in the legal issues involved, the challenges that their clients are likely to face and how best to resolve these. In general specialist lawyers are more likely to be able to establish the required evidence as a result of their experience and knowledge.\footnote{Miller, Keith and Holmes, ‘Levelling the Odds: The Effect of Quality Legal Representation in Cases of Asymmetrical Capability’ (2015) 49(1) Law & Society Review 209, 213-15.} They are also more likely to have the necessary resources available to them. Lawyers and legal advisors, particularly immigration specialists, are also able to
draw out information in instructions that the asylum seeker may not realise is relevant to their matter.

The cuts to IAAAS funding have led to a more than 80% cut to the funding of Refugee Legal (one of the two bodies in Victoria providing free legal services to asylum seekers and refugees) for their core client work in relation to refugees.216 These cuts apply to all organisations providing help to refugees previously under the IAAAS. A major issue in relation to these cuts is that interpreting services are no longer paid for. Clearly interpreting services are essential when providing legal assistance to vulnerable clients who do not speak, read or write in English. The LIV is aware that not-for-profit CLCs are paying large sums of money to the Translating and Interpreting Service so that the Government’s policies and procedures can be explained to the people they affect. These TIS bills are enormous and are creating an additional strain on CLC resources in Victoria as well as across Australia.

Kon Karapanagiotidis, CEO of the ASRC, asserts that the legal services offered by IAAAS providers were incredibly good value and were necessary to ensuring a fair and robust process for determining asylum claims.217 The issue with leaving asylum seekers reliant on receiving pro bono legal assistance rather than being provided with assistance directly through IAAAS providers is that while legal representation is important in providing for greater fairness, efficacy and efficiency of asylum processing claims, it is also important that the representation provided is quality representation.218

Research in the US shows that where legal representation provided is of poor quality, it results in a lower probability of success than where the asylum seeker self-represents, while average quality representation only resulted in slightly higher rates of success than self-representation.219 On the other hand, the likelihood of success is greatly increased by legal representation provided by experienced lawyers.220 In a study conducted in the US, success rates for migrants and asylum seekers represented by not-for-profits, large law firms or law school clinics in the US were much higher.221 As far as Australia is concerned, the best quality representation is likely to come from specialist refugee and immigration lawyers who have previously provided these services under the IAAAS.

A refugee law specialist is likely to be better able to represent an asylum seeker because they will be better able to: establish the core components of the case and make a new and nuanced application of emerging jurisprudence and will have greater familiarity and expertise in regards to difficulties with authenticating critical documents, thereby making it

219 Ibid 232.
more likely that they will be able to achieve this. If the case progresses to the courts it is easier for the courts to deal with representatives who fully understand the relevant procedures and system, and this also means that just outcomes are more likely because the relevant facts are more likely to be presented and tested in light of the relevant law.

The removal of IAAAS funding is likely to result in less efficient and less effective outcomes for asylum seekers and the immigration system in Australia. While pro bono legal services provided by large firms can be effective in providing good outcomes in particular circumstances, such as class action cases, insofar as the provision of early legal advice and assistance is concerned the best and most efficient outcomes are likely to be achieved by the provision of publicly funded legal assistance to specialised not-for-profit refugee law providers like Refugee Legal, VLA and ASRC.

**Term of Reference 5: Pro bono legal services**

The private legal sector contributes enormously to the provision of legal assistance to asylum seekers, by individual lawyers volunteering at CLCs, and firms taking on pro bono judicial review cases in the Federal Circuit Court of Australia as well as test cases in the High Court. Members of the private profession are working together as part of LIV’s Legacy Caseload Working Group to create better responses to the unmet legal needs of asylum seekers in Victoria.

As part of this working group, private migration lawyers and migration law firms have agreed to reduce fees considerably and charge capped fees for asylum seekers who are unable to access the free services available, but are not able to pay the usual fees of a private law firm. This is to assist the sector in dealing with the enormous demand on resources and capacity that the fast-track process has created. Firms are working with the two CLCs, Refugee Legal and ASRC, to increase and make more effective their pro bono contributions, including staffing and hosting legal clinics.

Justice Connect plays a leading role in coordinating the private legal profession’s pro bono work for asylum seekers, and through their program many firms and barristers have provided pro bono legal assistance to asylum seekers.

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223 Ibid 213.
**Term of Reference 6: Availability and distribution of funding**

In the LIV’s view, funding should be focused on the provision of quality legal assistance in the form of advice and representation. As discussed above, this reduces the need for legal assistance later in the process in the context of merits and judicial review, and reduces the additional pressure on Tribunals and Courts, as it ensures cases are properly and fully put at the initial stage. It is clear that funding appropriate legal services for asylum seekers saves costs to the government and the public overall.

