

Criminal and Family Law Private Practitioner Service Delivery Model

*Law Institute of
Victoria*

Report

October 2015

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Executive summary

Background

PwC was engaged by the Law Institute of Victoria (LIV) to undertake a study to propose a private practitioner criminal and family law service delivery model that provides access to justice and quality legal services, within the constraints of the current funding envelope.

What is the existing service delivery model?

The service delivery model defined in this report is the model used by Victoria Legal Aid (VLA) to engage criminal and family law private practitioners to deliver legal assistance services. These services are primarily the provision of legal representation pursuant to a grant of aid, to clients who meet one or more of VLA's eligibility guidelines.

PwC has defined the service delivery model as including the following five key elements:

1. **Private practitioner panels and preferred barristers list** – The arrangements used to procure legal aid assistance services from external lawyers
2. **Eligibility assessment** – Assessment and certification of grant approvals by private practitioners on behalf of clients, who meet one or more of VLA's eligibility guidelines
3. **Case work** – The delivery of legal aid assistance to clients
4. **Payment of fees and disbursements** – Online certification of payments by practitioners owed for work in progress or work completed
5. **Compliance and review** – Post supply of service audit and compliance processes.

Scope and objectives

The objectives of this report were to:

- Understand current challenges in the Victorian legal aid system
- Undertake a comparative analysis of legal aid service delivery models nationally and internationally
- Propose a service delivery model that improves access to justice and quality legal services, within the constraints of the current Commonwealth and State government funding envelope.

The scope of the report is limited to consideration of the family law and criminal law jurisdictions.

Service delivery model options

PwC conducted stakeholder consultations and desktop analysis to identify challenges with the current criminal and family law service delivery model and analyse legal aid service models in national and international jurisdictions to develop recommendations for improvements.

The range of options considered spans from maintaining the status quo (no change), through to transitional change or transformation of the legal aid service delivery model, within the boundaries of the Victorian government's procurement framework. Our analysis has not taken a view on service delivery/alternative agency options and our recommendations are framed to improve the quality and efficiency of legal aid services.

While further analysis could be conducted which would provide a stronger basis for recommendations for change, it is PwC's assessment there is likely to be benefits associated with VLA adopting a transitional operating model. This option retains some parts of the current model, while addressing stakeholder concerns.

Elements for consideration include the following:

1. Adoption of a more consultative approach to stakeholder engagement that is inclusive of the LIV, Victorian Bar and other justice system representatives.
2. The potential for LIV and the Victorian Bar to 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, such as NSW, and could be used in Victoria to build confidence in this process.
3. VLA establishing a mechanism to consult justice system stakeholders on changes to the eligibility guidelines. This would assist in anticipating 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. Regular and independent review of fee structures 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. The analysis undertaken by PwC does not lead us to suggest that it is necessary to change the current compliance and review system more broadly, although "follow the money" amendments to the Audit Act foreshadowed by the Victorian Government are likely to lead to changes in this area.

Findings

PwC has made eight findings relating to the service delivery model, as well as on access to justice and quality representation in Victoria's legal aid system. PwC believes that these findings can inform a more effective functioning of the legal aid system, in particular the provision of legal aid assistance services by private practitioners. These findings also underpin our recommendations on changes to the service delivery model, outlined above.

Finding 1: Enhanced consultation processes

Decisions made by VLA on delivering legally aided representation to the Victorian community impact the justice system more broadly. For example, decisions made by VLA on the eligibility guidelines and arrangements for engaging private practitioners impact a wide range of stakeholders, including private practitioners, the courts and litigants.

Both the LIV and VLA have an interest in increasing access to justice and ensuring high standards of legal aid representation. However, information sharing, dialogue and collaboration between the two organisations have been limited in recent years. While there have been a number of robust consultation processes and engagement on specific projects, such as the recent Family Law Legal Aid Services Review, Delivery High Quality Criminal Trials project and VLA's Strategy 2015-18, cooperation and collaboration between the LIV and VLA could be more embedded and consistent.

In other jurisdictions, opportunities for cooperation and collaboration have been pursued through the representation of broader justice system actors in governance and consultative mechanisms. For example, the Legal Aid NSW Board represents a range of key organisations such as the Law Society of NSW, welfare groups and the Bar Association. Representatives from the Law Society and Bar Association also sit on the selection committee for private practitioner panels.

PwC is not recommending that VLA change the composition of its Board, and we note that the *Legal Aid Act 1978* sets out specific requirements on the Board's structure. However, there may be other opportunities to better integrate private practitioner representatives, as well as other justice system representatives, into VLA's consultative processes.

Recommendation: VLA could give consideration to adopting consultative arrangements that ensure stronger representation of the LIV and the Victorian Bar, as well as other justice system representatives. The aim would be to ensure more open, ongoing and constructive dialogue and information sharing. This could include consideration of a model similar to Legal Aid Queensland’s Industry Reference Group, a forum set up for consultation with the legal profession, which is chaired by Legal Aid Queensland’s CEO.

Finding 2: Data collection

While we acknowledge that some data collection is undertaken across the justice sector, we were unable to collect data to the level of granularity required to inform the analysis in this project. The lack of targeted and coordinated data collection makes it difficult to design and pursue evidence-based system improvements.

Further, this makes it difficult to assess the state of access to justice in the Victorian community. For example, PwC was unable to obtain data on the number of self-represented litigants currently in Victorian courts and the average duration and costs of matters involving self-represented litigants. Other examples of data that are unavailable include data on unmet demand on legal aid services and data on quality of legal representation.

This echoes a finding in the recent Productivity Commission report into Access to Justice Arrangements. The Commission found that evaluation and data collection in the legal assistance services sector is poor and does not provide a robust evidence base to determine what is working and where improvements can be made.¹

PwC notes that some work is underway to address issues around data, including the design and implementation of data reporting and collection arrangements under the National Partnership Agreement on Legal Assistance Services. The Victorian Government has also committed to an inquiry into access to justice.

Recommendation: All justice system actors should continue the work that has already commenced to improve data collection, information sharing and coordination across the Victoria justice system. A common and systematic framework for the collection of data to inform justice system access, resourcing options and outcomes should be implemented.

Finding 3: Self-represented litigants

A number of stakeholders, including judicial officers and private practitioners, expressed concerns about a perceived increasing number of self-represented litigants in the court system, and the downstream costs associated with this increase.

In the criminal jurisdiction, concerns were raised about the eligibility guideline limiting assistance to defendants facing an immediate term of imprisonment. It was suggested that in some offences self-represented litigants are poorly equipped to represent themselves, particularly where the law is complex and the penalties and consequences resulting from a finding of guilt are high.

In the Commonwealth funded family law jurisdiction, stakeholders identified concerns that the family law trials and final hearing guidelines result in a litigant being required to represent themselves at the most critical point in the litigation, without having any prior exposure to the court as a self-represented litigant. This issue is particularly acute in family violence matters.

VLA’s recent Family Law Legal Aid Services Review proposes to make changes to family law litigation funding and ease restrictions on trial representation funding, so that priority clients are provided full representation through to the final hearing. The review also proposed amendments to eligibility guides for family dispute resolution, family violence matters and Recovery Order hearings.

¹ Productivity Commission (2014), *Access to Justice Arrangements: Overview*, Inquiry Report No. 72, Canberra, September 2014, p39.

Recommendation: The Victorian and Commonwealth governments could consider options for services that provide legal advice and limited scope assistance to self-represented litigants. This could include consideration of a model similar to Queensland’s Self Representation Service. This service is staffed by volunteer lawyers and provides assistance and advice to litigants who are ineligible for legal aid, before they reach the court. Such models could be examined in the Victorian Government’s access to justice inquiry.

Finding 4: Earlier settlement

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.

We understand that 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.

Recommendation: The Victorian Government and justice system actors could consider options to settle cases earlier that create cost and time savings to self-represented litigants and the courts.

Finding 5: Increased transparency around costs

Many stakeholders are keen to understand the cost-efficiency of using in-house VLA lawyers vs. private practitioners. Cost-efficiency of services affects the number of clients able to access legally aided representation, and therefore access to justice more broadly. One of the legislated objectives of VLA is to “provide legal aid in the most effective, economic and efficient manner”, however PwC was unable to obtain information to form a view on this issue.

This issue was raised in the Victorian Auditor-General’s 2014 Report on Access to Legal Aid.² VLA has advised PwC that it has commenced a process of analysing the relative cost of providing legal assistance across different legal matter and supplier types. However, the analysis is in its formative stage and VLA advised that it will not be released to stakeholders for approximately 18 months.

PwC notes that several legal aid entities, including Queensland and New South Wales, are taking similar steps towards accurately costing the work undertaken by in-house lawyers and private practitioners, in order to understand relative cost-efficiency.³ Tasmania and South Australia have also recently examined the relative cost-efficiency of their legal aid service delivery models, as part of broader reviews into the delivery of legal aid in these jurisdictions.⁴

Recommendation: As soon as practicable, VLA should disclose the relative, if not actual, costs of using in-house lawyers and private practitioners with a view to ensuring that limited legal aid funds are being used efficiently.

Finding 6: Access to legal aid-funded lawyers

Through our consultation, PwC formed the view stakeholders are concerned about whether the recently-introduced panel arrangements and fee structures are deterring practitioners with valuable experience and specialised skills sets from continuing to take on legal aid funded matters. It was noted that this is likely to

² Victorian Auditor-General’s Office (2014), *Access to Legal Aid*, Victorian Auditor-General’s Report, August 2014.

³ Productivity Commission (2014), *Access to Justice Arrangements: Productivity Commission Inquiry Report, Volume 2, Inquiry Report No. 72*, Canberra, September 2014, p707.

⁴ Attorney-General for the State of Tasmania (2015), *Review of Legal Aid Commission of Tasmania*, 27 March 2015; Attorney General’s Department, Government of South Australia (2014), *Review of the Provision and Procurement of Legal Aid Services in South Australia’s Criminal Courts*, First Report – The Current Context, February 2014.

cause particular issues for access to justice in regional and rural areas where the quantity of legal professionals is less than metropolitan Melbourne.

VLA data show that the number of solicitors on its panels has decreased, however data on the number of years of experience or other measures of quality are unavailable.

Recommendation: VLA should continue to monitor access to legal aid practitioners, particularly in regional and remote areas of Victoria.

Finding 7: Quality

In 2012, VLA introduced changes to private practitioner panels for external lawyers wanting to take on VLA-funded matters. In addition, a preferred barristers list for indictable trials was announced in early 2015 and the list was released on 31 July 2015. Other jurisdictions have introduced similar systems to procure services from private practitioners, including New South Wales, South Australia and New Zealand.

Stakeholders agree that having a system in place to ensure quality of service provision is critical to providing the Victorian community with high-quality access to justice. Stakeholders reported a positive experience with legal aid practitioners in the vast majority of matters, however, some judicial officers raised concerns about the quality of representation of both private practitioners and in-house VLA lawyers on occasion. This included concerns about inexperienced lawyers making errors that lead to appeals and retrials, and ultimately poor outcomes for litigants. Concerns about the quality of advocacy skills were also raised. We understand that quality systems and controls have recently been implemented by VLA, and these may need to be in place for a period of time before it is appropriate to evaluate the impact of these systems.

Recommendation: The panel arrangements and preferred barristers lists could be reviewed after a period of time to assess their impact on quality and access to legal representation. VLA, the LIV and the Victorian Bar should also continue to work together to continuously improve professional development and quality standards for both private practitioners and in-house lawyers.

Finding 8: Procurement

There are a range of different models that are used by governments to procure services from the private sector. Consideration could be given to alternative models for procuring legal aid services from private practitioners.

Enhancements to the current procurement model may enable more streamlined administration arrangements and other benefits such as greater cost-efficacy and innovation in the delivery of legal aid services. However, a new model would need to ensure continued access to high-quality legal representation, particularly in regional and remote areas of Victoria.

The Victorian Government Purchasing Board (VGPB) sets policies that cover procurement activity for much of the Victorian Government. While VLA is not required under the *Financial Management Act 1994* to adhere to these policies, most agencies seek to conduct procurement activities in accordance with the policies and any modifications to current arrangements should follow the VGPB's procurement framework.

Recommendation: VLA, the LIV, the Victorian Bar and other justice system actors should work together to consider the potential benefits and impacts of adopting an alternative procurement model.

Abbreviations

| Abbreviation | Description |
|---------------------|------------------------------------|
| VLA | Victoria Legal Aid |
| LIV | Law Institute of Victoria |
| DJR | Department of Justice & Regulation |
| CLC | Community Legal Centre |
| CSV | Court Services Victoria |

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1 About this report

1.1 Background and context

Victoria Legal Aid (VLA) is a statutory authority responsible for providing legal aid services to the Victorian community. The agency helps people with their legal problems who cannot otherwise afford legal assistance. VLA services range from general information provision about legal matters to more intensive services, such as legal representation in court. It receives funding from the Victorian and Australian governments to deliver these services. VLA has 14 metropolitan and regional offices across Victoria.

VLA provides a range of legal aid services and information in civil, criminal, family, youth and children's law matters. While many services are accessible to all Victorians, the more intensive services, such as legal representation and access to duty lawyers, are limited to those people who meet one or more of the eligibility guidelines. The biggest areas in which VLA provides legal representation are criminal law and family law.

VLA has a mixed model for the provision of legal aid services. In addition to providing services through in-house lawyers, legal aid funded work is also delivered by Community Legal Centres and private practitioners. Private practitioners are private barristers and solicitors who provide legal representation to clients, that VLA funds. In 2013-14, private practitioners delivered 70 per cent of all legally-aid funded representation across family, criminal and civil law matters.

VLA has four statutory objectives that guide its operations. These are contained in the *Legal Aid Act 1978* and are to:

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

In order to control demand on its services and constrain costs, VLA has a number of policy levers it can use, including:

- altering the means test
- altering the types of matters eligible for grants of legal assistance
- changing the cost ceiling or introducing financial caps on assistance
- altering the resourcing of different types of work
- changing the fees paid to legal practitioners.

