

Productivity Commission

Inquiry into Access to Justice

November 2013

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About Victoria legal Aid

Victoria Legal Aid (VLA) is an independent statutory authority set up to provide legal aid in the most effective, economic and efficient manner.

VLA is one of the biggest legal services in the country, providing legal information, education and advice for all Victorians.

Our clients are often people who are socially and economically disadvantaged; people with a disability or mental illness, children, the elderly, people from culturally and linguistically diverse backgrounds and those who live in remote areas.

VLA helps people with legal problems about criminal matters, family breakdown, child protection, family violence, fines, social security, mental health, immigration, discrimination, guardianship and administration, tenancy and debt.

VLA also works to address the barriers that prevent people from accessing the justice system by participating in law reform, influencing the efficient running of the justice system and ensuring the actions of government agencies are held to account. We take on important cases and advocate for reforms that improve the law and make it fairer for all Victorians.

In 2012–13 VLA assisted over 86,800 unique clients with:

- 89,463 information services;
- 51,598 legal advice and minor assistance;
- 65,303 duty lawyer services; and
- 39,782 grants of legal assistance.

In addition, we distributed over 615,500 publications, held 350 community legal education sessions attended by over 12,700 participants and made over 71,000 external referrals.

Executive Summary

VLA welcomes the opportunity to provide a submission to the Productivity Commission's (the Commission) inquiry into *Access to justice arrangements* (the Inquiry) in the civil justice system.

Legal aid commissions, while representing only a fraction of the broader legal services market in the civil and family law area, nonetheless play a critical and significant role in helping make the justice system more accessible to the community, particularly those facing significant disadvantage. VLA promotes the needs and interests of the most vulnerable in society, whose lives are often disproportionately impacted by unfair laws and practices that serve to entrench disadvantage. The importance of the sector has been consistently affirmed by reviewing bodies¹, with recommendations consistently urging for additional investment and further research into the core business and impact of the services of legal aid providers.

VLA acknowledges that over the years there have already been a number of reviews and reports looking into access to justice and unmet legal need both at a federal and state level². The number of reviews highlights that issues around access to justice, particularly for certain disadvantaged groups are not a new phenomena³.

We do not propose to use this submission to revisit these reviews. We know that properly targeted legal assistance delivered at the right time and at the earliest possible opportunity can help to resolve or minimise everyday life problems and save costs elsewhere in the justice system and in the provision of other government funded social support services.

VLA's client constituency is broader than the individual clients who can access grants of legal assistance. We know that for every person we are able to assist, there will be others that miss out.

Our contribution to the Inquiry focuses on innovative efforts to move away from individual legal services, VLA's mandate for strategic advocacy, and the consequential savings for the taxpayer.

Effective strategic advocacy is fundamental to ensuring we maximise the impact of our work.

Targeted advocacy improves the operation of the justice system, addresses practices that disproportionately affect legally aided clients and encourages good administrative decision making.

The benefits therefore are not just around clarifying the law. Advocacy of this kind saves the courts and the community money and can benefit thousands of people in a single action, providing critical improvements and access to justice for the broader community.

Our submission also highlights the virtue of the mixed model of service delivery whilst demonstrating the wider benefits of a salaried staff practice. Legal aid has always relied on the goodwill and participation of our private practitioner and community legal centre partners and we have sought to explain how these service delivery elements combine to address market failure.

¹ For example - PricewaterhouseCoopers, *Economic value of legal aid: analysis in relation to Commonwealth funded matters with a focus on family law*, National Legal Aid, 2009.

² Whilst we do not intend to list them all, the recent *Legal Australia Wide Survey: Legal Need in Australia and Updating Justice* (a series of short papers that provide snapshots from the published LAW Survey Australia reports and new analyses of the survey data) are particularly relevant.

³ Examples include – LAW survey / Legal and Constitutional Affairs Reference Committee *Access to Justice 2009* / [Civil and Social Justice survey](#) (CSJS) between 2006-2009, covering England and Wales. (Pleasence et al, 2009).

It should be noted that VLA has contributed to the submission by National Legal Aid (NLA). As many of the issues addressed within the NLA submission are clearly relevant to Victoria, we do not intend to repeat them in our submission. Rather, our submission aims to offer supplementary commentary from a VLA perspective on some discrete issues.

Introduction

Access to justice remains a nebulous concept that has attracted significant economic, social and legal policy deliberation for decades. The consistent findings from reviews and inquiries which highlight the limitations of the justice sector and reinforce the existence of a growing 'justice gap' has positioned true access to justice as an aspiration rather than achievable objective.

With competing and equally important demands on public funds, the legal assistance sector has been tasked with doing the "best it can" with the resources available.

