

Access to Justice Arrangements

Productivity Commission draft report

May 2014

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Contents

About Victoria legal Aid	1
Executive Summary	2
1. Unmet civil legal need	3
1.1 The ‘justice gap’	3
1.2 The cost of unmet legal need	5
2. Meeting the cost of legal need	6
2.1 Precise quantification of unmet legal need.....	6
2.2 Which disadvantaged people?	7
3. The VLA approach	9
3.1 The VLA tripartite mixed model	9
3.2 Collective Impact	9
3.3 Community legal centres are part of the legal safety net	10
3.4 CLC administration in Victoria	11
3.5 Reform of CLC funding in Victoria	12
4. Supporting innovation in the legal assistance sector	13
4.1 Quarantining of funds	13
4.2 Bridging the gap – Legal expenses contribution scheme.....	14
Conclusion	15

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 the biggest legal service in Victoria, providing legal information, education and advice for all Victorians.

We fund legal representation for people who meet eligibility criteria based on their financial situation, the nature and seriousness of their problem and their individual circumstances. We provide lawyers on duty in most courts and tribunals in Victoria.

Our clients are often people who are socially and economically isolated from society; 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 can help people with legal problems about criminal matters, family breakdown, child protection and family violence, immigration, social security, mental health, discrimination, guardianship and administration, tenancy and debt.

We provide:

- Free legal information through our website, our Legal Help line, community legal education, publications and other resources
- Legal advice through our Legal Help line and free clinics on specific legal issues
- Minor assistance to help you negotiate, write letters, draft documents or prepare to represent yourself in court
- Grants of legal aid to pay for legal representation by a lawyer in private practice or a VLA staff lawyer
- Funding to 40 community legal centres and support the operation of the community legal sector

In addition to helping individuals resolve their legal problems, VLA 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 campaigns that aim to improve the law and make it fairer for all Victorians.

Executive Summary

Victoria Legal Aid (VLA) commends the Productivity Commission on its comprehensive draft report on Access to Justice Arrangements in Australia.

VLA was pleased the Commission acknowledged the net public benefits associated with legal assistance expenditure. We appreciated confirmation of our long-held view regarding the devastating impact unresolved legal problems can have on individuals and the community more broadly, as those problems spiral into other areas of government expenditure.

While the draft report covers a number of matters relating to access to justice and the legal assistance sector, VLA has chosen to focus its response on issues relating to the following issues:

- Unmet civil legal need in Victoria – many deserving applicants are refused legal aid by just falling short of eligibility requirements. We provide some examples of the circumstances of those who are missing out on legal assistance to illuminate the current inequities in accessing services and the importance of a broad and inclusive definition of disadvantage in quantifying legal need.
- The tripartite nature of the mixed model – including the distinct and important role that community legal centres (CLCs) play in delivering tailored services to address local or specialist need, that can act to complement the services offered by legal aid commissions.
- CLC administration and reform in Victoria – outlining the progressive role VLA plays in CLC funds administration in Victoria, particularly as it relates to state funding to CLCs. It also describes collaboration within provider partners, coordinated by VLA, to improve the sector's response to evolving legal need, including initiatives to address some of the concerns identified by the Commission regarding duplication and meeting place-based need.
- The valuable role of independent statutory boards in service design and delivery – noting the benefits associated with empowering governing boards to work with other service providers to design services to meet current and evolving legal need which does not rely on, but can be aided by, guidance from government on priorities.

VLA notes that the Commission's report in draft form does not at this stage include economic modelling quantifying the level of funding required to meet the legal needs of disadvantaged Australians. VLA is conscious of the under investment in the legal assistance sector over many decades that has produced highly constrained eligibility guidelines, a 'mean' means test and casework services offered to only the acutely disadvantaged and vulnerable. What has been absent is credible, authoritative modelling on the cost of meeting unmet legal need that can provide the necessary evidence base and inform future funding decisions by government. We would be pleased to provide any further assistance to the Commission in this important task.

1. Unmet civil legal need

1.1 The 'justice gap'

VLA endorses the view, expressed by many others as part of this inquiry, that the demand for legal services amongst those who cannot afford private legal fees greatly exceeds the capacity of the publicly funded legal assistance sector. The draft report acknowledges the significant unmet legal need in Australia and some of the contributing factors. These include tight eligibility criteria being applied by legal aid commissions, the large number of people who are turned away from legal assistance providers and the apparent increase in self-represented litigants.