In response to increasing demand for services and fiscal constraints VLA has made numerous adjustments to the types of matters eligible for legal aid funding through changes to the VLA guidelines in recent years. In 2013, VLA made significant changes to its eligibility guidelines, including restrictions on legal representation in family and criminal law matters. It also ceased to deliver services from its Preston office.

Further, VLA has made a number of changes to the way it engages private practitioners to undertake legal aid-funded work. This includes changes to panel arrangements in 2012, which limit delivery of VLA-funded legal representation to practitioners on the panel. A preferred barristers list for indictable trials was also introduced in 2015.

Changes to the eligibility guidelines and procurement of legal aid services have impacted the private practitioners who provide VLA-funded legal representation, as well as the legal aid system more broadly. It is in this context that the Law Institute of Victoria (LIV) engaged PwC to review the service delivery model for criminal and family law practitioners to work with VLA.

1.2 Scope of this project

The objectives of this project were to:

- understand current challenges in the Victorian legal aid system
- undertake a comparative analysis of legal aid service delivery models nationally and internationally, based on desktop research
- propose a service delivery model that improves access to justice and quality legal services, within the constraints of the current Commonwealth and State government funding envelope.

The scope of the report is limited to consideration of the family law and criminal law jurisdictions.

1.3 Steering Committee

The LIV commissioned PwC to undertake this scoping study. The Department of Justice & Regulation (DJR) and VLA have also contributed to this report through Steering Committee input. The Steering Committee met four times during the development of the scoping study, and feedback on this report was provided by the LIV, DJR and VLA.

While DJR and VLA were members of the Steering Committee, this report does not represent the views of either organisation.

1.4 Approach to completing this project

Our approach for completing this project has involved:

- Reviewing key literature and recent reviews of legal aid commissions completed in other jurisdictions, a list of documents and references can be found at Appendix A
- Undertaking desktop research of legal aid models in other jurisdictions. The desktop research has focused on the following jurisdictions: New South Wales, Queensland, South Australia, New Zealand, the United Kingdom, Canada and the United States of America. A summary of the key findings is provided in Appendix B
- Consulting with key stakeholders on an anonymous basis to understand the key issues affecting the legal aid system and suggestions for improvements to the service delivery model. PwC was provided with an agreed list of stakeholders. The anecdotal evidence contained in this report reflects the stated views of this set of stakeholders. Stakeholders included representatives from the courts, law enforcement, private practice, the Office of Public Prosecutions, the Department of Justice & Regulation and VLA. A consultation list is provided in Appendix C. The questionnaire used to structure stakeholder consultations is set out in Appendix D
- Proposing a service delivery model based on the activities undertaken above, and assessing the advantages and disadvantages of proposed models. We tested the models with VLA, the Department of Justice & Regulation, the LIV Legal Aid Taskforce and other stakeholders, and refined our recommendations based on their feedback.

1.5 Limitations

The key limitation in compiling this report was a lack of data and evidence, to support anecdotal evidence collected through consultations. The data and information that was not available included:

- costs of in-house solicitors undertaking grants of legal assistance, compared with private solicitors (per unit cost)
- costs of in-house counsel compared with private barristers (per unit cost)
- methodology VLA uses to set private practitioner fees
- number of self-represented litigants in criminal and family law jurisdictions
- average costs or duration of a self-represented matter compared to a matter with legal representation
- data on quality of legal representation
- level of unmet demand for legal aid services in Victoria
- evidence of a decline in numbers of private lawyers practising family and criminal law, particularly in regional and rural areas.

1.6 Structure of this report

The remainder of this report is structured as follows:

- Section 2 provides context and evidence about the current challenges with the way in which legal aid is provided in Victoria
- Section 3 provides an overview of the service delivery model for criminal and family law practitioners working with VLA
- Section 4 provides insights into models adopted in other jurisdictions with a particular focus on those aspects that are relevant in the Victorian context
- Section 5 proposes new service delivery models, including a summary of the advantages and disadvantages of each model.

Additional detail is provided in the Appendices to support the analysis in the body of the report.

2 Current challenges in the Victorian legal aid system

“The Legal Aid system is essential to the operation of the justice system: its effect extends beyond the individual who is represented by a legal aid lawyer. The legal aid system’s operation can help the courts run smoothly, or it can bring the court system to a halt. The range and mix of services, and delivery method, can help people to resolve their problems, or can perpetuate social exclusion”.

Dame Margaret Bazley, New Zealand Legal Aid Review

2.1 Increasing demand for legal aid services

Demand for legal aid services in Victoria has increased over time, as a result of population growth and changes to policy and legislation.

Available data show that there has been an increase in activity in Victorian courts over the past five years. Data captured by the Productivity Commission show that the number of criminal matters being commenced in Victorian courts, referred to as lodgements, has increased from 189,108 matters in 2009-10 to 243,962 matters in 2013-14 (a 29 per cent increase over four years).

Table 1 shows that the number of lodgements in criminal courts in Victoria has increased year on year, over the past five years. It also shows a spike in activity in 2013-14. While this increase does not directly translate to an increase in demand for legal aid services, as not all criminal matters are eligible for legal aid assistance, it demonstrates that there are more defendants in the criminal law system.

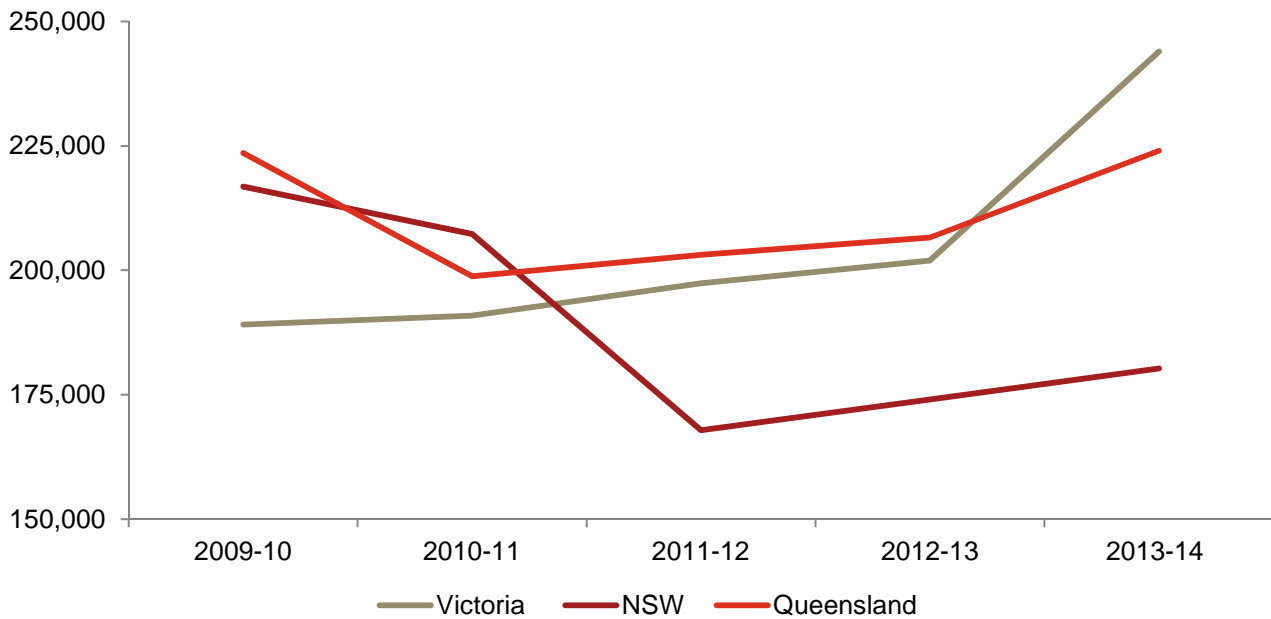
Table 1: Number of lodgements in criminal courts in Victoria⁵

| Year | Number of lodgements in criminal courts |
|---------|---|
| 2009-10 | 189,108 |
| 2010-11 | 190,932 |
| 2011-12 | 197,419 |
| 2012-13 | 201,958 |
| 2013-14 | 243,962 |

The number of lodgements in criminal courts in Victoria has increased relative to other jurisdictions. Figure 1 below shows the increase in Victoria, compared to decreases in lodgements over the same five year period in New South Wales.

⁵ Productivity Commission (2015), Report on Government Services, “Chapter 7: Courts, attachment tables and data quality information” Table 7A.1.

Figure 1: Trends in lodgement figures in Victoria, New South Wales and Queensland



An increase in criminal matters does not necessarily translate to an increase in demand for VLA’s services. However, VLA’s demand modelling, which was captured in the Victorian Auditor-General’s 2014 Report into Access to Legal Aid, shows VLA’s forecast demand for grants of legal assistance. This forecast shows demand for grants of legal assistance is increasing.

Table 2 shows VLA’s forecast demand for grants of assistance, with and without changes to the VLA eligibility criteria made in 2012-13. VLA forecast increased demand in legal aid services across each of VLA’s programs and sub-programs if no eligibility changes were made.

Table 2: Change in average forecast demand for state-related grants of assistance with and without eligibility changes, 2012-13 to 2016-17⁶

| Program and sub-program | Eligibility change | No eligibility change |
|-------------------------|--------------------|-----------------------|
| Civil law | 1% | 4% |
| Criminal law | 2% | 3% |
| Summary crime | -3% | 1% |
| Indictable crime | 2% | 6% |
| Youth crime | -4% | 9% |
| Appellate crime | 2% | 1% |
| Family law | 4% | 3% |
| Child protection | 4% | 2% |
| Family violence | 1% | 4% |

VLA estimated that the impact of the eligibility changes in 2013 would equate to 1,000 less grants of legal assistance, and \$7.41 million reduction in expenditure, in 2013-14.⁷

⁶ Victorian Auditor-General’s Office (2014), *Access to Legal Aid*, Victorian Auditor-General’s Report, August 2014, p13.

VLA’s monitoring and modelling has identified a number of demand drivers for VLA’s services in both the family and criminal law programs, including:

- recruitment of additional police officers and protective service officers, leading to increased detection and reporting of crime
- changes to sentencing law, including abolishing suspended sentences, introduction of mandatory minimum terms of imprisonment for ‘gross violence’ offences and changes to bail and parole law
- police and policy focus on family violence and increased monitoring of breaches of family violence orders
- an increase in child protection notifications and child protection grants of assistance and policy focus on addressing child abuse
- increased prisoner numbers leading to more human rights-related complaints
- economic conditions, including the impact that deteriorating economic conditions have on disadvantaged Victorians.⁸

2.2 Funding for legal aid services

PwC notes that although analysis and recommendations on the size of the VLA funding envelope are out of scope in this report, past and current funding levels are important in understanding the context around the service delivery model.

At the same time that demand for legal aid services is increasing, funding for legal aid has not been increased to the level needed to meet growth in demand. Table 3 shows current and past funding levels for VLA.

Table 3: Victoria Legal Aid funding

| Victoria Legal Aid funding | 2013-14 | 2012-13 | 2011-12 |
|---|-----------------|-----------------|-----------------|
| State Government funding | \$83.0m | \$75.3m | \$72.9m |
| Commonwealth Government funding | \$49.4m | \$46.9m | \$46.3m |
| Public Purpose Fund | \$25.7m | \$25.7m | \$25.7m |
| Total income from government and Public Purpose Fund | \$158.1m | \$147.9m | \$144.9m |

The Commonwealth Government provides funding to the states and territories through the National Partnership Agreement on Legal Assistance Services. Another source of funding is the Public Purpose Fund, made up of interest paid on money that is collected by the Victorian Legal Services Board from solicitors’ trust accounts.

The recent Productivity Commission report into Access to Justice Arrangements estimates that \$200 million per year of additional legal aid funding is needed, Australia-wide. This would increase the number and types of matters eligible for legal aid assistance and enable better alignment of means tests with established measures of disadvantage and poverty.⁹

⁷ Victorian Auditor-General’s Office (2014), *Access to Legal Aid*, Victorian Auditor-General’s Report, August 2014, p13.

⁸ *ibid*, p12.

⁹ Productivity Commission (2014), *Access to Justice Arrangements: Overview*, Inquiry Report No. 72, Canberra, September 2014, p30.

2.3 Victoria Legal Aid Board

Board composition

VLA's Board has five directors nominated by the Victorian Attorney-General and appointed by the Governor-in-Council. The *Legal Aid Act 1978* specifies that the Board must consist of:

- a chairperson
- a managing director
- three directors, of whom at least one must have experience in financial management and at least one must have experience in either business or government operations.

VLA also has a Community Consultative Committee to help the organisation identify ways to target services more effectively for people who are, or are at risk of becoming, socially excluded. The Committee makes recommendations on matters referred to it by the Board. The Committee is made up of representatives from community organisations, academia, the police and other organisations that VLA works with. The Committee does not include any representatives from the LIV or the Victorian Bar.

Frameworks that guide VLA decision-making

The Board of Directors is responsible for ensuring VLA meets its statutory objectives and carries out its duties and functions in accordance with the *Legal Aid Act 1978*. VLA has four statutory objectives that guide its operations. These are to:

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

VLA also has a set of unifying principles, agreed by the VLA Board in December 2012, to guide decision-making about service mix and eligibility. These are set out in Table 4.

Table 4: Victoria Legal Aid unifying principles¹⁰

VLA unifying principles

- 1 All services will have an element of targeting and triaging built in
- 2 Targeting and triaging will be directed towards assessing both access (initial eligibility) and intensity (extent) of service
- 3 Means or income tests are important, but are not necessarily the starting point for effective triage or targeting
- 4 We will only deliver services that have an impact or are effective in delivering benefits to an individual client or the community
- 5 Service choices and service design will be primarily focused on priority client needs, not just traditional legal problem categories

¹⁰ Victorian Auditor-General's Office (2014), *Access to Legal Aid*, Victorian Auditor-General's Report, August 2014, p16.