There is simply no one panacea that will "fix" all the issues impacting and influencing peoples' access to and experience of the justice system. There are a number of factors, all wide ranging and unpredictable that contribute to market failure and a person's ability to access justice.

Research tells us that as a community, we cannot afford to separate legal problems from the economic, social and personal circumstances of the people we help. Therefore any model to address the problem cannot be developed based on any one single factor or consideration.

The law and its remedies continue to grow as Parliaments enact provisions to codify rights and behaviours. In Victoria, demand for assistance has grown faster than our capacity to supply or respond to all the legal need in our community. A highly individualised service model weighted towards the acute end of the legal spectrum is arguably inequitable and an inefficient use of the Legal Aid Fund. VLA must use its knowledge of the client experience and their problems to develop holistic and innovative approaches to the prevention and early resolution of legal problems.

VLA is achieving this through a process of service reweighting, geared towards prevention and early intervention. While often construed as secondary or optional, community legal education, information and strategic advocacy are statutory functions and rightly form part of core business.

Our experience demonstrates that modest investment in these areas ensures our services are still accessible to those most in need whilst reducing pressure on our other more resource and cost intensive services.

Evolution of Victoria Legal Aid

The provision of legal aid in Victoria has evolved from a patchwork of pro bono services to a modern state-wide service delivery model, governed as a modern statutory corporation.

Historically, legal aid commissions and committees, in partnership with the private profession, offered low cost legal assistance to the poor and disadvantaged in society, largely in voluntary and charitable terms. This was done with a varying degree of sophistication and coordination by states and territories until the 1970s, when the passage of the *Commonwealth Legal Aid Commission Act 1977* paved the way for the establishment of state based legal aid commissions within an explicit Commonwealth-state federalist framework. The framework included Commonwealth input into the composition of, or direct representation on, commission boards, with the commissions then tasked with autonomy and discretion to determine funding priorities.

In the 1990s, the State Attorney-General commissioned a review, which ultimately recommended that the Legal Aid Commission of Victoria be restructured and modernised. This included a shift from the representative board model to a focus on other skills, such as financial and organisational management, with the Board empowered to seek representative stakeholder and community views from the statutorily established Community Consultative Committee. Amendments to the *Legal Aid Act 1978*, placed a greater emphasis on innovation noting ‘...with limited scope for revenue raising and the growing demand for legal aid, the need to ensure maximum value for the legal aid dollar is imperative.’⁴

What is access to justice? A VLA perspective

VLA is empowered to provide assistance notwithstanding that the interests of the assisted person are adverse to the State or Commonwealth, and must ensure that legal aid is provided in a manner that dispels fear and distrust⁵. As well as offering practical benefits to clients and their families, the provision of legal aid helps the broader community by promoting rights and responsibilities and ensuring the actions of government agencies are open to scrutiny and fair.

The provision of legal aid is a means to achieving access to justice, which is central to the rule of law and a critical element of a well-functioning democracy. Upholding the rule of law is intrinsic to a strong economy and political and social development⁶. There are a multitude of studies identifying the importance of the rule of law in breaking cycles of poverty and disadvantage that stand in the way of prosperity and stability⁷.

The World Justice Project’s *Rule of Law Index 2012-13 Report* ranks Australia among the top ten globally in five of the eight dimensions measured by the Index. However the report also notes that access to affordable legal representation is limited particularly for disadvantaged groups. The report also highlights that in comparison to other high income countries, Australia falls behind in guaranteeing equal treatment for low-income people⁸.

VLA is committed to protecting peoples’ rights and to contributing to a community that is fair, just, participatory, inclusive and rights respecting. Our statutory objectives require efficient and innovative methods for improving access to justice and legal remedies for the community⁹. This requires more than legal representation in individual cases. It includes, but is not limited to, contributing to reforming legal processes where they impact disproportionately on disadvantaged and vulnerable people.

⁴ Wade, J Second Reading Speech Legal Aid Commission (Amendment) Bill, *Hansard*, 4 May 1995 at 1224.

⁵ *Legal Aid Act 1978* (Vic).

⁶ *A Strategic Framework for Access to Justice in the Civil Justice System* – Chapter 1 Attorney General’s Department September 2009.

⁷ GRC exchange – Economic growth and governance http://grc-exchange.org/g_themes/cc_ecgrowth.html - Governance Resource Centre (GRC) UK Department for International Development (DFID).

⁸ Agrst, M, Botero, J, Martinez, J, Ponce, A & Pratt, C *WJP Rule of Law Index 2012-13* Washington DC: The World Justice Project.

⁹ *Legal Aid Act 1978* (Vic).

Far from being static, the justice system is in fact dynamic and constantly changing. The demand for legal assistance is directly affected by the pace of legislative reform, policy change and resourcing commitments to other actors in the system. The legal landscape and associated legal need can look very different from one period to the next, making comparisons between years difficult. Service mix and resource intensity change meaning that demand and supply five or ten years ago often bears little resemblance to today.