VLA often refuses applications for legal assistance purely on the basis of a person's financial means - be this income or assets or both.¹ In addition, there are many legal problems affecting disadvantaged people which we do not assist with, irrespective of means.² This is notwithstanding the fact that many of the applicants for grants of legal assistance face genuine legal issues in circumstances where they have limited or no capacity to either meet private legal costs or deal with it by themselves. In essence, VLA is not resourced to meet all genuine legal need and CLCs, whilst a vital part of the legal safety net, are unable to completely fill the increasing gap.

These issues are highlighted in the following case study, which is expressed in the applicant's own words. The applicant was seeking assistance in relation to a tenancy issue for an appeal to the Supreme Court.

Case study - Mariah's * experience

“My partner was on Workcover and also on Newstart. He was earning about \$500 a week... [from Workcover]. I was only on Newstart. When I was evicted, because of this income, Legal Aid wasn't able to help me. The only other thing I could do was go to the Supreme Court and do an originating motion by myself. I'm only 30 years old and it was too hard to do on my own. In the end I had to lay down and roll over and I got bulldozed. I was kicked out of my house and I'm still homeless. I've spent more than \$1000 on hotels and I'm still looking for a place. I've still got my things in storage and my animals in kennels. It was pretty much a nightmare and I'm still recovering from it.”

[*not her real name]

When Mariah was refused assistance VLA endeavoured to get her a lawyer through Justice Connect. Unfortunately, whilst Justice Connect found private firms that were interested in principle, they required a partner who would have the available capacity. None could find a lawyer to do the actual work in the time available.

This case clearly demonstrates the profound disadvantage and significant consequences of those who miss out on our services. This is just one example of where legal assistance could have averted the escalation of legal problems as well as the personal hardship and financial costs which accompanied that escalation.

¹ For further information on VLA's means test, see the *VLA Handbook for lawyers* at <
<http://handbook.vla.vic.gov.au/handbook/232.htm>>.

² For a list of matters that VLA will not normally assist with, see *VLA Handbook for lawyers*, at <
<http://handbook.vla.vic.gov.au/handbook/232.htm>>.

Like Legal Aid NSW, VLA considers that our current means test is 'mean' (page 645). In 2012-13, 96 per cent of those who received a grant of assistance from VLA were either receiving government benefits³ or had no income at all.⁴ Of those earning an income who may qualify for assistance, if they earn more than \$256 per week, they may be asked to contribute to the cost of their legal fees.

VLA has developed the following scenarios to provide the Commission with some insight into common issues that VLA regularly faces when assessing applications for grants of legal assistance under our current means test and eligibility guidelines. Whilst not actual case studies, they accurately reflect the difficulties faced by many Victorians in accessing publically funded legal assistance services.

Case scenario 1

Bill is 45 and owns his own home in country Victoria. He has been on a full disability support pension for the last ten years due to a work-related back injury. He has equity in his property of \$325,000 and no mortgage but the house has become dilapidated as he struggles to maintain the property due to his injuries. Bill wants to spend time with his two estranged children, whose mother has mental health issues, and seeks family law funding to do so. Bill is refused assistance on the basis that he has more than \$300,000 of equity in his property. He has no realistic prospects of getting a job or obtaining a loan.

Case scenario 2

Sharon is a single mother with four children and lives in one of the Melbourne growth corridors. She is not currently working, has no savings and receives a full parenting payment from Centrelink. Sharon separated from her violent husband a year ago and is seeking funding for family dispute resolution through VLA's Roundtable Dispute Management service, to obtain parenting orders and child support. Living on the outskirts of Melbourne, public transport is scarce and she relies heavily on a car. The car is currently valued on redbook.com as being worth \$17,000. She is eligible for assistance based on income, but is assessed to pay a \$1435 contribution based on the value of her car. As it is a contribution based on an asset, VLA requires this payment to be an upfront lump sum as it demonstrates capacity to borrow against the asset. It is highly unlikely that Sharon will be able to obtain a loan or if she does it will attract high interest rates with a realistic prospect of default. It is also not feasible for her to sell her vehicle.