- 6 Commitment to the mixed model of service delivery in Victoria, but with flexibility to respond to changing circumstances by adjusting the weighting of staff practice, private practitioners and community legal centres

 - 7 There should be physical access points to legal aid services across the entire state, but the physical footprint must be appropriately targeted and efficient

 - 8 Maintain a material footprint through a dynamic staff practice

 - 9 Constantly seek out more efficient or lower unit cost service delivery approaches for legal problems or needs, and preference those approaches

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

 - 11 Preference more straightforward rules over rules that require application of selective judgement

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

One of the VLA Board's roles is to determine the type of matters for which legal assistance is made available and make associated changes to its eligibility guidelines. Stakeholders consistently reported a lack of consultation on changes to VLA's eligibility guidelines that have been made in recent years, particularly in relation to the changes made in 2013 (these changes are discussed in more detail in section 2.4 below).

Subsequent major change projects conducted by VLA, including the Family Law Legal Aid Services Review, Delivering High Quality Criminal Trials project, the Criminal Appeals Review and the development of VLA's Strategy 2015-18, have included more robust consultation processes and engagement. Further, VLA has acknowledged that it could do more to increase stakeholder collaboration, including a commitment in its Strategy 2015-18 to increasing consultation and collaboration with justice sector partners.

2.4 Changes to Victoria Legal Aid's eligibility guidelines

Policy levers

The increase in demand for services has led VLA to use policy levers to manage its budget. The key levers available to manage costs include:

- **Altering the means test:** to determine whether an applicant is eligible for a grant of legal assistance and if the applicant can contribute to the legal costs of their case, VLA assesses the applicant using a means test. The means test assesses an applicant's net income, assets and living expenses. VLA can lower these threshold amounts so that a smaller number of people are eligible for a grant. The current means test is:
 - assessable assets of less than or equal to \$865, if the person has no financially associated person or dependant
 - net disposable income per week of less than or equal to \$255.

If an applicant's net disposal income is over this amount, VLA may still make a grant of legal assistance, but would require a contribution towards legal costs.

- **Altering the types of matters that are eligible for grants of legal assistance:** Through its guidelines, VLA can determine the types of matters that are eligible for grants of legal assistance, and the level of resources allocated to types of matters and at different stages of matters. Eligibility guidelines also apply to restrict access to duty lawyer services.
- **Changing the cost ceiling:** VLA will provide a grant of legal assistance but only up to a specific amount. If the costs of legal representation and disbursements exceed this amount, the client may be required to fund legal representation for the remainder of the matter or to self-represent.

- **Altering the resourcing of different types of work:** VLA can alter the allocation of resources between legal representation, duty lawyer services, alternative dispute resolution, legal information and education, and other programs. It can also change the balance of services to focus on early intervention and resolution of matters, or focus on providing more intensive services when matters reach trial stage.
- **Changing the fees paid to legal practitioners:** VLA is able to adjust the fees it pays to private practitioners to undertake duty lawyer services and legal representation.

Recent changes to eligibility guidelines

In recent years, the VLA Board has made numerous adjustments to the types of matters eligible for legal aid funding through changes to the VLA guidelines. In 2013, the Board made significant changes to eligibility guidelines to address increased demand for legal aid services and resulting financial pressure. These changes reduced the number of people eligible to receive legal representation and shifted more people to lower cost services, such as duty lawyer services.¹¹

Examples of changes to the eligibility guidelines in 2013 include:

- limiting funding of parents in family law matters to trial preparation, and providing representation at trial only when the other party has a lawyer
- restricting funding in child protection matters to children and parents, except in exceptional circumstances
- increasing the age at which children will be generally considered mature enough to be funded to instruct a lawyer in child protection matters, from 7 to 10 years
- capping instructing solicitors' fees in indictable crime trials to two-half days, with some exceptions
- limiting legal representation to people facing imprisonment in adult summary crime matters.

Justice system stakeholders who were consulted in the development of this report acknowledged the difficulties VLA faces in managing the number of legal services they can provide, in the context of a limited funding envelope and increasing levels of demand for legally aided services.

However, some stakeholders expressed concerns about particular changes to the types of matters eligible for funding and the resulting impacts on litigants, and more broadly access to justice for the Victorian community. These concerns are discussed in more detail in section 2.6 on self-represented litigants.

R v Chaouk

In *R v Chaouk* (2013), Supreme Court judge Lasry J stayed the criminal proceeding until VLA granted a defendant legal representation for the duration of the trial. The VLA eligibility guidelines had previously specified that instructing solicitors' fees were capped in indictable crime trials to two half-days regardless of the length of a trial, with a small number of exceptions for some defendants.

Lasry J applied the precedent in *Dietrich v The Queen* (1992) in which Mason J and McHugh J said: "In our opinion and in the opinion of the majority of this Court, the common law of Australia does not recognise the right of an accused to be provided with counsel at public expense. However, the courts possess undoubted power to stay criminal proceedings which will result in an unfair trial, the right to a fair trial being a central pillar of our criminal justice system".

After Lasry J stayed the proceeding, VLA put in place an interim guideline in May 2013 to provide for access to instructing solicitors in all criminal trials before a jury, and subsequently made this interim guideline ongoing from January 2015. The judgement in *R v Chaouk*, and VLA's subsequent change to the guidelines, suggests that this particular guideline introduced in early 2013 was inhibiting access to quality legal representation. In response, the number of lawyer hours now dedicated to an accused person's defence has increased.

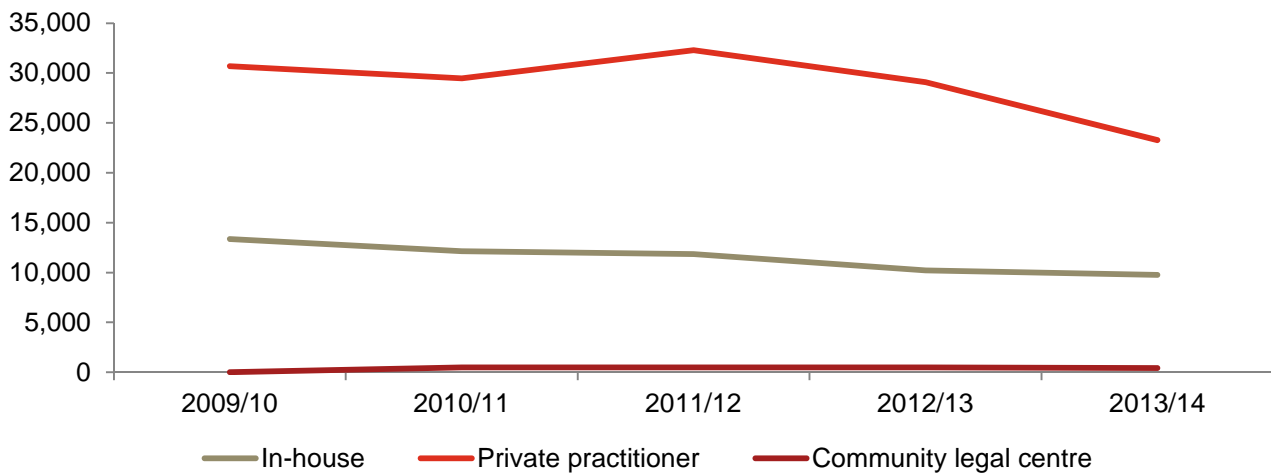
¹¹ Victorian Auditor-General's Office (2014), *Access to Legal Aid*, Victorian Auditor-General's Report, August 2014, p10.

PwC notes that while VLA currently provides access to instructing solicitors in criminal trials before a jury, a number of jurisdictions operate a model where solicitors and barristers are used differently in criminal trials.

2.5 Decreased access to legal aid funded representation

Changes to the eligibility guidelines have resulted in VLA delivering or funding legal representation in a more targeted way, meaning an increasing number of Victorians are missing out on legally aided support. It is noted that data were not available to demonstrate the extent to which those in need are missing out on legal aid representation. Lawyers do not capture data on the number of people they decline assistance to because they do not meet the eligibility requirements. Figure 2 shows that grants of legal assistance have been declining over time. Between 2009-10 and 2013-14, private practitioners grants have declined 24 per cent (from 30,693 to 23,270) and in-house VLA grants have declined 27 per cent (from 13,362 to 9,760).

Figure 2: Number of VLA grants of legal assistance



2.6 Increase in self-represented litigants

The term “self-represented litigant” includes both litigants that choose or prefer self-representation and those who are self-represented due to circumstances beyond their control, such as having limited financial resources.¹² There are a number of reasons why a litigant may choose to self-represent, including reasons associated with their experience or background (ie where a litigant holds legal qualifications).¹³ Self-represented litigants may also change status throughout court, litigation or dispute resolution proceedings, including being represented or self-represented at different stages.¹⁴

In consultations, many stakeholders expressed concerns about the increasing number of disadvantaged Victorians who are missing out on legal representation, because they are ineligible for legal aid and cannot afford a lawyer. One judicial officer expressed the opinion that “access to legal aid doesn’t come within a cooe of the required legal of service provision”. We noted there are also other early intervention services engaged by the VLA, to support self-represented litigants such as Community Legal Centres and Dispute Settlement Centres.

Numerous reviews of the Australian justice system have found that there is a growing issue around vulnerable and disadvantaged self-represented litigants in the court system. Many justice system actors have expressed a

¹² E Richardson, T Sourdin and N Wallace (2012), *Self-Represented Litigants*, Literature Review, May 2012, p10.

¹³ E Richardson, T Sourdin and N Wallace (2012), *Self-Represented Litigants – gathering useful information*, Final Report, June 2012, p9.

¹⁴ *ibid*, p10.

similar view to Legal Aid NSW that the “most vulnerable are less likely than others to have the skills and psychological readiness to achieve legal resolution on their own or with minimal assistance”.¹⁵

Justice system stakeholders are concerned about the increasing number of self-represented litigants in Victorian courts, who are ineligible for a grant of legal assistance and are ill-equipped to represent themselves. PwC was unable to obtain any data on the number of self-represented litigants in the Victorian court system, and accordingly cannot determine whether there has been a significant increase in numbers of self-represented litigants. This is an area where the Victorian justice system would benefit from improved collection of data.

Further, stakeholders identified particular types of matters where they were concerned about self-represented litigants being able to obtain a fair outcome. In the criminal jurisdiction, these are typically matters in which the law is complex and the attached penalty has serious implications for the litigant. Some examples of these types of matters include driving while suspended charges and indecent assault charges.

Stakeholders also identified numerous anecdotal examples of litigants in summary crime matters who were ineligible for grants of legal assistance, but whom they viewed as being in need of legal representation to achieve a fair outcome. Anecdotally, stakeholders advised that self-represented litigants are likely to receive worse legal outcomes than those with legal representation. This has flow on consequences to the individual, their family and community, the economy and often the correctional system.

In the family law jurisdiction, stakeholders identified concerns that the family law trials and final hearing guidelines result in a litigant being required to represent them at the most critical point in the litigation, without having any prior exposure to the court as a self-represented litigant. This issue was seen to be particularly acute in family violence matters.

VLA’s recent Family Law Legal Aid Services Review¹⁶ recommends easing restrictions on trial representation funding, so that priority clients are provided full representation through to the final hearing. The review also proposes amendments to eligibility guidelines for family dispute resolution, family violence matters and Recovery Order hearings. These changes will come into effect on 30 October 2015.

Many stakeholders expressed the view that the increasing numbers of self-represented litigants are leading to delays and inefficiencies in the Victorian court system. Due to a lack of data, it is difficult to measure the extent or the cost of these delays.

A related issue was also identified through consultations around the court system not being accessible to self-represented litigants. Deputy Chief Faulks of the Family Court has noted that “if it becomes the norm for many litigants to be self-represented, the justification for retaining existing court procedures based on parties being legally represented may no longer be valid”.¹⁷ The Productivity Commission also found in its report into Access to Justice Arrangements that complexity in the justice system needs to be reduced, to make it easier for litigants to self-represent.¹⁸

2.7 Opportunity to invest in earlier resolution of matters

Many stakeholders expressed the view that increased investment in mediation, alternative dispute resolution and early intervention would result in big productivity gains and improved outcomes for the justice system. This up-front investment may prevent some matters from reaching the court. For example, alternative dispute resolution offers a number of advantages, including cost and time savings, if both parties are willing to participate in the process.¹⁹

¹⁵ Legal Aid New South Wales (2013), Legal Aid NSW Submission to the Productivity Commission, October 2013, p58-59.

¹⁶ Victoria Legal Aid (2015), *Family Law Legal Aid Services Review*, Final Report, June 2015.

¹⁷ Deputy Chief Justice Faulks, Family Court of Australia (2013), “Self-represented litigants: tackling the challenge”, Managing People in Court Conference, National Judicial College of Australia and the Australian National University, February 2013, p2.

¹⁸ Productivity Commission (2014), *Access to Justice Arrangements: Overview*, Inquiry Report No. 72, Canberra, September 2014, p37.

¹⁹ *ibid*, p12.

In VLA's recent Family Law Legal Services Review, it undertook to investigate and scope an Early Intervention Unit for family law matters, and committed to other actions to better identify and assist clients earlier in their matters. The Review also undertook to invest in reducing the number of disputes escalating to litigation, including through a court based mediation pilot.

Trials such as the Dandenong Project, a pilot undertaken by the Federal Magistrates Court from 2010-12, have shown that early intervention models can be effective in reducing increasing the number of self-represented litigants who settle their matters early, without judicial determination and with less court events.²⁰

2.8 Conclusions

Despite the data limitations PwC encountered while undertaking this project, which are outlined above, we were able to make some findings on current challenges in the Victorian legal aid system. These include:

- 1 Adoption of a more consultative approach to stakeholder engagement by VLA that is inclusive of the LIV, Victorian Bar and other justice system representatives. For example, more embedded consultative processes could assist in determining the impacts of changes to eligibility guidelines on litigants and the court system.
- 2 Limited data collection in the justice sector in relation to justice system access and outcomes inhibits evidence-based decision making around improvements to the legal aid system.
- 3 There is likely to be increasing numbers of self-represented litigants in the Victorian court system. These self-represented litigants are often poorly equipped to represent themselves and may benefit from additional support.
- 4 There could be potential gains to be made by encouraging early settlement and resolution of cases, and by doing so create cost and time savings to litigants and the court system.