Access to justice and quality legal assistance is a fundamental democratic right for every Australian citizen. VLA notes that these rights are currently delivered by a mixture of public funding (legal aid), privately funded lawyers, conditional fee arrangements (no win no fee) and pro-bono work. However, it is essential to get the balance between all these different models of legal services right. An efficient and effective system that provides equal access to justice should be reliant on more than one approach.

Value and cost efficacy of effective strategic advocacy

Strategic advocacy can include strategic litigation, policy and law reform work and engagement with stakeholders, including the media. Strategic advocacy is increasingly utilised by the sector as a necessary means to stretch the value of finite funds to maximise benefits to the community.

Statutory mandate

VLA's enabling legislation expressly requires it to look beyond individual clients to determine ways to have a bigger impact on the operation of the justice system. Specifically, the Act requires VLA to:

- provide legal aid in the most effective, economic and efficient manner (s4(a));
- pursue innovative means of providing legal aid directed at minimising the need for individual legal services in the community (s4(d)); and
- make recommendations to or through the Attorney-General with respect to any reforms of the law the desirability for which has come to its attention in the course of performing its functions (s6(2)(c)).

This mandate acknowledges that the finite Legal Aid Fund will never meet all unmet legal need, requiring innovative approaches to expand our reach and impact.

Efficacy of law reform

One of the greatest benefits to the existing legal assistance model is its capacity to achieve positive social outcomes for the community that extend beyond individuals receiving a service.

There has been an increasing recognition in recent years that it is far more beneficial and cost effective to avoid legal problems or resolve them at an early stage than to wait to react to legal need at the acute end of the spectrum¹⁰. It has also been acknowledged that the "...legal system can no longer focus solely on legal representation one case at a time¹¹."

The private market alone has neither the infrastructure nor the incentive to prevent legal problems (reducing need for its own services) or undertake important preventative work (such as providing

¹⁰ This has informed the principles underpinning the *National Partnership Agreement on Legal Assistance Services* and is a guiding principle in modern service delivery in the legal assistance sector.

¹¹ *Transforming the Legal Aid System: Final Report and Recommendations*, Ministry of Justice, November 2009 at p9.

free information or community legal education), despite these being inexpensive and cost effective ways to reduce demand on justice services. As a private lawyer's business model is to focus on the individual client, there is limited scope for them to identify state-wide or national trends to inform policy development and implementation. It also does not create incentives to drive lasting, systemic reform within the justice system. Legal aid commissions on the other hand can identify systemic issues and are able to act accordingly.

When done effectively, strategic advocacy can create significant savings not simply for the legal assistance sector but also a cascading impact on other agencies. This includes improving primary decision making providing government with the advantages that flow from getting a decision right the first time and short-circuiting the duplication and delay caused by poorly made decisions.

The case study below demonstrates how VLA used strategic litigation effectively to the benefit of our individual client, other clients in similar circumstances and those who will no longer experience a legal problem. It also highlights the consequential impact on another government agency and ultimately cost savings for them and the courts.

Case study – Kelli Keating

Our client, Ms Keating, was charged with welfare fraud under backdated legislation introduced by the then Commonwealth Government in July 2011. She had received an alleged overpayment of \$6,942 from Centrelink, due to what Centrelink says was a failure to declare her income.

VLA initiated Ms Keating's case to determine whether this retrospective legislation was constitutional. It also sought much needed clarity on the prosecution of offences on the basis of omissions (which, VLA argued, could result in criminal prosecutions in circumstances where persons made honest mistakes or did not understand their reporting obligations).

On 8 May 2013, the High Court of Australia handed down its unanimous decision *in Director of Public Prosecutions (Cth) v Keating* [2013] HCA 20.

The decision has far reaching implications for the conduct of low level social security fraud prosecutions in Australia. It is anticipated that this decision may affect around 15,000 previous prosecutions where people have been charged with welfare fraud because they omitted to tell Centrelink of a change in circumstances, as these matters are now arguably unsound on the basis of the High Court's decision.

In response to the High Court decision in Keating, the Commonwealth Director of Public Prosecutions has adopted a national policy that confirmed that they will not proceed to prosecute people on the basis of omissions and will withdraw all prosecutions on foot that are based solely on omissions.

The Court's judgment also provided more clarity around the legal obligation imposed by the notices sent out by Centrelink to welfare recipients asking them to report changes in their circumstances. The Court recognised that the Centrelink action in just sending a notice to someone does not necessarily mean that person has done the wrong thing if they don't respond. That is, sending a notice does not mean that it was actually received or that the recipient was able to properly understand it.