As discussed above, the formerly funded IAAAS scheme should be reinstated. This scheme was effective and efficient. Given there was a tender process for legal providers to apply to be part of the scheme, the IAAAS ensured the best value for money for the government’s expenditure and the most efficient service for clients. The value of providing proper legal assistance for asylum seekers, not only for the client, but also in efficiency of costs for the system as a whole, is unquestionable.

**Term of Reference 7: Duplication of services**

Free specialist legal assistance for asylum seekers is very limited in Victoria. Some of the services that provide this assistance were previously funded by IAAAS grants to provide asylum seeker legal aid. All services are now experiencing extremely high demand as the number of unrepresented asylum seekers in Victoria has grown and the urgency of their matters increases. There is no duplication in services as demand for assistance is far higher than the services have the capacity to meet.

Legal education material has been developed by various services including Refugee Legal and ASRC; VLA; the RCOA, as well as interstate CLCs such as RACS in NSW; RAILS in Queensland, and the Humanitarian Group in Western Australia. The Federal government through the DIBP has also developed comprehensive information sheets as discussed above.

Many of these legal education materials have been translated into a number of languages including the main language groups of the majority of asylum seekers in Australia. However such materials are not an adequate or appropriate substitute for comprehensive legal advice or representation. This is especially the case given the particular vulnerabilities of asylum seekers facing the peculiar challenges of the fast-track system.
Term of Reference 8: VLA service delivery

VLA plays a vital role in the provision of legal services to the most vulnerable and impecunious asylum seekers who seek judicial review when their merits review application is refused. VLA’s means and merits tests are vigorously applied so that VLA only acts for clients who cannot afford to pay a private lawyer, and who have a reasonable chance of succeeding in their case. VLA’s Migration Team has significant expertise in assessing merits review decisions for errors and advising clients on the legal merits of their cases, instructing barristers and running matters to hearing at the Federal Circuit Court. This work is an essential element of the provision of access to justice for asylum seekers in Victoria. VLA is one of the only free services to do such work. ASRC also conducts judicial review work including assessing for merit and running matters to hearing, and often acts for free where VLA cannot because of conflict of interest, for example.

The Migration Team at VLA has an excellent reputation within the legal community, among other providers of legal assistance to asylum seekers and at the Bar. Other providers regularly refer clients to the Migration Team, consult its lawyers for advice, and consider that VLA carries out this work to a high standard. VLA further through its community funding scheme provides funding to Refugee Legal, the leading community legal centre providing assistance with initial applications for protection and merits review.

VLA continues to perform this work within the new fast-track system and expects to receive an increase in referrals, given the numbers of unrepresented asylum seekers who are part of this process living in Victoria. In the LIV’s view, VLA is delivering this service efficiently and effectively as part of the network of services providing free legal assistance to asylum seekers in Victoria, while dealing with significant and increasing demands on its capacity. It would be reasonable for the governments, federal and state, to consider increasing funding to this program, given the above discussion about the importance of accessible legal assistance for asylum seekers going through a court process, and that it is considered very difficult for asylum seekers to self-represent in these matters.

Further, we consider it reasonable to consider funding a scheme similar to the IAAAS for judicial review advice and assistance, so that not for profit and private providers may be funded to help in meeting the increasingly burdensome legal need of the legacy caseload that is at present falling on specialist CLCs, VLA and the private providers including private migration law firms who provide pro bono assistance to these clients either separately or as part of the CLCs’ legal clinic.

Recommendations:

91. The Victorian and Commonwealth governments to consider increasing funding to VLA’s Migration Team.

92. The Victorian and Commonwealth governments to consider instituting a legal funding scheme similar to the IAAAS for organisations and firms to tender to provide legal assistance for asylum seekers applying for judicial review.
Term of Reference 9: Self-represented litigants

Self-representation in the asylum context should be avoided due to the complex issues and vulnerability faced by asylum seekers which make the provision of legal assistance necessary to achieving a fair and efficient justice system.

Issues with self-representation by asylum seekers

Self-representation is not an appropriate option for asylum seekers for a number of reasons, discussed at Term of Reference 2. The UN, the European Council on Refugees and Exiles and many others have clearly articulated that because of the particularly difficulties and vulnerabilities asylum seekers face, they should be provided with adequate legal assistance to make their claims.

As the UNHCR has noted, ‘[a]sylum seekers are often unable to articulate the elements relevant to an asylum claim without the assistance of a qualified counsellor because they are not familiar with the precise grounds for the recognition of refugee status and the legal system of a foreign country’. For instance, in one US case an applicant did not realise that it was relevant to his claim that he had a fear of returning to his home country because his brother had been killed for political reasons, while in another US case an applicant did not realise that it was relevant to her claim that she had been subjected to female genital mutilation (despite this being a recognised basis for asylum).

There can also be difficulties in providing evidence without legal assistance due to the fact that many asylum seekers come with no documents or any other evidence to establish their claims. Immigration specialists are more likely to be able to find ways to establish the required evidence as a result of their experience and knowledge from having had to do so on previous occasions.