²⁰ Federal Magistrates Court of Australia (2012), Review of the Dandenong Project, March 2012.

3 Victoria Legal Aid service delivery model

3.1 Overview of the service delivery model

VLA has a mixed model for the provision of legal aid services. This means that in addition to providing services through in-house lawyers, legal aid-funded work is also delivered by Community Legal Centres (CLCs) and private practitioners. Private practitioners are private barristers and solicitors who provide legal representation to clients that are funded by VLA.

All jurisdictions in Australia have a mixed service delivery model, with some services being delivered by in-house lawyers and some by private practitioners and CLCs. A mixed model is widely regarded as having a number of benefits in the Australian context. Mixed models enable greater flexibility and legal aid commissions are able to harness the expertise of the private sector, while developing in-house specialisations and filling gaps in legal assistance where the private sector is unable or unwilling to provide services.²¹ A mixed model also enables conflict of interest issues that arise to be managed.

In 2013-14, in Victoria, private practitioners delivered 70 per cent of all legal representation services, and in-house lawyers delivered 29 per cent. All Australian jurisdictions have a mixed model for the provision of legal aid services; however the proportions of services delivered by private and in-house lawyers differ. At a national level around 70 per cent of legal aid commissions' services are provided by private practitioners and 30 per cent by in-house lawyers.²²

As Table 5 shows, the number of grants of legal aid being delivered by private practitioners has decreased. However, the number of grants of legal assistance delivered by in-house solicitors has also decreased. This is a result of changes to VLA's eligibility guidelines that have reduced the total number of grants of legal assistance being provided to the Victorian community.

Table 5: Grants of legal assistance²³

| Casework under grants of legal assistance | 2013-14 | | 2012-13 | | % change |
|---|---------|---------|---------|---------|----------|
| | Number | % share | Number | % share | |
| Grants of legal assistance (total) | 33,463 | | 39,782 | | 16% down |
| In-house grants of legal assistance | 9,760 | 29% | 10,227 | 26% | 5% down |
| Private practitioner grants of legal assistance | 23,270 | 70% | 29,072 | 73% | 20% down |
| Community legal centre grants of legal assistance | 433 | 1% | 483 | 1% | 10% down |

²¹ Productivity Commission (2014), *Access to Justice Arrangements: Productivity Commission Inquiry Report*, Volume 2, Inquiry Report No. 72, Canberra, September 2014, p724.

²² National Legal Aid (2013), Submission to the Productivity Commission Inquiry into Access to Justice Arrangements, November 2013, p18.

²³ Victoria Legal Aid (2014), *Nineteenth Statutory Annual Report 2013-14*, 27 August 2014, p1.

Allocation of grants of legal assistance

Currently, it is the client who determines who will provide them with legal representation, subject to the client being eligible for a grant of legal assistance. A client will visit a private law firm, Victoria Legal Aid offices or a Community Legal Centre and a solicitor will lodge an application for a grant on the client's behalf. If legal aid is granted, that solicitor will then undertake the matter in most cases, although there are some exceptions (ie conflicts of interest). This model is based on the principle of "solicitor of choice".

The number of direct applications to VLA, or "unallocated cases", is small. VLA recommends that applicants for a grant of legal assistance seek the assistance of an in-house or private practitioner to submit the application on their behalf. However, a small number of applications choose to complete the form themselves and submit it directly to VLA for assessment and allocation. Where the direct application does not nominate a practitioner or firm, or allocates one that is not on a panel, VLA will allocate the matter.

In 2013-14, less than one per cent of cases were unallocated. In that year, of the 33,463 grants of legal assistance that VLA provided, 197 (0.6 per cent) were allocated to an in-house lawyer or private practitioner. Table 6 shows the numbers of matters that were allocated to in-house and private practitioners.

Table 6: Allocation of direct applications to in-house and private practitioners, 2013-14²⁴

| Law type | In-house | Private lawyers and CLCs | Total |
|----------|----------|--------------------------|-------|
| Family | 31 (41%) | 45 (59%) | 76 |
| Crime | 8 (28%) | 21 (72%) | 29 |
| Civil | 80 (87%) | 12 (13%) | 92 |

The allocation of work to in-house counsel or private barristers is undertaken differently. In early 2015, VLA advertised for expressions of interest for a barrister's list for the conduct of indictable trials for the first time. The recent Family Law Legal Aid Services Review conducted by VLA also contains a commitment to set up a preferred barristers list for family law matters.

Going forward, only the barristers on these lists will be able to be briefed in VLA-funded matters. In addition, in July 2012, VLA established in-house chambers. The purpose of establishing the chambers was to manage a greater range of high-cost legal work through a staff practice, instead of purchasing advocacy services from private barristers at a daily rate.²⁵ Since the establishment of in-house chambers, briefings from VLA to private practitioners have reduced significantly.

Cost-efficiency of the service delivery model

The Victorian Auditor-General delivered an audit report in 2014, which assessed whether VLA is performing its functions and duties effectively and efficiently, and achieving its statutory objectives.²⁶ While the audit found that VLA is performing its role in delivering legal services, it also found that limitations in calculating the cost of service provision limit measures to determine how effectively, efficiently and economically VLA is in providing legal aid services.²⁷

²⁴ Data provided by Victoria Legal Aid on 12 June 2015.

²⁵ Victorian Auditor-General's Office (2014), *Access to Legal Aid*, Victorian Auditor-General's Report, August 2014, p10.

²⁶ *ibid.*

²⁷ *ibid.*, p10.

Further, the 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.²⁸

VLA has advised that it has commenced a process of analysing the relative cost of legally aiding different matter types, and VLA anticipates that this data will be available to stakeholders in approximately 18 months (from the time at which this report was authored). This analysis will provide unit cost data as to how various case types are managed and proceed through the justice system (ie the proportion of cases that go to trial or final hearing and the during of trials and final hearings).

The cost-efficiency of services provided by VLA affects the number of clients that VLA is able to assist. Stakeholders have indicated that they would be interested in further understanding and accessing data and evidence on the cost-effectiveness of using in-house solicitors and chambers, compared with private solicitors and barristers. Further, some stakeholders suggested that they were keen to understand the “optimal balance” between delivering legal aid services through private and in-house lawyers.

Other jurisdictions, including Queensland and New South Wales, have taken steps towards accurately costing the work undertaken by in-house counsel and private practitioners, in order to understand the relative cost-efficiency. For example, Legal Aid NSW undertook an activity-based costing pilot in 2014 to augment the service planning process and demonstrate that services are delivered efficiently.²⁹ This was after the NSW Auditor-General recommended that the organisation implement a time costing system to ensure that legal aid is provided in the most effective, efficient and economical manner in accordance with the *Legal Aid Commission Act 1979* (NSW).

Legal Aid Queensland has developed annual performance targets for in-house lawyers and transparent timekeeping.³⁰ The performance targets are expressed in terms of income earned and use the same fee rates payable to private lawyers for undertaking the same work. Lawyers are required to record time spent working on specific activities and matters.³¹

Reviews undertaken in other jurisdictions have questioned the staffing levels of legal aid commissions and the service delivery mix. The recent independent Review of Legal Aid Commission of Tasmania by Peter Evans, a former Tasmanian Supreme Court judge, found that the cost of grants when performed in-house is approximately twice the cost of grants being performed by the private profession.³² The review found that in order to establish the most effective, efficient and economical means of providing legal aid, it was incumbent on the Commission to regularly compare the cost of providing legal aid in-house with the cost of providing it via the private profession. However, the Legal Aid Commission of Tasmania had not undertaken this comparison at any time.³³

VLA’s governing legislation, the *Legal Aid Act 1978*, specifies that one of the four objectives of VLA is “to provide legal aid in the most effective, economic and efficient manner”. Further, one of the VLA Board’s 12 unifying principles, set out in section 2.3 of this report, is to “constantly seek out more efficient or lower unit cost service delivery approaches for legal problems or needs, and preference those approaches”. PwC observes that an accurate per unit costing of legally aided services would assist VLA fulfil both these objectives. Information on the costs of providing legal assistance through in-house solicitors may also be useful in benchmarking the fees paid to private practitioners.

²⁸ Victorian Auditor-General’s Office (2014), *Access to Legal Aid*, Victorian Auditor-General’s Report, August 2014, p10.

²⁹ Productivity Commission (2014), *Access to Justice Arrangements: Productivity Commission Inquiry Report*, Volume 2, Inquiry Report No. 72, Canberra, September 2014, p707.

³⁰ *ibid.*

³¹ *ibid.*

³² Attorney-General for the State of Tasmania (2015), *Review of Legal Aid Commission of Tasmania*, 27 March 2015, p5.

³³ *ibid.*, p27.

PwC cost estimate of the service delivery model

PwC requested data from VLA on the costs of providing grants of legal assistance by in-house solicitors and counsel, when compared with private solicitors and barristers. However, VLA advised the data required was not available. VLA advised that they are currently undertaking an internal project to analyse per unit costs and the results would be available in approximately 18 months' time.

Using publically available data, PwC has estimated the average per unit cost of private practitioners compared with VLA in-house lawyers. To develop a per unit costing, we needed to estimate the cost of duty lawyer services. We costed each duty lawyer service at the per hour fee of \$146 paid to private practitioners who undertake duty lawyer services³⁴. We assumed that each duty lawyer service takes an hour.

PwC notes that the cost estimates developed in this model are imprecise for the following reasons:

- there are numerous types of matters within the criminal law and family law programs, however due to a lack of more granular data, the cost estimate represents a 'blended' unit cost
- the estimate does not recognise that expenditure on some cases extends beyond a single year and therefore does not capture the full cost of all matters
- due to the lack of more granular data the estimates potentially do not separate overheads and cost attribution factors of VLA's regulatory functions
- the model does not account for outliers (ie complex cases) that distort the figures
- legal aid in-house services do not incorporate a profit margin as may occur in the private practice.

However, they do provide indicative cost comparisons.

The figures in Table 7: Per unit costings in family law matters and Table 8: Per unit costings in criminal law matters show that the average per unit costs for private practitioners are lower in both criminal and family law matters. In family law matters the average per unit cost for private practitioners is \$2,326, compared with \$10,013 for in-house lawyers. In criminal law matters, the average per unit cost for private practitioners is \$2,170, compared with \$5,417 for in-house lawyers.

Family law

Table 7: Per unit costings in family law matters

| | In – House | Private practitioners | Total | Source |
|---|------------|-----------------------|------------|-------------------|
| Number of duty lawyer services | 14,709 | 1,190 | 15,899 | VLA Annual Report |
| Cost per hour (\$) | 146 | 146 | | VLA Handbook |
| Length of duty lawyer service (hours) | 1 | 1 | | Assumption |
| Cost of duty lawyer services (\$) | 2,147,514 | 173,740 | 2,321,254 | Calculation |
| Total expenditure on family law program | | | 51,200,000 | VLA Annual Report |
| less Cost of duty lawyer services | | | 2,321,254 | |

³⁴ See VLA website: <http://handbook.vla.vic.gov.au/handbook/24-payments-to-lawyers-and-service-providers/duty-lawyer-schemes>.

| | In – House | Private practitioners | Total | Source |
|--|---------------|-----------------------|------------|-------------------|
| Estimated expenditure on grants (total) | | | 48,878,746 | Calculation |
| Total expenditure on private practitioners | | 24,300,000 | | VLA Annual Report |
| Estimated expenditure on grants | 24,752,486 | 24,126,260 | | Calculation |
| Number of grants | 2,472 | 10,374 | | VLA Annual Report |
| Per unit cost (\$) | 10,013 | 2,326 | | |

Criminal law

Table 8: Per unit costings in criminal law matters

| | In – House | Private practitioners | Total | Source |
|--|--------------|-----------------------|------------|-------------------|
| Number of duty lawyer services | 46,595 | 5,025 | 51,620 | VLA Annual Report |
| Cost per hour (\$) | 146 | 146 | | VLA Handbook |
| Length of duty lawyer service (hours) | 1 | 1 | | Assumption |
| Cost of duty lawyer services (\$) | 6,802,870 | 733,650 | 7,536,520 | Calculation |
| Criminal law program | | | 70,200,000 | VLA Annual Report |
| less Cost of duty lawyer services | | | 7,536,520 | |
| Estimated expenditure on grants (total) | | | 62,663,480 | Calculation |
| Total expenditure on private practitioners | | 28,200,000 | | VLA Annual Report |
| Estimated expenditure on grants | 35,197,130 | 27,466,350 | | Calculation |
| Number of grants | 6,497 | 12,660 | | VLA Annual Report |
| Per unit cost (\$) | 5,417 | 2,170 | | |

In South Australia, the Review of the Provision and Procurement of Legal Aid Services in South Australia's Criminal Courts, published in February 2014, looked at the relative costs of providing legal assistance services. The expert committee appointed to undertake the review had access to the South Australian Legal Services Commission's internal data and used it to calculate the relative cost-efficiency of delivering legal assistance services across different matter types, using a task-based methodology.

The costing exercise undertaken by the committee showed that there is significant variance in the cost of matters handled by in-house and external lawyers, across different types of matters and court jurisdictions. Out of the five most prevalent case categories (Assaults, Offences Against Judicial Procedure, Motor Vehicle Driving

Offences, Burglary, Break and Enter and Theft and Other Dishonest) in-house lawyers were more expensive than private practitioners with the exception of Burglary, Break and Enter cases.³⁵

PwC recommends that further work is undertaken to determine the relative cost-efficiency of services, across different jurisdictions and matter types, and that the results of this work be made publically available and be used to inform VLA’s future service mix.