Taking on this case was part of our commitment to improving government decision making, which saves time down the track with reviews, appeals, criminal charges or court challenges. Preserving a person's income is also a key aspect of Commonwealth legal aid policy as it ultimately saves the

community money by preventing other problems such as reliance on social services, homelessness and family breakdown.

For VLA, this means up to 100 matters are no longer proceeding with savings of approximately \$84,000 in case expenditure alone¹². But nationally the impact is even greater following the national decision to not proceed on any purely omission cases, with the Office of the Commonwealth Director of Public Prosecutions sending all these files back to Centrelink. Importantly, this translates into very significant savings across the sector.

Achieving systemic improvements to the justice system

As a state-wide service provider of legal services across a broad range of practice areas, VLA can identify and address systemic problems within the justice system. Our data and case studies allow us to authoritatively advise governments and agencies on the operation of the law, and the importance of this function has been expressly recognised under the Act¹³.

The limitations on private practitioner models to achieve such broader changes was recognised in the 1974 discussion paper in which Professor R Sackville noted that the focus on individual interests that is inevitable in individual casework "...only coincidentally attacks problems that transcend individual interests and capacities."¹⁴ Sackville also noted that a historic focus on litigation in legal aid schemes failed to provide 'preventative law', to avoid disputes and legal proceedings.

Over the last two years, VLA has been active in drawing attention to some of the unjust consequences of the fines system. The case below demonstrates the impact of addressing this systemic problem which was impacting disproportionately on already vulnerable and disadvantaged members of our community.

Case study - Taha

Taha is another instance where our advocacy work has resulted in systemic change. Mr Taha has an intellectual disability and had accumulated fines totalling \$11,000. At the time of sentence, the magistrate was unaware of his intellectual disability and sentenced him to 80 days jail for failure to pay. Even when the disability was subsequently identified, the absence of an appeal right in the legislation prohibited the magistrate from being able to revisit the client's circumstances and review the decision.

Given the constraints of the infringements legislation, the only option was to pursue an application for judicial review in the Supreme Court. In *Victorian Toll & Anor v Taha & Anor; State of Victoria v Brookes & Anor* [2013] VSCA 37, the Court of Appeal upheld the Supreme Court ruling that a magistrate is under a duty to inquire into the circumstances of an infringement offender, including whether they have a disability or other special circumstances, before making an imprisonment order against them for a failure to pay fines under the *Infringements Act 2006*.

¹² Note that this saving does not take into account matters that were withdrawn prior to Keating being handed down or those pending the Keating decision where charges had not been laid. In addition since Keating there have also been cases where people who were previously found guilty have had their matters "re-opened" and then struck out with the active co-operation of the CDPP.

¹³ *Legal Aid Act 1978* (Vic) s. 6(2)(c).

¹⁴ Sackville, R, *Legal Aid in Australia : Discussion Paper*, November 1974.

Importantly, for Mr Taha, the case was remitted to the Magistrates' Court and the remaining fines were discharged. More broadly, the effect of the decision is to impose a duty on magistrates to inquire about the circumstances of all people appearing before them.

The Victorian Parliament has now passed reforms which will allow a limited rehearing right, through its *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Bill 2013*. Introducing the amendments to Parliament, Victorian Attorney-General, Robert Clark, said the reforms responded to issues brought to light by two-test cases in which VLA represented people with disabilities who faced jail for unpaid fines.

VLA has also provided a detailed submission to the Sentencing Advisory Council's examination of fines in Victoria. Included in our submission was demonstrating the existence of inconsistent and complex internal review processes, with the subsequent costs to the community, and the justice system, of enforcing infringements¹⁵.

The mixed model of delivery of legal assistance services

As noted earlier, VLA refers the Commission to the submission of National Legal Aid for a comprehensive response to the questions relating to Legal Assistance Services (p.31 of the Issues Paper).

VLA intends to respond to some discrete issues raised, particularly in relation to the mixed model of delivery of legal services.

Value of the mixed model in Australia

VLA administers a mixed model of legal aid delivered through a staff practice, community legal centres (CLCs) and private practitioners. These services include legal representation through grants of legal assistance and duty lawyers, community legal education, legal advice, information and referrals in person and by telephone, all designed to improve the effectiveness and fairness of the justice system. All Australian states and territories operate on a similar mixed model with varying proportions of the work being done by the different elements or components of the model.

Over the last four years we have maintained the general proportions of legally aided case work as between the staff practice and private practitioners with the latter providing 73% of case work services in 2012–13 (CLCs 1.2%) under a grant of aid. This is one of the highest shares of private profession service delivery in Australia¹⁶.

In other areas of service delivery such as duty lawyer, VLA staff provide 90% of services compared to the private profession¹⁷. Private practitioners are not funded to provide community legal education and legal information services, which are the domain of legal aid commissions and CLCs.