The European Council on Refugees and Exiles identifies further reasons why access to legal assistance is particularly important for asylum seekers:

- many do not speak the language of the country they are applying in, making it difficult to articulate the relevant points required to establish their claim;
- traumatic experiences make it difficult to recall the details relevant to their claims and to establish the relationship of trust with officials that is necessary to relate the

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information, especially in a short interview or when filling out forms and where their past experiences have left them distrustful of people in authority; and

- and they lack knowledge of the legal framework including rules of evidence and the procedures applicable and require assistance to avoid omitting pertinent elements of their claim.\textsuperscript{228}

A US study found that over 80\% of asylum seekers were suffering from post-traumatic stress disorder; such conditions make it difficult for them to coherently and linearly present their story, and more likely that they will forget details or conflate events.\textsuperscript{229} These gaps and inconsistencies in their stories undermine the credibility of their claims, making it more likely their legitimate claim will be rejected.\textsuperscript{230}

Legal advice plays an important role in establishing a relationship of trust between the asylum seeker and authorities.\textsuperscript{231} Building trust to share information about traumatic experiences takes time; that is not afforded in the context of a short interview.\textsuperscript{232} Lawyers and other legal advisors are able to take the time to build up that trust in a less stressful environment. They are able to discuss traumatic and difficult experiences with the assurance of client confidentiality and with the support of experts trained in assisting vulnerable people.\textsuperscript{233}

The story of an asylum seeker who fled to the US, known as ‘Matthew’, is indicative of why legal assistance is essential in ensuring asylum claims are presented clearly and consistently.\textsuperscript{234} Matthew was instructed by an untrained acquaintance to write down the exact dates and times of his abduction and the number of guards that tortured him. However the trauma and injuries he experienced prevented him from remembering all the relevant details he had been trying to forget. The acquaintance told Matthew he must include all these details so he did his best to fill them in, and when he got to the asylum interview he was questioned on these details. The distress of having to recount his experiences of torture and his abduction left him unable to lucidly recall the particulars and his terror at the thought of being deported left him overwhelmed to the extent that he could not recall any details. Matthew’s claim was dismissed due to inconsistencies between his written statement and the interview. Ultimately his refugee status was recognised when he was able to get free legal assistance from a clinic working together with medical and psychological professionals and a country expert.\textsuperscript{235} If Matthew had been able to get this assistance from the beginning he would have likely been able to give the relevant details in the appropriate manner, and avoided the need to go through the courts.

\textsuperscript{228} European Council on Refugees and Exiles \textit{Survey on Legal Aid for Asylum Seekers in Europe}, (Oct 2010), 34; Ardalan, Ibid at 1001, 1002.
\textsuperscript{230} Ibid at 1020-1.
\textsuperscript{231} European Council on Refugees and Exiles \textit{Survey on Legal Aid for Asylum Seekers in Europe}, (Oct 2010), 13.
\textsuperscript{235} Ibid 1002.
The importance of providing legal assistance to asylum seekers is clear; the particular vulnerabilities of asylum seekers and the difficulties associated with making an asylum claim make self-representation especially inefficient and ineffective.

A further issue for self-represented asylum seeker litigants is the waiting list for hearings dates at the Federal Circuit Court (FCC). Currently, the Court is not able to respond adequately to the demands of judicial review applications being made. Waiting times have blown out and an application to the Victorian FCC for judicial review of a migration decision will be allocated a hearing date in 2017. It is expected that the number of applications to the FCC will increase, and waiting times are therefore expected to worsen as more clients subject to the fast track process receive rejections and apply for review of their decisions.

LIV is advised that the Melbourne registry of the FCC currently has an effective duty lawyer service run by VLA with a clerk and solicitors present fortnightly at Direction Hearings to advise and assist unrepresented asylum seeker litigants. This triage model assists the Court to process matters efficiently, and helps to identify unrepresented litigants who are eligible for VLA’s ongoing assistance, as well as those who can be referred to other services like CLCs, fee-based or pro bono representation, and could be adopted by other states.

Despite this, the number of applicants increasing means the FCC will experience more delay. Applicants waiting for cases to be resolved will continue to require support in the community from support services and the DIBP, meaning there is more demand on these resources. In the LIV’s view, as well as providing legal assistance with the primary stage which will reduce the number of applicants requiring judicial review in the first instance, and funding for legal advice and representation at the judicial review stage of an asylum seeker’s application, both the Victorian and Federal governments should consider adequately resourcing Federal Circuit Courts to deal with the increased demand that is almost certain to occur over the next few years. This may mean appointing more FCC Judges to deal with the backlog of cases waiting for decisions. However if new Judges are appointed, and more migration judicial review matters are listed for hearing, adequate funding must be provided to VLA to continue operating its duty lawyer service under the increased demand.