Stages of the service delivery model

VLA procures the legal representation services undertaken by private practitioners through its service delivery model. PwC has interpreted this model as involving five stages:

- 1 Panel accreditation and preferred barristers list
- 2 Eligibility assessment
- 3 Case work
- 4 Payment of fees and disbursements
- 5 Compliance and review

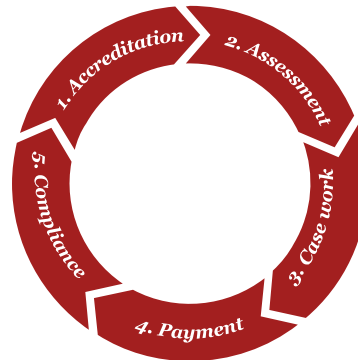
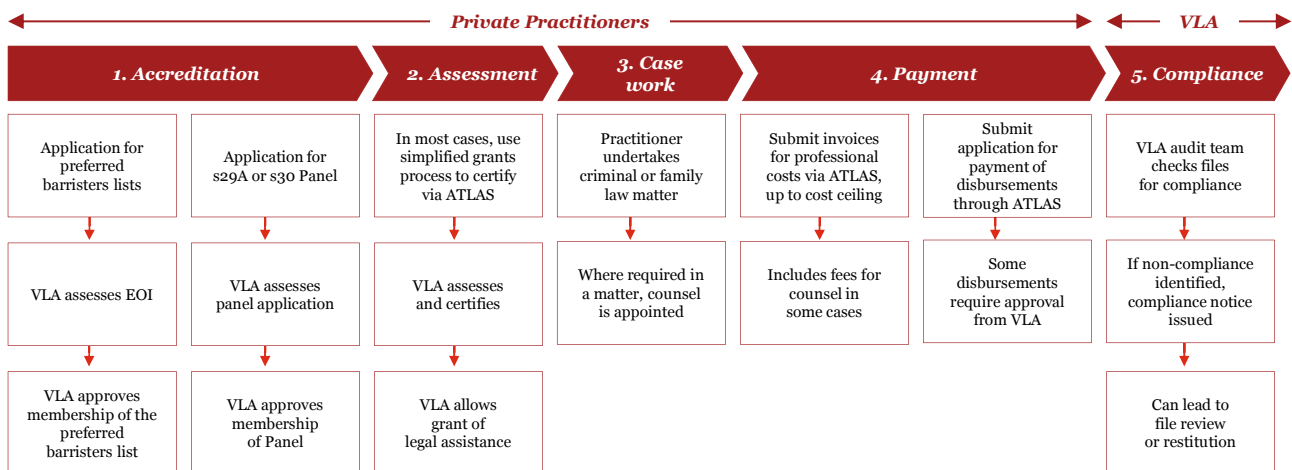


Figure 3 sets out these five stages and the tasks involved in each stage. This diagram shows that under the service delivery model the administrative costs are borne primarily by private practitioners. PwC heard from some stakeholders that lump sum fees paid to private practitioners by VLA do not cover all the tasks involved in administering the grant of legal assistance.

Each stage of the service delivery model is stepped out and analysed below, including setting out some of the key concerns raised through stakeholder consultations.

Figure 3: VLA service delivery model



³⁵ Attorney General’s Department, Government of South Australia (2014), Review of the Provision and Procurement of Legal Aid Services in South Australia’s Criminal Courts, First Report – The Current Context, February 2014, 96-97.

3.2 Panel arrangements and preferred barristers list

Victoria Legal Aid has private practitioner panels to procure services from external solicitors. In 2012, VLA undertook a refresh of its panel arrangements including updating the requirements for law firms and individual practitioners to be eligible to deliver grants of legal assistance.

VLA also established specialist panels under s29 of the Legal Aid Act 1978. These include:

- Child Protection Panel
- Family Law Panel
- Family Violence Panel
- Independent Children’s Lawyer Panel
- Summary Crime Panel
- Indictable Crime Panel and Youth Crime Subset.

These panels are exclusive and grants for matters covered by each panel can only be allocated to members of that panel. Practitioners are required to apply for membership of a panel and the criteria are different for each panel. Appointment to the panels is for a specified period of time, between three and five years. There is also a general referral panel established under s30 of the *Legal Aid Act 1978*, for firms willing to assist in any legally assisted matters.

In addition, a preferred barristers list for indictable trials was announced in early 2015 and VLA set up an expression of interest process for barristers wanting to be on the list. The list was released on 31 July 2015, and in criminal trials practitioners are now only permitted to brief barristers on the Criminal Trial Preferred Barrister List, unless an exception is granted.

The preferred barristers list will provide VLA with more visibility of barristers undertaking legally aided work, and was introduced as a result of concerns raised around the quality of some trial advocates through VLA’s High Quality Criminal Trials Review. An outcome of the recent VLA Family Law Legal Aid Services Review is to establish a preferred barristers list for family law matters.

Other jurisdictions have similar mechanisms to procure services from private practitioners, including for example New South Wales, South Australia and New Zealand.

Stakeholders generally agreed that having a system in place to assess quality is critical to providing the Victorian community with access to high-quality legal representation. This is particularly important in the legal aid context where clients are disadvantaged and find it hard to judge quality.

Some stakeholders expressed the view that having a panel or other procurement system is normal practice in procuring government services, and the legal aid system should be no exception. For example, the Victorian Government Legal Services Panel was established to provide legal services to government clients.

However, private practitioners report that they incur significant administrative and compliance effort as a result of the new panel arrangements, and that this creates extra costs for firms. PwC also heard from Community Legal Centres that the panel system may not be appropriately tailored to their needs, as they are required to apply to panels but can only use panels to claim disbursements, not the costs of full legal representation.

A key concern of stakeholders is that experienced solicitors and barristers will elect not to apply for VLA panels or the preferred barristers list, and that over time this will lead to a diminished pool of high quality private practitioners who are able to take on legal aid matters. Some stakeholders also expressed concerns that there may be fewer practitioners operating in regional and rural areas in Victoria over time, inhibiting access to legal representation in these areas.

Table 9 shows the membership of VLA's panels before and after the new panel arrangements were brought in, showing a decrease in the number of firms on the new panels. The numbers of firms that did not reapply after the panel refresh are also shown. VLA has advised that many of the firms that did not reapply were not active providers of legal aid services.

Table 9: Numbers of firms on s29 Panels at June 2015³⁶

| Panel name | Number of firms on new panel | Number of firms on former panel | Number of firms that did not reapply |
|--------------------|---|---------------------------------|--------------------------------------|
| Child Protection | 76 | 101 | 46 |
| Family Law | 115 | 199 | 102 |
| ICL | 49 | 56 | 26 |
| Indictable crime | 99 | 114 | 24 |
| Summary crime | 154 | 223 | 87 |
| Youth Crime Subset | Summary crime: 31 Indictable crime: 35 | N/A – new subset | N/A – new subset |
| Family Violence | 154 | N/A – new subset | N/A – new subset |

Table 10: Geographical distribution of firms at June 2015³⁷

| Area | Child Protection | Family Law | Summary Crime | Indictable Crime | Summary – Youth | Indictable – Youth |
|-------------------------|------------------|------------|---------------|------------------|-----------------|--------------------|
| Barwon | 7 | 12 | 15 | 8 | 6 | 3 |
| Gippsland | 14 | 6 | 20 | 14 | 3 | 8 |
| Grampians | 8 | 18 | 8 | 3 | 1 | 1 |
| Hume | 10 | 10 | 12 | 6 | 5 | 2 |
| Loddon Campaspe | 7 | 11 | 13 | 6 | 4 | 6 |
| Metro – North East/West | 18 | 29 | 60 | 43 | 11 | 15 |
| Metro – Southern | 4 | 16 | 16 | 9 | 3 | 3 |
| Metro – Eastern | 1 | 4 | 5 | 4 | 2 | 2 |

Stakeholders expressed concerns about clients who are eligible for legal aid being unable to access legal representation, due to reduced numbers of private practitioners on panels and therefore fewer practitioners able to provide VLA funded representation. Table 9 shows a significant decline in the number of private firms on panels.

Stakeholders were interested in understanding whether the recently-introduced panel arrangements, in addition to existing fee structures, are having the effect of deterring practitioners with valuable experience and

³⁶ Data provided by Victoria Legal Aid on 12 June 2015.

³⁷ *ibid.*

specialised skills sets from continuing to take on legally aided matters. It was noted that this could cause particular issues for access to justice in regional and rural areas. Table 10 shows the geographical distribution of firms on s29 panels. PwC recommends that VLA should continue to monitor access to legal aid practitioners, particularly in regional and remote areas, to ensure there are no gaps in service provision both geographically and across different panel specialisations.

Further, after the panel arrangements and preferred barristers lists have been in place for a sufficient period of time, PwC recommends that VLA undertake an independent review of the arrangements to assess and report on the impact of the panel arrangements on quality and access to legal representation. This review could also consider whether the criteria to assess quality are effective and make recommendations on how future panel processes could minimise the administration and compliance tasks required to be undertaken by private practitioners.

Quality issues

Stakeholders noted that in the vast majority of legal matters, quality was high. However, concerns about the quality of legal representation of both private practitioners and legal aid lawyers were raised. This included concerns about inexperienced lawyers making errors that lead to appeals and retrials, and ultimately poor outcomes for litigants. Concerns about the quality of advocacy skills of solicitor advocates were raised compared with more traditional forms of representation.

The new panel system and preferred barristers list have recently been implemented by VLA to address some of these concerns, and these arrangements may need to be in place for a period of time before evaluating their impact.

The LIV and the Victorian Bar also have schemes for the accreditation and quality assurance of solicitors and barristers undertaking legal aid matters. For example, the LIV has a program through which practitioners can gain an accredited specialisation in a particular area of the law (ie family law, criminal law and children's law) which recognises the practitioner's enhanced skill level in the legal area.

Further, the Victorian Bar introduced the Indictable Crime Certificate in 2013, a scheme for barristers undertaking indictable matters, which is now a pre-requisite for membership of VLA's Criminal Trial Preferred Barrister List.

Some stakeholders were also keen to ensure that in-house solicitors and counsel are subject to rigorous quality standards, through recruitment processes and ongoing quality assessment and training. As one judicial officer noted, VLA have the largest litigation practice in criminal and family law in Victoria, and accordingly high quality advocacy skills should be a focus for the organisation.

VLA, the LIV and the Victorian Bar should continue to work together and with other organisations in the justice sector to continuously improve professional development and quality standards for both private practitioners and legal aid lawyers.

PwC also notes that the Legal Profession Uniform Law came into effect on 1 July 2015 in Victoria and New South Wales. This puts in place additional requirements around conduct and practice standards and professional development for legal practitioners.

Alternative procurement models

Government agencies outsource a range of services to the private sector. A common means of procuring services is through competitive tendering. Other systems are also used, such as voucher systems where individuals receive funds that can be used to purchase services from different providers in the market, for example through the National Disability Insurance Scheme.

Other models for procuring legal aid services from private practitioners could be considered, drawing on insights from other sectors. The current panel system used by VLA is a "direct" procurement model in which VLA contracts directly with firms and lawyers to provide services to individual clients. Other areas of government use "bulk" procurement models. A summary of the advantages and disadvantages of these different models is in Table 11, noting that there may be variation within these two categories of procurement models.

Table 11: Procurement models

| Model | Advantages | Disadvantages |
|--------------------|--|--|
| Direct procurement | Contracting with individual providers may enable a greater level of control over delivery of the service | May create a greater administration burden than other models May stifle creativity and innovation if too prescriptive |
| Bulk procurement | May lead to less administrative burden May create cost-efficiencies due to economies of scale May enable innovation and creativity in how the service is delivered | May not be suitable where there is wide variation in the type or intensity of service or product being purchased |

In other sectors, such as health and human services, procurement models are being changed and adapted with the objective of providing higher quality services to the community, while encouraging innovation and cost-efficiency.

These sectors are suitable for comparison with the legal aid sector, as the challenges and issues associated with procuring services are similar. This includes:

- the services procured are non-homogenous, and are often involve clients with complex and sensitive needs
- a limited pool of funding to service large numbers of clients and a requirement to provide universal access
- issues of information asymmetry where clients are not equipped with the information needed to make fully-informed choices.

Two examples of alternative models include the employment services and public health systems, these are outlined below.

Jobactive: A geographically based, bulk procurement model

Jobactive (previously Job Services Australia) is the Commonwealth Government's employment service. It contracts the private and not-for-profit sectors to provide job creation and placement and training programs for job seekers. A total of 44 organisations currently deliver Jobactive services across non-remote Australia.

Employment providers are contracted to help a proportion of job seekers in an employment region, called a "business share". The proportion may be up to one hundred per cent of the business in a particular region.

Job seekers can nominate their preferred employment provider. However, if the preferred employment provider has reached the upper limit of their business share, the job seeker will be requested to nominate an alternative employment provider. Providers must accept and service all eligible job seekers referred to them.

Jobactive providers are selected through a competitive tender process, on basis of price and quality criteria. Once contracted, providers have broad discretion over how they can spend their fixed and outcome fees, to achieve employment outcomes for job seekers. The payment structure and flexibility of the model incentivise Jobactive providers to secure long-term employment outcomes for their clients.

A model for legal aid service delivery, similar to the Jobactive model, in which providers deliver a share of the legal aid services required in a geographic region could be considered.

Public hospitals: A data-driven, activity-based funding model

Government spending on public health is the fastest growing area of expenditure in Australia, in particular public hospital expenditure. Historically public hospitals and primary health providers were funded based on their previous amount of funding through block funding, with no reference to the volume of patients or types of services provided.

However, Australian jurisdictions are currently moving towards a system of activity-based funding. Activity-based funding is a system for funding public hospitals based on the number and breadth of services provided to patients and the efficient cost of delivering those services.