VLA continues to see a mixed model of service delivery as best practice. A strong staff practice provides leadership and specialisation, and a capacity to deliver services that the private sector is

¹⁵ A copy of our submission is available on the VLA website: <http://www.legalaid.vic.gov.au/about-us/justice-and-law-reform/vulnerable-people-and-fines>

¹⁶ Note that the percentage of case work differs in each jurisdiction. In criminal law private lawyers undertake 70% of case work; in family law private lawyers undertake 82%. In the civil jurisdiction private lawyers undertake only 33% of case work.

¹⁷ VLA does not capture what (if any) legal advice is provided by private lawyers.

unable or unwilling to provide (for example, in some rural and regional areas or for matters the private profession may consider uneconomic). It is only by operating a competent and well regarded staff practice that we have the credibility and evidence base to influence the operation and quality service delivery of others in the system. Equally, the involvement of private practitioners provides supplier flexibility and facilitates competition, ultimately improving the quality and geographic availability of legal services. Private practice involvement also ameliorates limitations arising from conflict of interest rules, which preclude VLA staff representing or advising other parties to a legal matter.

By contrast, CLCs provide community or issue specific legal services often focused on information, community legal education, advice and advocacy. When they work well, CLCs provide community driven legal services, can identify emerging issues quickly and trial possible new or speculative approaches to tackling such issues before larger investment is committed to “scaling-up” such approaches, and add an important and different voice into the sector.

Alternative models where legal services are provided on a commercial basis which then fund legally aided services¹⁸ are not considered scalable or appropriate for mainstream legal aid. VLA believes that competing with private practitioners for fee paying clients, would erode goodwill and may offend competitive neutrality policy considerations.

Case study – Mixed model service delivery for family dispute resolution

VLA provides funding to the Family Law Legal Service (FLLS) for representation services so that otherwise unrepresented clients who require legal representation in family dispute resolution conferences through VLA’s Roundtable Dispute Management receive good quality advice. FLLS provide a lawyer two days a week to assist RDM-referred conference participants.

The objective of this service is to provide assistance for both men and women to enable them to participate in conferences that would otherwise have been assessed as unsuitable due to one party having no legal representation. Legal representation in these cases serves to redress power imbalances between the parties.

Results continue to be favourable with FLLS assisting in 101 conferences with a settlement rate of 82% in 2012–13.

International experience of private provider model

International experience has shown that a coordinating agency has to have its own practice presence in order to properly coordinate the delivery of a coherent legal aid scheme. Canada operates a true mixed model, while New Zealand is moving towards a mixed model. This leaves the United Kingdom as the only comparable system delivered primarily through private contracting – it is also the one of the most expensive per capita¹⁹.

Following a major review of the legal aid system in New Zealand, a new staff practice (the Public Defence Service) is expected to take up to 50% of grants of legal aid is being established to deal

¹⁸ For example, Salvos Legal.

¹⁹ The legal expenditure per head in England and Wales as a proportion (%) of GDP per head in 2008 was 0.18 compared to 0.06 in New Zealand and 0.04 in Canada. In 2004, legal aid expenditure per head was £38 for England and Wales, compared to just £7 in Australia. Further international comparisons are found in the *International Comparisons of Public Expenditure on Legally Aided Services*, Ad hoc statistics note, Ministry of Justice, 8 September 2011.

with cost and quality issues that arose in relation to the total reliance on private practitioners²⁰. The report noted the virtues of a staff practice describing such services as low cost and representing good value for money, with efficiency gains going to the Crown. The report also noted the benefits of competition in the provision of legal services in improving quality, noting the role that in-house services can play in quality benchmarking²¹.

A literature review conducted as part of Lord Carter's *Review of the Procurement of Legal Services* undertaken in the United Kingdom in 2005 found that: "Generally, evidence from the UK, Canada, US, Australia, and in a limited way, from New Zealand suggests that public defender services are cheaper than private practice lawyers." The study indicated that the range of savings can vary from significant to very low, depending on the model²². However, the jurisdictions with significant savings suffer from the criticism that they reflect overwork and therefore poor quality public defender services.

Supporting uneconomic work

One of the benefits of the mixed model is that work considered uneconomic by private providers is taken up by the salaried and often specialist in-house practice and not simply disregarded.

While private providers often undertake legal aid work in the spirit of goodwill and to offer their services to assist the disadvantaged (which is reflected by the continuing market for legally aid work notwithstanding acknowledged fee erosion), commercial considerations and related opportunity costs ultimately inform the type of work that is attractive to private suppliers.

An identified factor leading to the change in market share in the legal aid sector is inadequate remuneration²³. In circumstances where fee payments that are not comparable to those available from privately funded clients, suppliers may seek to limit services to clients who may require a more resource intense service (for example, clients with complex needs) or not provide legally aided services at all.