**Recommendations:**

98. The Victorian and Commonwealth governments to adequately resource the Victorian registry of the Federal Circuit Court to deal with an increase in demand in the next few years, including appointing new Judges.

99. The Victorian and Commonwealth Governments to ensure the appropriate funding of VLA to continue to operate an efficient, effective duty lawyer and referral service for unrepresented asylum seekers at the Federal Circuit Court.
Dual regulation of migration lawyers

Dual regulation of lawyers who practice migration law has been at issue for 20 years.

In a submission to the Independent Review of the Office of the Migration Agents Registration Authority, the LIV said that lawyer migration agents in Victoria are required to pay a number of additional fees and subject to extra CPD requirements on top of the fees and CPDs required for practicing as a lawyer. The LIV submitted that it is in the interests of the migration advice industry to encourage law graduates to practise migration law, but that dual regulation is a significant disincentive for young legal practitioners to practise in this area of law.

In 2014, the Final Report of the Review by Independent Reviewer Dr Christopher Kendal (the Kendall Report) recommended that lawyers be removed from the regulatory scheme that governs migration agents such that lawyers:

- cannot register as migration agents; and
- are entirely regulated by their own professional bodies.

The LCA welcomed this as long-overdue reform of dual regulation of migration lawyers, which they said was as “unnecessary, inefficient and counter-productive”. LCA president Duncan McConnel said, “The Australian legal profession operates in the most strictly regulated environment in the country. The LCA has always maintained that dual regulation of migration lawyers is an avoidable burden to governments, the community and the profession. The removal of dual regulation not only means a significant reduction in red tape, it will also contribute to better consumer protection and a stronger, united legal profession.” 236

The then Assistant Minister for Immigration and Border Protection, Senator Michaelia Cash, planned to introduce legislation in 2015 to implement the recommendation to remove dual regulation of migration lawyers, along with 23 others.237 However, since Senator Cash departed the portfolio, the momentum has gone. The LCA continues to liaise with the DIBP on the dual regulation issue, and have advised the LIV that the government still intends to introduce this legislation perhaps in the second half of 2016, but that it is not considered an urgent priority.

Dual regulation is a barrier to lawyers wanting to practice migration law. Given there are 30,000 asylum seekers, including 11,000 in Victoria, who are subject to the Fast Track scheme and are not eligible for funded legal assistance, thus reliant on help from pro bono


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firms or CLCs, scrapping dual regulation would enable more lawyers to assist in providing pro bono or volunteer migration law advice and assistance to these clients.

The unmet legal need for this cohort of clients is high and anecdotal evidence shows that despite increasing staffing and extending hours and free clinics offered, CLCs are struggling to meet the demands and many asylum seekers are being forced to go through the process unrepresented. This puts strain on Department resources. DIBP receive applications that are not clearly set out or don’t provide necessary details of claims against the law, requiring officers to seek further details and conduct longer interviews to elucidate claims.

It also impacts on the Victorian community as a whole, including unqualified volunteer groups who assist in filling out forms, and eventually, will put enormous pressure on the Courts when clients who have been unable without representation to understand the requirements of the law and properly argue their case, appeal for judicial review. The requirement for additional qualified migration lawyers who are able to practice in this field is urgent.

**Recommendation:**

100. The Victorian Government to urge the Federal Government as a high priority to introduce legislation to end dual regulation of migration lawyers, as per the Kendall Report recommendation.
People with a disability face a number of obstacles to accessing justice through Victoria’s legal system. This section focuses on the issues faced by people with a cognitive impairments, such as an intellectual disability or acquired brain injury, however, many of the points made would also be relevant for other people with a disability, including people with a mental illness, hearing or speech impairment and people who need communication supports. This section of the report does not cover all of the issues to do with access to justice for people with a disability, but simply seeks to highlight some issues that have been raised by members of the LIV’s Disability Law Committee, which includes members who are private practitioners, lawyers from CLCs and other lawyers with an interest in disability issues.

People with a disability, particularly those with cognitive impairments, are generally agreed to be overrepresented in the justice system, especially in the criminal justice system. However, people with a disability also face challenges accessing justice through the civil justice system, for example in guardianship and administration matters, complaints about disability services and residency issues.

It is the LIV’s position that people with a disability should have access to appropriate assistance to allow them to pursue civil litigation to protect their rights and to ensure that their best interests are served. This is consistent with article 12 of the United Nations Convention on the Rights of Persons with Disabilities, under which Australia must ‘take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity’. Greater awareness of the support needs of people with a disability is needed throughout the legal system and the broader community. Providing legal assistance to people with a disability early on in the legal process is crucial to saving resources and court time overall.