This move towards activity-based funding is possible as a result of improvements in data capture and reporting that show large differentials in cost per procedure or service across hospitals, and enable calculation of an efficient cost for different types of treatment.³⁸

It is particularly useful for public hospitals, by providing incentives to identify inefficient and unnecessary costs. This process also provides incentives for hospitals to improve the efficiency and quality of their services within the funding they receive for each individual patient. The data and reports provided to hospital management allow for the identification of either areas or services where inefficiencies exist so that the services provided to patients are optimised.

The Victorian Government, VLA, the LIV and the Victorian Bar could work together to further consider the merits of alternative models for procuring legal aid services. More detailed examination and identification of models in other sectors and jurisdictions would be required and consideration would need to be given to their potential application to the Victorian legal aid system. This would include analysis of:

- the potential costs and risks of a new approach
- the benefits that would be realised
- the implications for different stakeholder groups and impact on the broader justice system.

International examples of alternative procurement models are also discussed in Section 4 of this report.

3.3 Eligibility assessment

In most cases in-house lawyers, private practitioners and Community Legal Centres apply for and self-certify a grant of legal assistance for a client through the simplified grants process. The simplified grants process applies to approximately 80 per cent of grant applications.³⁹ The solicitor recommends funding for a grant of legal assistance based on their self-assessment that the client meets the means test and eligibility guidelines.

The lawyer submits the application electronically to VLA recommending funding. The system then processes the application to determine whether it can be automatically approved or requires a manual assessment by VLA's assignments team. If required, VLA's assignments team manually assess if a grant of assistance can be made.

The standard grants assessment process applies to a smaller number of matters, including some civil law, Commonwealth family law and public interest matters.

Lawyers are responsible for keeping casework files for all legally assisted matters. Casework files may be subject to compliance reviews by VLA, to ensure the lawyer has complied with VLA's record-keeping requirements and the file supports VLA's decision to provide a grant of assistance.

The eligibility assessment process was not an area that was raised in the consultations conducted by PwC, only how the assessments relate to the eligibility guidelines discussed in section 2 of this report.

³⁸ Grattan Institute, "Controlling costly care: a billion dollar hospital opportunity", Report No 2014-2, March 2014.

³⁹ Victorian Auditor-General's Office (2014), Access to Legal Aid, Victorian Auditor-General's Report, August 2014, p4.

3.4 Case work

After an application for a grant of legal assistance has been approved, the solicitor then provides legal representation in the matter. This may include briefing a barrister in some cases.

The actual case work undertaken by criminal and family law practitioners was not raised in the consultations by PwC, with the exception of concerns around the quality of legal representation, which was covered in section 3.2. Concerns around access to disbursements to provide expert evidence during trials were also raised, and this is covered in section 3.5 below.

3.5 Payment of fees and disbursements

Fees paid to private practitioners

There is a difficult tension between funding legal representation in a cost-effective manner, while also setting fees at the right level to incentivize high-quality legal representation.

VLA operates a lump sum fee structure across all areas of law based on court events and other stages of a case. Fees are increased annually on an ongoing basis, and VLA has also made changes to selective fees as a result of the findings of recent reviews on criminal trials and family law services. VLA also told PwC it is currently building its internal capability through the costing analysis being undertaken to benchmark and assess the adequacy of private practitioner fees.

The payment of fees and disbursements to private practitioners was an area of concern for private practice stakeholders consulted in the development of this report. Some stakeholders suggested that the fees paid by VLA have historically been low, and don't cover the time and costs required to perform case work.

In its submission to the Productivity Commission's review into Access to Justice Arrangements, the Law Council of Australia suggested that "if the rates offered to the private profession for accepting legal aid work do not increase significantly, the withdrawal of the private practitioners will continue. This threatens the viability of the mixed model for legal service delivery".⁴⁰

Private practitioners who were consulted told PwC that low legal aid fees are putting pressure on their businesses. Many law firms are using privately-funded matters to cross-subsidise legal aid matters. Although it is uneconomical to undertake a high volume of legal aid matters due to low fees, many private practitioners are dedicated to continuing to take on legal aid clients because of their commitment to assisting the most disadvantaged members of society.

In addition, private law firms report they have been taking on increasing numbers of clients on a pro bono basis due to the increase in the number of people ineligible for legal aid, but not able to otherwise afford legal assistance. This reflects cost shifting from the public to the private sector purse.

Other justice system stakeholders expressed a concern that due to the low fees paid by VLA, some experienced solicitors and barristers are no longer taking on legally aided matters. This has led to a "juniorisation of the bar" and growth in the number of solicitor advocates who can still make profits through "scale, volume and churn" of legal aid matters. Stakeholders thought this issue was likely to be more acute in the County Court than in other jurisdictions.

It was acknowledged however, that the panel arrangements and preferred barristers list may address some of these issues.

PwC requested information from VLA to understand the methodology VLA uses to set private practitioner fees. However, VLA did not provide this information. Without this information, we are unable to make observations on the current fee structure. PwC recommends that this methodology be made publically available to assuage concerns around competitive neutrality and ensure transparency.

⁴⁰ Law Council of Australia (2014), Productivity Commission Draft Report into Access to Justice Arrangements, 5 June 2014, p91.

Disbursements

Disbursements are used to fund costs in addition to those of the legal practitioner in a legally aided matter. This could include for example fees for investigations, expert reports, transcripts of evidence, plans or photographs. In-house and private practitioners use the simplified grants process to recommend that assistance should be granted for a disbursement.

Some stakeholders expressed a concern that in-house lawyers were obtaining more approvals for disbursements than private practitioners. Data provided by VLA show that expenditure on expert reports, and therefore overall disbursements, has gone down across both the in-house practice and the private profession. Between 2010-11 and 2013-14, there has been a 51 per cent decrease in expenditure on General Medical Reports, a 34.5 per cent decrease in expenditure on Psychologist Reports and a 12 per cent decrease in expenditure on Psychiatric Reports. When consulted, VLA said that it was a policy decision to decrease spending on disbursements across the board.

Table 12 shows the number of disbursements certified by in-house solicitors and private practitioners in 2013-14 across all programs. The amount certified is the amount spent – once a disbursement cost has been incurred the solicitor submits the invoice for certification and payment. The data show that the amount spent on psychiatrists and psychologists roughly maps to proportion of in-house solicitors undertaking legal aid matters (30 per cent) compared with private practitioners (70 per cent). A larger amount of disbursements are being certified for in-house lawyers in the areas of general medical and neuropsychologists, when compared to the proportion of legal aid matters being undertaken by in-house solicitors.

Table 12: VLA disbursement data 2013-14⁴¹

| Disbursement type | In-house | | Private practitioners | |
|-------------------|------------------|-------------------|-----------------------|-------------------|
| | Number certified | Amount certified | Number certified | Amount certified |
| General medical | 272 | \$51,178 (40%) | 421 | \$76,696 (60%) |
| Neuropsychologist | 60 | \$65,811 (42.6%) | 82 | \$88,704 (57.4%) |
| Psychiatrist | 476 | \$301,545 (34.1%) | 929 | \$582,239 (65.9%) |
| Psychologist | 488 | \$237,370 (32.1%) | 1048 | \$501,606 (67.9%) |

3.6 Compliance and review

Compliance checks

In accordance with the VLA handbook, VLA's compliance officers check samples of legal aid-funded case files to ensure that:

- lawyers comply with VLA's requirements for record-keeping and invoicing
- the case files support VLA's decisions to make a grant of legal assistance.

If the records in a case file do not comply with VLA requirements, the compliance officer may choose to give one of the following levels of notice to the lawyer:

- a file review notice
- a non-compliance notice
- a restitution notice

⁴¹ Data provided by Victoria Legal Aid on 12 June 2015.

- a compliance failure notice
- a compliance failure notice 2.

The type of notice is determined by the nature and seriousness of the breach. This notice may require the lawyer to take remedial action within a specified time to avoid being issued with a restitution notice, or if the breach is more serious, the notice may require the lawyer to comply with a restitution notice.

A restitution notice requires the lawyer to repay VLA an amount of money. The amount will not be more than the amount expended by VLA on the grant of legal assistance. If a lawyer receives a restitution notice they have a right to request a review of the decision. This includes internal reconsideration if they believe that the compliance officer has wrongly applied VLA requirements or the alleged breach relates to the lawyer's assessment of matter under the VLA guidelines. They also have a right to request independent review if the breach relates to the lawyer's assessment of the guidelines and merits.

Private practitioners consulted in the development of this report expressed concerns that a high volume of compliance checks are being carried out on private practitioner files, compared to in-house files. They also raised concerns about the number of restitution notices being issued to private practitioners. VLA provided PwC with data and information in these two areas, set out below and this indicates that the private practitioners' perceptions are unfounded.

In July 2014, VLA implemented a new risk-based compliance framework, with quarterly compliance checks. The aim of the new framework was to "allow for problematic firms to be more easily identified, short and longer term trends to be scrutinised and any systemic compliance issues to be flagged in a timely and efficient manner".

Data provided by VLA, presented in Table 13, show that there has been variance in the number of files checked across different program areas and years. However, the total percentages of files that checked have been similar for private lawyers and in-house lawyers for each year, with the exception of 2013-14, when one per cent of in-house files were checked compared with five per cent of private lawyer files.

Table 13: Number of compliance checks ⁴²

| Law type | 2011-12 | | 2012-13 | | 2013-14 | | 2014-15 (forecast) | |
|---------------------|---------------|-----------------|---------------|-----------------|---------------|-----------------|--------------------|-----------------|
| | Files checked | Grants approved | Files checked | Grants approved | Files checked | Grants approved | Files checked | Grants approved |
| Family Law | | | | | | | | |
| In-house | 181 (7%) | 2713 | 181 (8%) | 2385 | 2 (0.1%) | 2472 | 270 (10%) | 2659 |
| Private | 1391 (10%) | 14041 | 779 (7%) | 11972 | 59 (0.6%) | 10523 | 190 (2%) | 10529 |
| Total | 1572 (9%) | 16754 | 960 (7%) | 14357 | 61 (0.5%) | 12995 | 460 (3%) | 13188 |
| Criminal Law | | | | | | | | |
| In-house | 347 (4%) | 8231 | 333 (5%) | 7144 | 62 (1%) | 6497 | 150 (2%) | 7570 |
| Private | 1086 (6%) | 18343 | 807 (5%) | 17231 | 1206 (9%) | 12859 | 830 (7%) | 11952 |
| Total | 1433 (5%) | 26574 | 1140 (5%) | 24375 | 1268 (7%) | 18437 | 980 (5%) | 19522 |

⁴² Data provided by Victoria Legal Aid on 12 June 2015.

| Law type | 2011-12 | | 202-13 | | 2013-14 | | 2014-15 (forecast) | |
|-----------------------|------------------|-----------------|------------------|-----------------|------------------|-----------------|--------------------|-----------------|
| | Files checked | Grants approved | Files checked | Grants approved | Files checked | Grants approved | Files checked | Grants approved |
| Civil Law | | | | | | | | |
| In-house | 74 (8%) | 969 | 57 (8%) | 698 | 28 (4%) | 791 | 80 | 1078 |
| Private | 29 (8%) | 344 | 25 (7%) | 352 | 5 (2%) | 321 | 0 | 311 |
| Total | 103 (8%) | 1313 | 82 (8%) | 1050 | 33 (3%) | 1112 | 80 | 1389 |
| Total in-house | 602 (5%) | 11913 | 571 (6%) | 10,227 | 92 (1%) | 9760 | 500 (4%) | 11307 |
| Total private | 2506 (8%) | 32728 | 1611 (5%) | 29555 | 1270 (5%) | 23703 | 1020 (4%) | 22792 |

VLA also provided data on the number of non-compliant files found through file checking for in-house and private practitioners, shown in Table 13.

Table 14: Compliance results 43

| Lawyer type | 2011-12 | | 2012-13 | | 2013-14 | | 2014-15 (to 31 Mar) | |
|-------------|---------------|----------------------|---------------|----------------------|---------------|----------------------|---------------------|----------------------|
| | Files checked | Number non-compliant | Files checked | Number non-compliant | Files checked | Number non-compliant | Files checked | Number non-compliant |
| In-house | 602 | 55 (9%) | 571 | 72 (13%) | 92 | 20 (22%) | 421 | 149 (35%) |
| Private | 2506 | 379 (15%) | 1611 | 367 (23%) | 1270 | 382 (30%) | 718 | 307 (43%) |
| Total | 3108 | 434 (14%) | 2182 | 439 (20%) | 1362 | 402 (30%) | 1139 | 456 (40%) |

VLA data on compliance results show that while a decreasing number of private practitioner and in-house files are being checked, the proportion of files being checked that are being found to be non-compliant is increasing. This is consistent with VLA's advice that it has moved to a risk-based compliance framework.

Restitutions

In 2013-14, the total value of restitution sought as a result of compliance checks of criminal law files, following the reconsideration and independent review stages was \$168,498. This represents approximately 0.5 per cent of the total actual costs of all criminal law grants in this period. Of this amount, \$126,888 related to summary criminal grants, representing approximately 1.2 per cent of the total actual costs of grants for summary criminal matters in this period. VLA did not provide information on the value of restitution sought from private practitioners compared with in-house lawyers.

The compliance and restitutions data show that VLA is undertaking checks of the case files of both private practitioners and in-house lawyers. It also shows that a slightly higher percentage of private practitioner files are being found non-compliant.

VLA's shift to a risk-based compliance model is consistent with contemporary practice in organisational management.

⁴³ Data provided by Victoria Legal Aid on 12 June 2015.