The reality is that many of our clients require intensive services that can require patience, persistence and specialist skills. Many of our clients require assistance with matters that go beyond pure legal problems, but are often underlying contributors to legal issues, such as substance abuse, lack of housing or employment or untreated medical or psychiatric conditions.

A salaried practice provides the flexibility for abandoned or unattractive market share to be handled by experienced in-house practitioners, ensuring the consistent continuity of services to clients that may otherwise be considered uneconomic. The statutory imperatives of VLA mean its services are primarily guided by community need and benefit rather than motivated by earnings.

²⁰ Ministry of Justice factsheet: *Changes to manage legal aid spending*, April 2011, available at <http://www.justice.govt.nz/publications/global-publications/l/legal-aid-funding-april-2011/legal-aid-funding-factsheet-for-lawyers>.

²¹ *Transforming the Legal Aid System: Final Report and Recommendations*, Ministry of Justice, November 2009 at pp69-67.

²² p60, *Report on International Approaches to the Defence of Indigent Persons in Criminal Cases*, December 2005, available at: <http://www.legalaidprocurementreview.org.uk/publications.htm>.

²³ Fleming, D and Daly, A "The retreat of the legal profession from legal aid: labour market change in the Australian mixed model", *International Journal of the Legal Profession*, Vol 14, No. 1, March 2007.

Case study – Bulk Debt Project

VLA and Legal Aid NSW joined with West Heidelberg Community Legal Service to assist people in long-term financial hardship struggling with debt. The National Bulk Debt (NBD) project involves negotiating with selected debt collectors and credit providers for bulk waivers of debt incurred by people with no or virtually no capacity to pay. Bundling the debts together has made sense for creditors, who have little likelihood of recovering the debt, and it is also fairer on vulnerable people with low or no incomes. It is far more efficient and cost effective for all involved, compared to simply assisting each individual client in isolation.

Financial counsellors, State Trustees and lawyers refer debts of eligible people through the project website (National Bulk Debt Project). Eligible people must be dependant on Centrelink benefits or have no income at all; have no assets; have no prospect of employment in the short to medium term and be unable to repay the debt.

To date the project has negotiated waiver or closure of debts worth over \$15 million with creditors such as major banks, insurance companies, credit providers, debt collectors and utility service providers. Clearing these debts gives people breathing space from what can seem like a crushing burden and ensures they can use their limited income for food, housing and other necessities.

More recently, a further client eligibility criterion has also been added for the next phase of the project, whereby the debt can only be referred if the client has sought a waiver from the creditor and this has been refused or not provided. The aim of this additional criterion is to provide evidence as to whether, and to what extent, the NBD project has changed industry practice.

VLA is discussing with project partners how to transfer the knowledge developed to the financial counselling sector, to ensure there are continued efforts to make certain long-term financial hardship is properly recognised and dealt with. The project is informing discussions between consumer advocates, industry and regulators about the treatment of long-term financial hardship, and is spurring discussions about the creative use of online platforms for intake, triage and referral of clients.

The NBD is a good example of collaboration and connected service delivery between different legal service providers across different states, and between legal and non-legal service providers. It is also a good example of how innovative and unconventional problem solving methods are used by the legal assistance sector to deliver a service delivery response that is more efficient than individual legal services.

Addressing market failures in the legal assistance sector

The Issues Paper (at p33) sought advice on alternative approaches to funding legal assistance services and cited vouchers as an example of an potential alternative approach.

VLA would welcome further guidance from the Commission on the design and features of a voucher-based model, noting there has been some public commentary on the issue.²⁴

While a private market-based service model is attractive in theory, its allure diminishes once due consideration is given to documented evidence which suggests the value of the mixed model of

²⁴ Breheny, S, 'I'll vouch for vouchers to keep aid on track', *The Australian*, 27 September 2013. and Curran, L "Society's neediest in no position to brave the rigours of a voucher system for legal help" *The Australian* 25 October 2013.

service delivery in terms of cost efficacy, quality benchmarking and positive systemic change for the community. Furthermore, analysis of the legal services market also highlights the role that the legal assistance sector plays in ameliorating a number of market failures, which would likely act to diminish the accessibility, quality and cost effectiveness of legal services to legally aided clients.

In considering any alternative funding methods to the existing mixed model, VLA encourages the Commission to consider the following issues.

Information asymmetry

A fully market-based model of service delivery relies on consumers having not only the knowledge but also the insight to make informed market decisions that preference suppliers that provide services that are of the quality, value and nature required by the consumer. In the absence of such knowledge, consumers' purchasing power no longer governs the market, leaving those consumers vulnerable to exploitation and poor service.