People with a cognitive disability can face challenges accessing legal representation as they often rely on social welfare as their primary income. This means that they often rely on CLCs for assistance, such as Villamanta Disability Rights Legal Centre and the Disability Discrimination Legal Service, as well as other organisations such as Victoria Legal Aid and the OPA. Legal services for people with a disability are currently struggling to provide this assistance and require more resources to do this effectively. The LIV

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reiterates the Law Reform Committee’s Recommendation 19 for the Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability that:

The Victorian Government ensure that specialist community legal centres and other agencies that provide services directly to people with a disability are able to adequately meet demand.\textsuperscript{242}

There are also difficulties involved with people with a disability accessing litigation guardians, due to the current cost liabilities involved.

There have been a number of previous reports on the difficulties facing people with a disability in accessing the legal system. The LIV encourages the Department to consider the information and recommendations included in the Victorian Parliamentary Law Reform Committee’s 2013 \textit{Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers} and the Victorian Law Reform Commission’s final report on \textit{Guardianship}.\textsuperscript{243}

More broadly, the LIV also acknowledges that there is a need for increased resourcing to increase awareness among people with a disability of their legal rights and how to enforce those rights. The LIV also reiterates and supports the Law Reform Commission’s Recommendation 18:

That the Victorian Government develop a comprehensive education campaign to increase awareness of legal rights, court processes, and legal assistance and support by people with an intellectual disability or cognitive impairment, their families and carers.\textsuperscript{244}

Much of this community education would be provided by CLCs and other similar organisations, which need increased funding to develop and implement this education.

The Victorian Equal Opportunity and Human Rights Commission is currently in the process of drafting a Disability Access Bench Book which will provide information on how court processes can be adjusted to better accommodate the needs of people with a disability. The LIV supports this project and the LIV Disability Law Committee participated in the consultation stage.

\textsuperscript{242} Ibid 192.


\textsuperscript{244} Law Reform Committee, Parliament of Victoria, Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers (2013) 186.
Term of Reference 1: Information on legal assistance services

People with an intellectual disability can have difficulty exercising their legal rights due to the complex nature of the legal system and the language used. Under article 21 of the CRPD Australia is required to ‘Provide information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost’.

Accessible documents

Easy English documents are needed for people with a cognitive impairment, such as an intellectual disability or acquired brain injury. As the Law Reform Committee Report notes, there continues to be a lack of comprehensive Easy English documents to describe court processes and legal rights. The Committee found this issue to be ‘one of the biggest barriers to accessing legal advice and information’ for people with cognitive impairment. However, Easy English documents and website content is not enough on its own. As the Victorian Advocacy League for Individuals with a Disability highlighted in their submission to the inquiry, there is also a need to allow for adequate time and the opportunity to discuss these materials, in order to assist people with cognitive impairments to adequately process the information. This would require people with adequate training to be present at courts and legal centres to explain the information and who could confirm that it has been understood. Documents must also be available in different languages to allow access for people who do not have English as their first language.

LIV members have reported that the jurisdictions that are most frequented by people with a cognitive impairment (and would benefit most from the availability of Easy English documents) are:

- Magistrates’ Court (criminal matters);
- Family jurisdiction in the Children’s Court; and
- Human Rights list at VCAT, particularly the guardianship and civil detention matters (some Easy English documents are available, but more could be developed).

Developing these documents and providing training for support staff to be able to communicate them to people with an intellectual disability is a relatively low cost way of increasing knowledge of legal rights and processes (and therefore access to justice) for people with a disability.

245 Ibid 180.
246 Ibid 179-180.
247 Ibid 178.
248 Ibid.
Communication of hearing dates/legal rights

Courts and Tribunals need to be flexible when communicating with people with a disability, in order to ensure that they are aware of their rights and how to access and defend those rights. LIV members report that Courts and Tribunals continue to rely on written letters as their primary means of communicating with people accessing the court system, and this causes difficulties for people with a disability.

The LIV has previously raised concerns about the way in which the VCAT Guardianship List has communicated with people with a disability. The LIV focuses on this example because the Guardianship List at VCAT is frequently accessed by people with a disability. However, it is important that all courts and tribunals are aware of the particular issues faced by people with a disability and make best efforts to adjust their methods of communication accordingly.

VCAT generally hears administration orders on the papers. Clients receive a letter requesting them to nominate whether they wish to attend a hearing. If the form is not completed and returned then the hearing will proceed without them.

LIV members are concerned that under this system clients are missing their hearings without making an informed decision to do so. Many clients do not receive their mail, their mail may be passed on or they may not understand the content of letters or their importance. Instead, the LIV has suggested that an ‘opt out’ system be initiated, similar to that which takes place for Mental Health Review Board hearings.

People with a disability may have their fundamental right to make decisions about their lifestyle and finances determined at these hearings. It is therefore important that all reasonable steps are taken to ensure that clients are notified of the hearing, that they attend and their views are heard before a matter is determined.

This could be achieved through phone calls from the registry to the person with a disability to ensure that they are aware of their right to request a hearing (and any other necessary information). Alternative methods of communication could include phone text messages for hearing dates and other notifications.