3.7 Conclusions

PwC has made a number of findings on the current service delivery model for engaging private practitioners to deliver family and criminal law services. These include:

- 1 VLA should accelerate the internal work being undertaken to determine the relative cost-efficiency of delivering legal aid services through in-house lawyers compared with private practitioners, for different types of matters and across different court jurisdictions. This information is critical to making transparent decisions around VLA's service delivery mix and would also provide a benchmark for private practitioner fees
- 2 VLA data show that the number of solicitors on its private practitioner panels has decreased significantly. In this context, VLA should continue to monitor access to legal aid practitioners, particularly in regional and remote areas of Victoria
- 3 Having a system in place to ensure quality of service provision is critical to providing the Victorian community with high-quality legal aid services. The panel arrangements and preferred barristers lists should be evaluated after a period of time to assess their impact on quality and access to legal representation
- 4 Further consideration could be given to alternative models for procuring services from private practitioners, while complying with the Victorian Government procurement frameworks. A different procurement model may enable more streamlined administration arrangements and may encourage greater cost-efficiency and innovation in the delivery of legal aid services.

4 Potential models for Victoria

The service delivery mix of legal aid commissions differs across jurisdictions, and accordingly it is difficult to make direct comparisons between jurisdictions. For example, there is significant variance in the number and focus of Community Legal Centres operating in Australian jurisdictions, and the in the proportion of in-house and private lawyers conducting legal aid funded matters.

There are a range of mixed models in Australia, ranging from Legal Aid NSW's model in which private practitioners undertake approximately 41 per cent of matters and in-house lawyers are directed to undertake all criminal matters except in exceptional circumstances, to Legal Aid Queensland where the organisation is heavily dependent on private practitioners, who undertake 80 per cent of matters.

Appendix B sets out a summary of the models in comparable jurisdictions with common law systems, including New South Wales, Queensland, South Australia, New Zealand, the United Kingdom and Canada. This includes comparative information on the operating expenses, number of legal aid commission employees and the service mix of each jurisdiction.

This section sets out a number of models from other jurisdictions that could be considered in the Victorian context. The selection of models outlined in this section is not intended to be a comprehensive list, nor is PwC recommending the adoption of these models in Victoria. A summary of these models and their advantages and disadvantages is set out in Table 15.

Table 15: Alternative models and their advantages and disadvantages

| Model | Short description | Advantages | Disadvantages |
|--|---|---|---|
| Inclusive governance and consultative model | Legal aid commission consultative and governance structures that involve broader justice system representatives, including private practitioners. | Addresses concerns of stakeholders regarding lack of consultation on decisions regarding the provision of legal aid in Victoria. | The Legal Aid Act 1978 specifies VLA Board composition. PwC does not recommend a move away from a skills-based board. |
| Public Defenders Office | A separate Public Defenders Office, similar to the model in New South Wales. | A Public Defenders Office would provide a separate and independent service that is available to all lawyers undertaking legal aid funded matters. | It is not known whether this model would be cost-effective. |
| Service for self-represented litigants | A service for self-represented litigants providing advice on the merits of a case and strategies and approaches to litigation. | Provides access to legal assistance for a broader range of self-represented litigants, for some categories of proceedings. | Lawyer does not have comprehensive working knowledge of the matter, potentially affecting the quality of advice provided. |
| Centralised allocation of matters | Matters are allocated based on measures of cost-efficiency and expertise. | The model potentially allows for efficient allocation of matters, leading to greater access to legal services. | The model is a departure from the solicitor of choice principle. |
| Alternative models for procuring legal aid services | Introduction of competitive tendering or bulk funding of legal aid services provided by private practitioners. | Dependent on the form it takes, may result in greater streamlining, less administration and cost savings. | Dependent on the form it takes, may impact on access to quality legal aid representation. |

Inclusive governance and consultative model

Other jurisdictions have different have governance and consultative structures with a broader membership and remit. For example, the Legal Aid NSW Board consists of one full time member and nine part time members, including members from the NSW Bar Association, Community Legal Centres NSW and the Law Society of NSW who are nominated by these organisations but do not represent them on the Board.

Legal Aid Queensland has established an industry reference group that provides a regular forum for consultation with the legal profession and for discussing and managing stakeholder concerns. The group comprises nominated representatives from the Queensland Law Society and Bar Association of Queensland, and is chaired by the CEO of Legal Aid Queensland. Members are consulted in areas such as the fees paid to private practitioners and establishing panel arrangements for the private Bar.⁴⁴

VLA could consider reviewing its consultative processes to include key stakeholders who are funded to deliver services on behalf of VLA. This could involve, for example, establishing a similar industry reference group to Legal Aid Queensland's model.

This could have multiple benefits, including equipping VLA with a broader understanding of the impact of changes to eligibility guidelines or other policy levers on VLA's stakeholders, and establishing a closer working relationship between VLA and the LIV.

Public Defenders Office

In July 2012, VLA established in-house chambers. VLA has stated that the purpose of establishing the chambers was to manage a greater range of high-cost legal work through a staff practice, instead of purchasing advocacy services from private barristers at a daily rate. However, PwC was not able to obtain data from VLA on the cost-effectiveness of in-house chambers when compared with private barristers. Some stakeholders also raised concerns about the quality of legal representation provided by VLA's in-house chambers.

New South Wales has a statutory Public Defenders Office (PDO) that is separate from Legal Aid NSW. The terms of appointment under the *Public Defenders Act 1995* (NSW) ensure that barristers perform their duty independently of government or other directions, although they are subject to direction by the Senior Public Defender on administrative matters such as providing efficient and cost-effective services.

A public defender may be briefed to appear in matters by Legal Aid NSW, but also by private solicitors or other legal services. Reviews of legal aid delivery models in Australia have established that the PDO co-exists well with the private Bar in New South Wales.⁴⁵

A number of stakeholders indicated that they would like to see a PDO model in Victoria. Some of the factors that have been highlighted as making a PDO model successful include:

- independence from the legal aid commission
- recruitment of high-quality barristers, including senior counsel to lead the organisation
- similar structure and salaries benchmarked with the Office of Public Prosecutions
- an aim to co-exist with the private Bar, which is achieved in part by limiting the number of public defenders
- setting up the PDO as a resource to the justice system as a whole
- the PDO undertaking circuit and regional and rural matters.

⁴⁴ Legal Aid Queensland (2015), *Annual Report 2014-15*, p45.

⁴⁵ Attorney-General's Department of South Australia (2014), *Review of the provision of legal aid in State criminal cases by the Legal Services Commission, First Report – The Current Context*, February 2014, p139.

The Victorian Government could consider the establishment of a separate and small PDO that can be briefed in indictable matters by both private practitioners and in-house lawyers. Further work would need to be undertaken to establish the types of matters that would be most cost-efficient if undertaken by a PDO.

Services for self-represented litigants

Other jurisdictions have services that provide legal assistance to self-represented litigants who are ineligible for legal aid but cannot afford legal representation themselves. These services provide a greater level of support than duty lawyers, but often provide less intensive assistance than legal aid funded representation.

While Victoria has a service for self-represented litigants provided through Justice Connect, this is limited to fair work and bankruptcy matters. Community Legal Centres also offer legal assistance and advice to clients in particular areas of law, and often have less stringent means tests than VLA. Educational resources have been developed to assist self-represented litigants, for example the courts have guides and information packs to assist litigants to navigate the legal system. However, there are currently many gaps where self-represented litigants are unable to access legal assistance.

The Self Representation Service offered by the Queensland Public Interest Law Clearing House provides assistance to self-represented litigants who are ineligible for legal aid, but cannot afford their own legal representation. This service is staffed by volunteer lawyers. The service assists individuals before they reach the court, but lawyers do not appear on behalf of individuals and they remain responsible for the conduct of their proceedings. This type of assistance is also referred to as discrete task assistance or unbundled legal assistance.

An evaluation of the Queensland Self Representation Service pilot in the Federal Court and Federal Magistrates Court, found that it was successful in assisting self-represented litigants through their litigation. It also found that the service was able to divert clients away from the court process, saving the court resources and preventing clients from running unmeritorious matters.⁴⁶

A similar service in Victoria would fill the gap left by increasingly narrow legal aid eligibility guidelines, and may address the pressure on the court system and some of the negative impacts on self-represented litigants, that were reported by stakeholders. Many commentators suggest that this type of service is a pragmatic response to improving access to justice for litigants and the overall efficiency of courts, even if it falls short of full legal representation.⁴⁷

However, there are some drawbacks that would need to be considered. First, the lawyer providing the assistance may not have as good a working knowledge of the matter as a lawyer who provides full representation and may lead to the lawyer providing inadequate information and instructions. Second, whether this model contravenes professional conduct rules would need to be considered, including duty of care to clients.

The LIV, VLA and the Victorian and Commonwealth governments could investigate a similar model to address concerns around the increasing number of self-represented litigants in the Victorian court system.

Centralised allocation of matters

The *Legal Aid Commission Act 1979* (NSW) allows Legal Aid NSW to provide legal aid by such means as it determines, including by allocating matters to in-house lawyers or private practitioners. Legal Aid NSW has developed policies in accordance with the Act in relation to allocation of legal work. This includes a policy that legal aid applicants may nominate a legal practitioner on their application form, however the matter may not be assigned to the nominated practitioner.

In determining an application for legal aid in civil matters, Legal Aid NSW must be satisfied that the legal practitioner will provide the most cost-effective service due to the expertise of the legal practitioner in conducting the particular type of matter. In criminal matters, Legal Aid NSW's policy is that in-house lawyers undertake these matters except in exceptional circumstances (ie a conflict of interest).

⁴⁶ Dr Cate Banks, Evaluation of effectiveness of Queensland Public Interest Law Clearing House Self Representation Service in Federal Court and Federal Magistrates Court Brisbane, June 2012, p18

⁴⁷ Centre for Innovative Justice (2013), *Affordable Justice – a pragmatic path to greater flexibility and access in the private legal services market*, October 2013, p27.

The NSW model presents an alternative means of allocating matters that represents a departure from the principle of “solicitor of choice”. If the requisite work is done by VLA to determine the cost effectiveness of private practitioners and in-house lawyers undertaking different types of matters, then a centralised model could be used to allocate matters based on an assessment of cost-efficiency.

Further, this would remove one of the steps in VLA’s current service delivery model, where private practitioners are required to undertake an eligibility assessment for clients and to submit this to VLA for certification and maintain the case file. In this type of system, applications could be handled centrally.

More detailed examination of the potential risks and benefits associated with such a model would be required and consideration would need to be given to its possible application to the Victorian legal aid system.

Alternative models for procuring legal aid services

A number of recent reviews conducted in international jurisdictions have considered alternative models for procuring legal aid services from private practitioners, in particular bulk funding or tendering to contract with a set number of providers for the delivery of a defined volume of services.

England and Wales

The Transforming Legal Aid review and consultation process, undertaken by the UK Ministry of Justice, introduced changes to the way that criminal defence legal aid services are procured from lawyers in England and Wales.⁴⁸ One of the primary objectives of the reform was to reduce the costs of the legal aid system. The Government’s position was that this could be done through consolidation of the legal aid market and creating economies of scale.

The key changes to the procurement of criminal legal aid services included:

- competitive tendering of contracts for the provision of criminal defence services
- a 17.5 per cent cut in fees from 2013 rates, staggered across two fee reductions of 8.75 per cent each, for solicitors working in magistrates courts or police stations

While it was initially proposed that all criminal legal aid services would be tendered and limited to a set number of contracts, the model was subsequently modified. It now includes a two-tier contract system:

- where a client does not have their own lawyer and choose the duty provider at the first point of request, a competitive tendering process for a limited number of contracts
- where a client has a lawyer, an unlimited number of contracts to deliver criminal legal aid services.

The contract period for both systems is four years, with a one year extension option. Tendering is based on meeting quality standards, and price is not used as an award criterion. In addition, applicants for the duty provider tendering process must demonstrate the capacity to deliver the type and volume of work on offer.

These reforms have led to a high level of concern among the legal profession in England and Wales. This is in part because the number of service contracts for the duty provider scheme will be reduced from approximately 1,600 firms currently providing legal aid criminal defence, to 527 successful applicants.

The new system will come into effect in September 2015. It is too early to tell whether this new bulk tendering system will be successful in achieving its objectives of creating economies of scale and greater flexibility and simplification, while continuing to ensure high-quality legal aid representation.

⁴⁸ United Kingdom Ministry of Justice (2014), *Transforming Legal Aid – Next Steps: Government response*, 27 February 2014.

New Zealand

In the review of the 2009 New Zealand Legal Aid Review, Dame Margaret Bazley considered bulk funding of legal assistance services.⁴⁹ According to the review, bulk funding arrangements would involve a move away from funding individual lawyers, to a system where the procurement agency would contract with senior lawyers who would take on responsibility for delivering legal aid services within the contract and ensuring the quality of the services delivered.

Some of the benefits of bulk funding are that lawyers would not need to undertake administration on each individual legal aid application; the funding arrangements would enable streamlined administration. It would also enable lawyers to more actively manage their use of resources.

Dame Bazley also considered capitation-based funding. Instead of fixing a contract fee for a defined case load or number of hours, capitation-based funding involves a retainer or capacity contract. Lawyers would agree to reserve the capacity to provide all required services over a given period to a pre-defined population (ie all cases in a particular court jurisdiction). The contract value would be calculated on the basis of a fixed fee per capita of the defined population and would be similar to setting an insurance premium.

In 2012, New Zealand introduced fixed fees, and is still considering the possible introduction of bulk funding for some groups of cases in the future.

A bulk tender model could be considered in the Victorian context. However, such a model would need to take into account existing concerns around access to quality legal representation, particularly in regional and remote areas of Victoria, and other potential impacts on the viability of private practitioner firms.

Depending on how it is structured, one benefit of a bulk tender model is that it can potentially reduce the amount of administration required to be undertaken by both the law firm and the legal aid commission.

Technological innovations

Where possible, technology should be used to increase access to justice and improve the quality of legal representation for legal aid clients. However, restrictions currently in place on the provision of legal services may inhibit greater uptake of technological innovations in the legal aid sector (ie restrictions on lawyers practicing across different jurisdictions in Australia).