Clients who are reliant on the legal assistance sector represent the most vulnerable in society and their complex needs are often the product of entrenched systemic disadvantage. A significant proportion of our clients receive little or no income, have physical or cognitive disabilities, mental illness, low levels of literacy, are experiencing homelessness, are newly arrived Australians or from Indigenous communities²⁵. In addition to this, many require legal services in times of crisis; for example, when they are the victims of family violence, had their children removed or have been made subject to involuntary mental health treatment orders.

We believe that there is a role for legal assistance providers to assist vulnerable legal consumers navigate the legal market. VLA applies quality assurance measures to private providers, including vetting, monitoring and auditing the performance of private practitioner supplier panel firms and taking direct action to discipline or remove providers from supplier panels that fail to meet appropriate quality standards. It also involves internal quality assurance and supervision process to ensure the salaried practice is appropriately benchmarking quality standards.

In addition to ensuring quality legally aided services are provided by private practitioners, VLA also helps people make informed decisions with their legal problem through a number of avenues, including our Legal Help telephone service, via our website and through our various free publications. Research has found that clients' experiences when they first seek help with a legal problem are significant in determining their accessing timely and effective assistance, and, by extension, their access to justice.

The Australian Government's *Access to Justice*²⁶ framework recommended that justice agencies adopt a policy of 'no wrong number, no wrong door'. In practice what this means is that no matter which information provider or legal assistance service a person initially approaches, systems need to be in place to help connect them to the most appropriate service to assist them.

In light of this VLA has been undertaking a major initiative for improved client access and ensuring a more efficient and effective intake, assessment and referral system as part of the largest provider of legal services in the state.

²⁵ For further data on our clients, see the 'Client Profile' section of the *Victoria Legal Aid Annual Report 2012-13*, accessible via: <http://ar2013.vla.vic.gov.au/client-profile>.

²⁶ *A Strategic Framework for Access to Justice in the Civil Justice System* – Chapter 6 Attorney General's Department September 2009.

iCAT Project

The Improved Client Access and Triage project (iCAT) aims to deliver holistic assessment, streamlined access to legal assistance and best practice referral for any potential VLA client within Victoria. The project involves a series of initiatives, policies, service improvements and technical systems upgrades with a focus on preventative and early intervention services. The aim of the project is to provide easier access to VLA services for people seeking legal help; ensure that we prioritise people most in need of our services and provide referrals to the most appropriate VLA services and external service providers

The iCAT project will benefit clients by providing them with:

- a clear first point of entry to VLA from anywhere in the state
- a more consistent response from VLA no matter where they live, how they contact us or to whom they speak
- targeted referrals to the most appropriate help within or outside VLA based on both legal and non-legal assessment
- reduced need to retell their story.

The new system will allow VLA to:

- focus on providing high quality legal services to those most in need of our help
- authoritatively and consistently refer clients to the most appropriate help
- use limited resources to help the most disadvantaged instead of just the most persistent
- avoid repeating work already undertaken in another part of VLA.

VLA undertakes quality initiatives not only to safeguard the interests of our clients, but also to ensure it is meeting its statutory mandate in ensuring the Legal Aid Fund (ultimately tax payer funds) is used responsibly and effectively in a manner that dispels fear and mistrust.²⁷

Design and delivery of quality legal services

Service design within the legal assistance sector needs to be sensitive to the potential for unintended market distortion associated with profiteering, opportunistic or unscrupulous behaviour.

There have been unfortunate instances where providers of legal services in an area of practice dominated by private providers have taken advantage of vulnerable clients, who were not in a position to independently assess the value of the services provided to them.²⁸

These issues are not confined to privately provided legal services and apply to other areas of the economy, including areas subject to government regulation.

²⁷ *Legal Aid Act 1978*, (Vic) ss. 4 and 7.

²⁸ For example, a series of reported instances of overcharging of personal injury clients, many of whom were Chinese nationals, by the law firm Keddies, which culminated in Mr Keddie being struck off the roll of practitioners: *Legal Services Commissioner v Keddie* [2012] NSWADT 106 (4 June 2012).

As the case study below demonstrates, legal aid clients are vulnerable to unscrupulous providers motivated by profiteering. This resulted in reforms in New Zealand to move to a mixed model, with a salaried practice acting as a regulating quality benchmark.

Case study – Reform of the New Zealand legal aid model

A widespread review of the legal aid model in New Zealand has led to a shift away from a private market driven scheme to a mixture of publicly and privately provided services.