More generally, LIV members have also reported that the notices VCAT send to clients advising them of hearings are contained in an envelope format that is difficult to open, particularly for people with a disability, such as a cognitive impairment. The information contained in these letters can be hard to understand and the notice difficult to navigate to find the appropriate information, such as information relating to the right of representation and where to access services.

**Accessible and appropriate hearings processes**

Flexibility in the process and method of conducting hearings is important for people with a disability. Hearings are increasingly being conducted by video link. LIV members report that video link can benefit some people with disabilities, particularly children and where the hearing is concerned with sexual offences. In these circumstances anxiety and intimidation can be reduced by the use of video link.

However, LIV members report that video link may not be appropriate for all cases involving people with a disability. In particular LIV members have concerns about the increased use of video link for ECT hearings. The particular needs of the person with a disability involved, and the surrounding circumstances of the case, should be informing where it is appropriate to use video link and where it may not be. The decision should not be influenced by financial concerns, but rather in the interests of promoting access to justice.

**Recommendation:**

19. That:

19.1. the government provide funding to either the courts or the Victorian Law Foundation to develop Easy English guides to court processes to assist people with cognitive impairment to navigate the legal system; and

19.2. Courts and Tribunals review the way they communicate, and how they can communicate in alternative ways with people who are particularly vulnerable, such as people with a disability.

**Term of Reference 2: Diversion and triage**

People with a disability can be at a disadvantage in the adversarial system due to a lack of appropriate legal information (see discussion above) and due to court processes not accommodating their needs.

Many people with a disability would benefit instead from early independent investigatory processes that could assist the person with a disability to access the relevant information and identify the central issues in dispute. This process could lead to alternative dispute resolution rather than litigation. This process could be a way to assist unrepresented litigants with a disability to be aware of their rights and the best way for them to proceed to protect those rights and interests.

This independent process could be performed by the specialized disability support person discussed below under Term of Reference 9.
Term of Reference 3: Alternative Dispute Resolution

People with cognitive impairment can be disadvantaged in ADR due to the potential power imbalances with the emphasis on both parties reaching an agreed solution. It is therefore important that reasonable adjustments are made to ADR to enable fair participation by both parties. These could include, for example, making adjustments to suit the particular needs of the person, such as allowing for extra time for explanations, providing advance information in Easy English and checking their understanding of the issues during the process. Some forms of ADR may be more suitable for people with cognitive impairment, such as conciliation, where the independent person has a greater role in identifying the issues in dispute and an appropriate resolution.

LIV members report that ADR is not frequently used in the Guardianship List at VCAT because the person with a cognitive impairment may not have the mental capacity to participate. ADR may, however, be relevant in matters involving access to the represented person where consent arrangements could be filed with VCAT rather than result in guardianship and the guardian making the decision. In this instance it would be up to VCAT to approve the ADR outcome as being in the best interests of the represented person.

In the LIV’s response to the VLRC’s Guardianship Report, the LIV supported the Commission’s recommendations relating to planning conferences at VCAT in relation to applications for the appointment of a decision-making supporter, a co-decision maker, a personal guardian or a financial administrator (recommendations 361-367). These recommendations would allow VCAT to explore less restrictive options through mediation with the proposed represented person, family members and other interested person where appropriate. The LIV emphasised the importance of ensuring that the proposed represented person participates in any planning conferences and that their wishes are given appropriate weight when identifying the outcome that will best promote their personal and social wellbeing.


Ibid 8.

Ibid 3.


**Recommendations:**

25. That the government work with disability service providers and the Office of the Public Advocate (OPA) to develop information and training for on ADR providers on methods of adjusting ADR processes to better accommodate the needs of people with cognitive impairment.

26. That the government increase funding to the Disability Services Commissioner to allow it to adequately investigate complaints.
Term of Reference 4: VCAT

As noted above, people with cognitive impairment often rely on welfare as their primary source of income.

The cost to apply to VCAT in relation to a small claim or a claim that is not about a liquidated amount or compensation (perhaps the fulfilment of a warranty) is too high. That it would cost more to apply than the value of the goods means that many people with legitimate grievances of significance to them do not have an avenue of redress.

The LIV has previously expressed concerns about overly high fees at VCAT. It is the LIV’s view that no fees would be preferable, however does acknowledge that there is a cost associated with the operation of the Tribunal. While the current government has wound back some application fee increases introduced by the previous coalition government, the fees are still quite high which can create a serious impediment to justice. This can result in people with a disability who have low incomes being unable to access the justice system.

As recommended above in the main section of Term of Reference 4, VCAT should undertake a review of fees in consultation with key justice system stakeholders and implement measures to reduce fees. VCAT should also consider waiving fees altogether for applications to certain Lists. In reviewing VCAT fees for small civil claims, VCAT should ensure accessibility for those on low incomes.