Technological innovations enable increased quality of communication within and across jurisdictions. This creates the potential for a national or international market for the provision of legal aid services. For example, some legal tasks may be able to be undertaken anywhere in the world at a lower cost, such as drafting documents or conducting legal research. On the other hand, more complex services requiring jurisdiction specific knowledge or face-to-face meetings with lawyers will still likely need to be done in the particular jurisdiction.⁵⁰

In some jurisdictions, such as the United States, online businesses are beginning to offer low cost legal advice and services in areas such as wills and contracts. However, these types of models may not be applicable to criminal and family law legal aid services, as the legal issues involved are often complex and the client's understanding of the law is often limited.

In the Australian context, improvements in information and communications technology, including the National Broadband Network, may enable greater access and reach to clients in rural and remote areas through video-conferencing or other new methods.

⁴⁹ Dame Margaret Bazley (2009), *Transforming the Legal Aid System: Final Report and Recommendations*, New Zealand Ministry of Justice, Wellington, November 2009, p98-100.

⁵⁰ Neil Rickman, James M. Anderson (2011), *Innovations in the Provision of Legal Services in the United States: An Overview for Policymakers*, Occasional Paper, p26.

5 Options for revised service delivery models

PwC was engaged to propose a service delivery model that provides access to justice and quality legal services within the constraints of the current funding envelope. This was performed to consider the most optimal framework to maximise access to justice in Victoria. We have set out some options that could be considered going forward, that draw on the analysis in this report. These options are delivery agnostic, but are aimed at providing legally aided services in the most cost effective, high quality and optimal manner possible.

We considered potential changes to key elements of the service delivery model. This includes:

- **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
- **compliance and review:** a system to ensure quality and high standards.

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 we have set out spans from maintaining the status quo (no change), through to transitional change or transformation of legal aid service delivery model. Table 16 sets out a summary of these options.

Table 16: Summary of options for revised service delivery models

| | <i>Option A: No change</i> | <i>Option B: Transitional</i> | <i>Option C: Transformational</i> |
|---|--|--|---|
| Consultation | No change to current consultative and/or decision-making frameworks. | Advisory function established with membership of the LIV, Victorian Bar and other justice system representatives. | A LIV, Victorian Bar or private practitioner representative is appointed to VLA Board. Separate VLA regulatory function from its practice arm. |
| Panel arrangements and preferred barristers list | No change to current arrangements. | The LIV and Victorian Bar to have a role advising on the process and criteria for selecting private practitioners. | An independent function to run the process. |

| | Option A: No change | Option B: Transitional | Option C: Transformational |
|----------------------------------|---|--|---|
| Eligibility guidelines | Eligibility guidelines set by the VLA Board to meet legislative requirements and funding envelope. No requirement to consult more broadly. | Justice system stakeholders are routinely consulted on changes to guidelines. | All changes to guidelines are mandated to go through an independent and publicly reportable assessment of their long-term impact on the justice system. |
| Case work and service mix | Service mix determined by solicitor of choice model, remaining at approximately a 30:70 per cent split. Briefing processes for in-house counsel and private barristers remain the same. | More work done by VLA on the relative cost-efficiency to inform the optimal proportion and type of matters undertaken by in-house and private lawyers. | Remove solicitor of choice principle and allocate cases centrally based on cost-efficiency and assessment of expertise. Investigate establishing a Public Defenders Office and disbanding VLA in-house counsel function, based on cost-efficiency assessment. |
| Fees | No change to current periodic reviews of fee structures and yearly indexation. | Regular, independent review of private practitioner fees and benchmarking to in-house costs. | Regular, independent review of fees and benchmarking to in-house costs. The LIV, Victorian Bar and/or private practitioners to be consulted on fees. |
| Compliance and review | No change to current risk-based compliance model. | No change to current risk-based compliance model. | No change to current risk-based compliance model. |

5.1 Assessment of options

Table 17 below identifies some of the key strengths and weaknesses associated with each option.

Table 17: Assessment of options

| Option | Strengths | Weaknesses |
|--------------------------------|--|---|
| Option A: No change | <ul style="list-style-type: none"> Stakeholders are familiar with the current service delivery model. Some parts of the current service delivery model, such as panel arrangements, are relatively new and more time may be needed to establish their effectiveness. | <ul style="list-style-type: none"> Does not address issues identified with the current service delivery model. Lack of dialogue and information sharing between the LIV and VLA may remain unresolved. Opportunities to make improvements to eligibility guidelines through broader consultation remain unrealised. Service delivery mix is not informed by cost-efficiency assessment. |

| <i>Option</i> | <i>Strengths</i> | <i>Weaknesses</i> |
|---------------------------------------|--|---|
| Option B: Transitional | <ul style="list-style-type: none"> • Decision-making is more informed as a result of consulting with the LIV, the Victorian Bar and other justice system representatives. • Opportunity to strengthen the working relationship between the LIV and VLA. • Service mix is better aligned to assessment of cost-efficiency and resources are better targeted and utilised. • Independent review of fees takes this contentious task out of the hands of VLA, potentially leading to a better relationship between VLA and private practitioners. | <ul style="list-style-type: none"> • May not be enough of a departure from the current model to address stakeholder concerns. • Some parts of the current service delivery model, such as panel arrangements, are relatively new and more time may be needed to establish their effectiveness. |
| Option C: Transformational | <ul style="list-style-type: none"> • Decision-making is more integrated and informed as a result of consulting with the LIV, the Victorian Bar and other justice system representatives. • Opportunity to ensure the most cost-effective service delivery model, likely leading to increased access to legal aid services. • Some of the more contentious tasks are undertaken by an independent party, potentially leading to a better relationship between VLA, the LIV and private practitioners. | <ul style="list-style-type: none"> • A model that is wholly based on cost-efficiency may displace other principles that stakeholders regard as important, for example, solicitor of choice. • May take a period of time to implement all initiatives, unlikely to observe major benefits in the short term. • Some parts of the service delivery model, such as panel arrangements, are relatively new and more time may be needed to establish their effectiveness. |

5.2 Recommended option

PwC's assessment is that Option B, the transitional model, is the option that VLA and its stakeholders could consider as a potential new service delivery model. This option retains some parts of the current model, while addressing matters raised by stakeholders.

PwC's assessment is that some elements of the current service delivery model are functioning well (ie the compliance system). Other elements have been recently instituted, and more time is required to assess their effectiveness and impact on access to justice and the quality of legal representation (ie the panel system and preferred barristers list). Further, the lack of data in the legal system makes it difficult to forecast with certainty the impact of guideline changes and further fine tuning can be expected to provide optimal access to justice.

Accordingly, the transformational model that suggests changes to each of the elements of the service delivery model is not the preferred model.

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.

Appendices

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Appendix B Jurisdictional comparison

| Jurisdiction | Operating expenses (2013-14) | Number of legal aid employees (2013-14) | Number of legal aid services (2013-14) | Percentage of work delivered by private lawyers (2013-14) | Community Legal Centres (2013-14) | Key differences and similarities with Victorian model |
|------------------------|------------------------------|---|---|---|-------------------------------------|---|
| Victoria | \$146.9m | 606 | Legal representation: 33,463 Duty lawyer services: 71,944 | 70 per cent | 39 CLCs, \$22.9m to CLCs in 2013-14 | |
| New South Wales | \$243.9m | 994 | Legal representation: 35,772 Duty lawyer services: 171,765 | 41.1 per cent | 36 CLCs, \$17.9m to CLCs in 2013-14 | <ul style="list-style-type: none"> • Separate Public Defenders Office directly funded by the Attorney-General's Department, led by SC • Broader stakeholder representation on Board • Allocation of matters is done centrally through Legal Aid NSW • Solicitor of choice principle does not determine the allocation of cases. |
| Queensland | \$113.1m | 438 | Legal representation: 27,375 Duty lawyer services: 79,868 | 80 per cent | 41 CLCs, \$14.9m to CLCs in 2013-14 | <ul style="list-style-type: none"> • Similar in-house public defender service, led by QC • Private practitioners enter into "preferred supplier agreements" with Legal Aid Queensland instead of panel system • Solicitor of choice principle does not determine the allocation of cases. |
| South Australia | \$44.4m | 198 | Legal representation: 14,552 Duty lawyer services: 14,773 | 68 per cent | Unknown | <ul style="list-style-type: none"> • Similar panel system introduced in May 2014 following a review of the legal aid service delivery model • Solicitor of choice principle is legislated |

| Jurisdiction | Operating expenses (2013-14) | Percentage of work delivered by private lawyers (2013-14) | Key differences and similarities with Victorian model |
|---|------------------------------|---|---|
| England and Wales | £1.9b | 100 per cent | <ul style="list-style-type: none"> • Delivery organisation that procures services from private lawyers • Public Defender Service is a salaried criminal defence provider. |
| Scotland | £150.5m | Unknown | <ul style="list-style-type: none"> • Legal aid delivered primarily through private practitioners • Small Public Defence Solicitors' Office • Quality Assurance Scheme to monitor quality of legal aid, whereby all criminal solicitors who are registered are subject to peer review. |
| New Zealand | NZ\$119m | 50 per cent of criminal case load (projected) | <ul style="list-style-type: none"> • Law Societies determine committees of lawyers who provide legal aid • Public Defence Service, including in – house lawyers • Functions sit within Ministry of Justice, including an independent statutory officer, the Legal Services Commissioner, who grants legal aid • The Legal Services Commissioner determines grants of legal aid and the assignment of cases to providers or in-house lawyers • Recent move towards increasing the number of in-house lawyers. |
| British Columbia, Canada | C\$80.6m | 100 per cent | <ul style="list-style-type: none"> • The Legal Services Society is a government agency that provides legal aid grants only • All legal representation is provided by private lawyers. |
| Legal Aid Ontario, Ontario, Canada | C\$371.6m | Unknown | <ul style="list-style-type: none"> • Certificates are issued to individuals who meet the eligibility criteria, these are used to retain a private lawyer and the certificate is the guarantee of payment from the legal aid commission • Criminal law panel with quality standards and professional development requirements for lawyers • No public defender service. |

Appendix C Consultation list

- 1 Chief Magistrate Peter Lauritsen, Magistrates Court of Victoria
- 2 The Hon. Justice Bennett, Family Court of Australia
- 3 Steve Agnew, Judicial Registrar, Federal Circuit Court of Australia
- 4 The Hon. Judge Couzens, President, Children’s Court of Victoria
- 5 The Hon. Justice Lasry, Supreme Court of Victoria
- 6 The Hon. Justice Zammit, Supreme Court of Victoria
- 7 David Ware, Judicial Registrar, Supreme Court of Victoria
- 8 Bevan Warner, Managing Director, Victoria Legal Aid
- 9 Cameron Hume, Director, Corporate Affairs, Victoria Legal Aid
- 10 Helen Fatouros, Director, Criminal Law Services, Victoria Legal Aid
- 11 Megan Keogh, Director, Legal Practice, Victoria Legal Aid
- 12 Findlay McCrae, Director of Legal Services, Victoria Police
- 13 Angela MacRae, Commissioner, Productivity Commission
- 14 Marisa De Cicco, Deputy Secretary, Criminal Justice, Department of Justice & Regulation
- 15 Donald Speagle, Deputy Secretary, Civil Justice, Department of Justice & Regulation
- 16 John Champion, Director of Public Prosecutions, Office of Public Prosecutions
- 17 Liana Buchanan, Chief Executive Officer, Federation of Community Legal Centres
- 18 Criminal Law and Family Law representatives: Robert Stary, Mark Woods and Megan Aumair
- 19 Victorian Bar representative: David Neal SC
- 20 Victorian Bar and Law Institute of Victoria Joint Legal Aid Taskforce
- 21 Nerida Wallace, Chief Executive Officer, Law Institute of Victoria
- 22 Melanie Dye, Principal Lawyer, Inner Melbourne Community Legal Centre
- 23 Joanna Fletcher, Chief Executive Officer, Women’s Legal Service Victoria

Appendix D Stakeholder consultation framework

PwC conducted a series of consultations in order to provide a more detailed understanding of the Victorian legal aid system and the private practitioner service delivery model. PwC conducted structured interviews with an agreed set of stakeholders, set out in Appendix C. The interview framework and lines of inquiry used by PwC during stakeholder interviews is set out below.

Demand for legal aid services

- What trends have you observed regarding demand for legal aid services? How do these trends differ between criminal and family law matters?
- How many legal aid-funded services are represented by private practitioners vs legal aid solicitors? How has this changed over time?
- What factors do you think are driving demand for legal aid services?
- Feedback suggests that ‘tough on crimes’ policies (ie mandatory sentencing, increased police officers and introduction of PSOs) have been a driver. Do you agree? Are there any other factors?

Court process

- How many legal aid funded cases are appearing before the courts? How has this changed over time? Are the changes in numbers significantly different to non-legal aid-funded cases?
- How long does it typically take to resolve a case in court?
- What factors influence the duration of each case in court? Do the factors differ for criminal and family law matters?
- What types of cases generally proceed to court?
- How many duty lawyers are available at the courts each day? How have numbers changed over time?

Outcomes for legal aid clients

- What outcomes are achieved for legal aid clients?
- How many are incarcerated? What is the length of incarceration?
- How do the outcomes differ between legal aid solicitors, private practitioners and self-representation?
- To what extent does the experience of legal counsel influence client outcomes?
- Since the introduction of revised requirements for private practitioner panels and legal aid funding, how have client outcomes changed?

Impact of changes to legal aid eligibility

- To what extent have the revisions to eligibility requirements for private practitioner panels and legal aid funding impacted:
 - your ability to do your job?
 - the courts system?
 - weekend court?
 - the prison system?
 - client outcomes?
 - representation of clients based in regional and rural areas?
 - access to justice?

Self-representation

- What trends have you observed regarding self-representation?
- How many cases are self-represented?
- What proportion of all cases are self-represented?
- What are the reasons for self-representation?
- How do the outcomes differ for self- and legal- represented clients?
- What are the typical cases that defendants represent themselves? What types of cases usually have legal representation?

Legal Aid service delivery model

- What improvements or changes could be made to the legal aid service delivery model to ensure the best outcomes are achieved for clients?

Other

- Are there any other concerns or issues that you would like to raise?