The review uncovered widespread problems arising from a desire to maximise profits on legally aided work, which included instances of lawyers:

- ‘gaming the system’ by encouraging clients to delay guilty pleas to maximise legal aid payments;
- taking on too many files, leading to lawyers making sentencing submissions without having read the pre-sentence report and also resulting in non-appearances due to scheduling clashes;
- fraudulently charging ‘top up payments’ from clients to supplement legal aid fees; and
- taking significant measures to reduce overheads by operating mobile practices (referred to as “car boot lawyers”), where clients would receive services in public locations or simply on the day of the court event, often resulting in difficulties in clients contacting their lawyers or discussing their matter privately.²⁹

In light of these findings, the review recommended the expansion of publicly provided services, noting that the salaried practice could often “...provide services more efficiently than private lawyers, with no perceivable drop off in quality³⁰”. The review also found that competition between public and private providers ensures the best quality of service.³¹

Structure of the legal profession in Victoria

Since 1891, Victoria has had a fused legal profession, with practitioners admitted as both a solicitor and barrister of the Supreme Court of Victoria. Notwithstanding this, legislation and local rules and practice has historically preserved a distinction between solicitors and barristers, which has fostered the practice and culture of a split profession, which remains today.

As a result there are some limitations on the way in which legal services can be procured. The Victorian Bar Rules expressly precludes the direct briefing of barristers, instead requiring engagement through a client’s solicitor, unless the circumstances fall within the exceptions provided for in the Direct Access Rules within Part IV of the Practice Rules.

This adds an element of diversity in how legal services are provided across the country, as Victoria differs from a number of other fused jurisdictions in which a solicitor-advocate will often undertake both the preparation and advocacy for a matter. In practice this means that in some legally aided matters, a client in Victoria is represented by both a barrister and a solicitor.

²⁹ *Transforming the Legal Aid System: Final Report and Recommendations*, Ministry of Justice, November 2009, pp77-80.

³⁰ *Transforming the Legal Aid System: Final Report and Recommendations*, Ministry of Justice, November 2009, p96.

³¹ *Transforming the Legal Aid System: Final Report and Recommendations*, Ministry of Justice, November 2009 at p97.

In line with commitments outlined in our Strategic Plan 2011-14, VLA is pursuing a quality agenda and reforming arrangements for practitioner panel membership.³²

In many instances, continuity of representation with a single trusted advisor operating in solicitor-advocate mode would be advantageous for clients and the Legal Aid Fund. The vulnerability of our clients often necessitates a strong and trusting relationship with their lawyer and can make the introduction of unfamiliar counsel at the final stages of their legal matter confusing.

An example of this includes recent changes to grants of aid for Independent Children's Lawyers (ICLs). These changes moved from the prior practice of ICLs instructing barristers to appear in final hearings in the Family Court and the Federal Circuit Court to it being a condition of the grant of aid for ICLs to act as solicitor advocates at the final hearing. This change was consistent with the practice in other jurisdictions, such as Western Australia, Tasmania and South Australia.

The extent to which the operation of the split legal profession adds quality and/or increases or decreases legal costs remains a contested issue. However, VLA notes the current Commonwealth Attorney-General, Senator the Hon Brandis QC, has contemplated that direct briefing of barristers may operate to reduce expenditure, noting that in certain circumstances it is "desirable and cost effective"³³. The extent to which the split profession and limitations on direct briefing may also compromise client service, by breaking continuity of service or facilitating duplication or errors also remains contested and unclear³⁴.

Conclusion

VLA appreciates the opportunity to contribute to the Commission's preliminary deliberations on what is a demanding, broad-ranging and complex reference. VLA believes that access to justice is not simply about a person's capacity and ability to access the court system. Whilst the courts play a vital role in arbitrating legal issues, people's legal problems and associated need to redress these may in themselves require a different approach. We want people to be empowered to be able to resolve disputes quickly, at the earliest possible opportunity and at a reasonable cost. People should expect to be treated fairly, to benefit from their experience with legal service providers and to be confident in the operation of the justice system.

Preventative and early intervention services alongside thoughtful and targeted strategic advocacy are a critical element to achieving this, ensuring some legal help is available to as many people as possible. Focusing assistance through a holistic approach that looks not just at the presenting legal problem, but at the client as a whole, reduces the likelihood of further legal problems by addressing the underlying contributors. VLA has sought through its submission to explain to the Commission some of its approach to dealing with these challenges in an increasingly tight fiscal environment without compromising the integrity and quality of our services.

We look forward to making further contributions through proposed roundtable discussions and on the substantive proposals that will be canvassed in the Commission's draft report in April 2014.

³² Further information on VLA's quality agenda for panel membership can be found on our website at <http://www.legalaid.vic.gov.au/information-for-lawyers/doing-legal-aid-work/panels>

³³ Merritt, C "Rivals at odds over direct briefing of Bar", *The Australian*, 9 August 2013.

³⁴ McLeod, F "Direct briefing benefits seen in money and time", *The Australian*, 16 August 2013.