Term of Reference 8: VLA service delivery

VLA currently provides services for people with cognitive impairments where their fundamental rights to liberty or freedom of movement are being challenged. This can happen in guardianship, administration or civil detention matters.

However, due to limited resources, LIV members have reported that there is a tendency for assistance to be limited where it is viewed that legal representation is futile or of limited benefit in relation to the outcome.

The LIV notes that in these circumstances is often not just the outcome that is important, but the ability for the person with cognitive impairment to participate fully in the process. This can be very difficult without a legal representative. As Linda Steele has noted, lawyers are crucial in ensuring that people with a disability have ‘meaningful access’ to justice, by seeking to assist their clients to understand the issues involved. This

participation is important in allowing the person with a disability to achieve a sense of justice and therapeutic outcomes from the process and its outcome.

The LIV has previously supported recommendations made by the VLRC in the Guardianship Report for amendments to the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) to give a represented person or a proposed represented person a right to legal representation in all Guardianship List matters and to create a statutory power for VCAT to order that a person be provided with representation when VCAT believes this is necessary. This would need to be accompanied by additional funding to VLA and/or CLCs to ensure that people are able to access the right to legal advice where they do not have the means to pay.

**Recommendation:**

93. That VLA’s funding be increased for representation of people with cognitive impairment who are facing restrictions on their fundamental rights to liberty or freedom of movement.

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Term of Reference 9: Self-Represented Litigants

People with cognitive impairment face many challenges as self-represented litigants. The Law Reform Committee heard evidence that ‘attending court can be intimidating for people with an intellectual disability or cognitive impairment, and that procedures adopted in courts can present a number of challenges for them’. As noted above, many people with disability are unable to afford a lawyer and rely on CLCs and other services for support. The support these services can offer is limited, however, by inadequate resourcing.

Court services need to adjust their process to assist people with cognitive impairment to access justice. LIV Committee members have suggested the following ways in which the court and tribunals could make adjustments to assist people with a cognitive impairment:

- Flexibility in the timing of cases involving people with a cognitive impairment, e.g:
  - Allowing extra time so that explanations can be provided during the hearing;
  - Acknowledging that some people with a cognitive impairment function best at different times, and scheduling hearings to accommodate these needs;
  - Better training of triage staff to ensure that they are aware of these issues and can accommodate the needs of people with a disability;

- Training of court staff about different forms of disability and medication and how to recognise and accommodate different needs;

- Judicial officers should have access to an up to date medical record (where appropriate) to enable them to make informed decisions;

- Ability to adjust court processes to recognise supported decision-making (and also be awareness of potential conflicts and ensure that they are acting in the best interest of the person with a disability); and

- Adjustments to or assistance with processes such as preparation and filing of court documents.

There has been training of judicial staff in this area and LIV members report that some judicial staff can be very accommodating and can effectively communicate with people with cognitive impairment. However, they also report that there remains a great deal of variability in the awareness of judicial officers of the need for support. Comprehensive training should be provided to all judicial officers, along with ongoing support, to ensure that there is a consistent approach to recognising and responding to the needs of people with cognitive impairment in the court room.

The LIV also recommends that a specialised support person, with appropriate training, be available in court and tribunals to liaise with the court and assist people with cognitive impairment (particularly those who are self-represented) to navigate their way through the court system. This independent support person could help articulate and explain the cause

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of action being put to the court. LIV members have reported that in the past there has been a specific disability liaison officer role, however, the support staff currently employed by courts and tribunals have less specific expertise about accommodating people with a disability.

Another important role that judicial officers can take is thorough post-trial referral to support and medical services. LIV members have highlighted that referrals from judicial officers can offer a unique opportunity to encourage people with a disability to seek assistance. It is important, however, that these referrals be appropriate to the circumstances of the individual and respectful of people’s wishes and choices, and the disability support staff referred to earlier should be involved at this stage.

**Recommendations:**

101. That greater focus on training judicial officers to accommodate the needs of people with a disability is needed.

102. That specialised independent support persons should be available at Court and Tribunals to assist people with a disability to navigate the legal system.

**Litigation guardians**

It is the LIV’s view that litigation guardians play a crucial role in facilitating the legal agency of people with impaired decision making facility to assert their rights by enabling them to bring and defend legal proceedings.\(^260\) This is essential to provide access to justice on an equal basis with others in the community consistent with the CRPD. Litigation Guardians can be crucial in promoting the legal rights and interests of people with cognitive impairment by instigating or defending legal actions.

Under the current law, it can be difficult to arrange for litigation guardians. Under the current Supreme Court Rules potential litigation guardians are often reluctant to become involved in proceedings for fear of costs being awarded against them personally and lack of clarity about who can conduct litigation on behalf of a person with impaired decision-making ability.\(^261\) This uncertainty has also extended to administrators following the decision in *State Trustees Ltd v Andrew Christodoulou* [2010] VSCA 86.\(^262\)

\(^{260}\) Law Institute of Victoria, Submission to Senior Master, Funds in Court, Supreme Court of Victoria, Supreme Court (General Civil Procedure) Rules 2005 – Order 15, 13 November 2015.


\(^{262}\) In this case, the court refused State Trustees’ application for leave to appeal against the trial judge’s decision to make a costs order against State Trustees in its personal capacity rather than in its capacity as administrator for a represented person and not to provide it with an indemnity against the estate of the represented person.
The LIV has advocated for reforms to Order 15 of the *Supreme Court (General Civil Procedure) Rules 2015* to ensure that the litigation guardian not be personally liable for costs. These reforms will enable people with a disability to pursue their legal interests.

OPA has acted as a litigation guardian for people with a disability in some matters in the Children’s Court and Family Court. However, the OPA is unable to meet the demand for appointments. Currently, the OPA does not undertake the role of litigation guardian where the litigation relates to financial matters. This can mean that the litigation is unable to continue. This situation is not in the best interest of justice for all the parties in the dispute, particularly the person with a disability.

Many people with a disability may not be able to access a litigation guardian. The LIV supports the Law Reform Committee’s Recommendation 37:

“That the Victorian Government review current arrangements for the appointment of litigation guardians. The review could seek to:

- ensure consistent processes are employed by the courts to appoint litigation guardians;
- ensure that a mechanism exists to enable a person with a disability to locate a suitably qualified litigation guardian; and
- ensure that organisations currently acting, or required by the courts to act, as litigation guardians are able to draw upon funds to meet adverse costs orders should such orders be imposed by the courts.”

Such a review should consider OPA’s suggestion of a government funded litigation guardian service. As the Victorian Equal Opportunity and Human Rights Commission has stated, the ‘fundamental issue is to ensure that the rights of the represented person are not breached merely because there is no one available to conduct litigation on their behalf’.

**Recommendation:**

103. That the Victorian Government conduct a review of the appointment process for litigation guardians and consider establishing a government funded litigation guardian service. In the alternative, the LIV supports the amendment of rule 15.02 of the *Supreme Court Civil (General Civil Procedure) Rules 2016* to:

103.1. remove the personal liability of a litigation guardian for any adverse cost orders made against them; and

103.2. set off adverse costs against any costs that the Court has ordered that other party or non-party pay to that litigation guardian.

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263 Law Institute of Victoria, Submission to Senior Master, Funds in Court, Supreme Court of Victoria, *Supreme Court (General Civil Procedure) Rules 2005 – Order 15*, 13 November 2015.


265 Office of the Public Advocate, Submission No. 29 to Law Reform Committee, Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers, 13 September 2011.

Disability complaints

The Disability Services Commissioner is the complaints body for people who have a disability in Victoria who have problems with their service provider. However, the Commissioner’s office is inadequately resourced to deal with the large number of complaints it receives. It has a power to investigate, but is seldom able to use it. The Commissioner frequently uses a conciliation process which is often lengthy and does not bind parties to any outcomes. This can lead to unsatisfactory results for many of LIV members’ clients and can dissuade them from reporting abuse and returning to the Commission again when further issues arise for them which would justify a complaint. Due to the power imbalances involved, an alternative dispute resolution process such as this can be inappropriate or inadequate for complaints relating to abuse or neglect. These concerns have been raised in the Interim Report of the Family and Community Development Committee’s Inquiry into Abuse in Disability Services and the Victorian Ombudsman’s Phase 1 Report on Reporting and Investigation of Allegations of Abuse in the Disability Sector.

With the move to the NDIS, it is currently unclear what body will deal with disability service complaints in Victoria in the future (and whether this will be a Commonwealth or State body). LIV members report that one of the main issues with the way in which complaints are handled by the Disability Services Commissioner is that complaints that are not progressing cannot be referred to VCAT. This is unlike other similar systems such as complaints about health information. Under the Health Records Act 2001 a complaint about interference with health information or lack of access to health information is first lodged with the Health Services Commissioner. If the complaint cannot be resolved through conciliation, the person lodging the complaint can request that the matter be referred to VCAT. People with disability services complaints do not have this option. This option of taking a complaint to VCAT if conciliation is not successful provides an important additional layer of accountability that should be extended to disability services complaints.

Any disability complaints body (whether that be the existing Disability Services Commissioner or a new body) needs to be independent, properly funded and have an avenue to take complaints to VCAT or another appropriate Commonwealth Tribunal if conciliation is unsuccessful.

267 Family and Community Development Committee, Parliament of Victoria, Inquiry into Abuse in Disability Services (Interim Report) 2015, 91-96.
268 Ibid.
Recommendation:

104. That the body investigating complaints about disability services (either the Disability Services Commissioner or a new body under the NDIS) needs to be independent, properly funded and allow an avenue for complaint to go to a relevant State or Federal Tribunal.