Case scenario 3

Susan separated from her violent husband six months ago, with the assistance of a women's domestic violence crisis service. During their twenty year marriage, Susan's husband exercised

³ Government benefits include Abstudy, the aged pension, carers benefit, the disability support pension, Newstart, parenting payment, partner allowance, sickness allowance, special benefit, veterans and war service, widow allowance, widow B pension, wife pension and youth allowance.

⁴ For example, children and young people, people experiencing homelessness, people in custody and immigration detention and psychiatric patients.

total control over their finances, taking any income she earned and providing her only with a small weekly allowance. He purchased a house after they were married, but Susan's name was not put on the title. The house is worth \$280,000 and has no mortgage attached to it. Susan is now receiving a full Newstart pension, while she attempts to find employment. Due to her husband refusing to enter into any property negotiations, Susan now seeks legal assistance to obtain an equitable settlement. VLA does not provide assistance for family law property disputes, unless there is also a dispute in relation to children's issues.

While there are legal services which VLA provides that are not means tested – our Legal Help information line for example is open to the public irrespective of means – these kinds of services are designed to be low intensity and geared to those with greater capacity to self-help. Individuals with a high level of need and an inability to pay for a private lawyer continue to fall through our eligibility cracks.

1.2 The cost of unmet legal need

“.. to provide effective laws and lawyering, it is necessary to go beyond solving immediate problems. Lurching from one problem to the next, without examining the underlying causes of the difficulty, leads to a band-aid mentality.”⁵

Two key areas which are particularly impacted by unresolved or poorly resolved civil issues are the criminal legal system and the health and welfare systems.

The Australian Bureau of Statistics lists the key factors associated with high crime rates as poverty, unemployment, low levels of education and family relationship issues.⁶ Therefore, legal assistance with tenancy, social security and family law (which improves a person's experience of poverty, income support, employment, housing and family relationships) can also increase a person's protective factors against criminal justice involvement. The LAW Survey also established that the most common cluster of legal problems (issues that were co-occurring for individuals) included the civil areas of consumer law, housing and government, with crime.⁷

This link between civil and criminal systems is particularly evident in the case of children and young people who have had involvement with the child protection system. Extensive research has established a significant link between abusive, neglectful and inadequate parenting and the criminal activity of those children later in life.⁸ At VLA our high contact users⁹ are three times more likely to have been involved in a child protection or family violence issue prior to the age of 18 than standard users.¹⁰ These chronic offenders also represent significant financial costs to the criminal justice

⁵ The Hon. Michael Kirby AC CMG (2009) *Footscray Community Legal Centre – African legal Service*, Preface to Report.

⁶ ABS (2010) *Measuring Australia's Progress – 2010*, ABS Canberra.

⁷ Coumarelos, C. et al (2012) *Legal Australia-Wide Survey: Legal Need in Victoria*, p87.

⁸ Cashmore, J. (2011) “The link between child maltreatment and adolescent offending: systems neglect of adolescents” *Family Matters*, p89.

⁹ VLA defines high contact users as those in the top 1.2% of users by frequency. Jolic, R. (2014) *Research Brief: Victoria Legal Aid (VLA) Client Profiles – High contact users of legal aid services*.

¹⁰ *Ibid*, p6.

system with research suggesting this may be up to \$262,000 by the time they are 26 years old.¹¹ Legal assistance which assists families to resolve disputes and provide safe, stable and sustainable structures for children, will have a direct and positive impact on that child's life and criminal trajectory.

More broadly, unresolved civil law issues have a significant effect on the health and wellbeing of the people they affect and as a result on health and social services spending. The LAW Survey suggests that 44% of people with legal problems experience one or more adverse consequence such as income loss or financial strain, stress-related illness, physical ill health, relationship breakdown or having to move home.¹² Additionally, civil justice matters such as family law, personal injury, employment and health are more likely to result in multiple adverse consequences being experienced.¹³ These adverse consequences are strongly aligned with the social determinants of health as set out by the World Health Organisation (WHO) and the US Centre for Disease Control & Prevention (CDC). Employment, family, housing, social inclusion and income and wealth have been shown to be key predictors of ill health,¹⁴ with research suggesting that closing the gap in health equity in Australia could result in 141,000 early school leavers being in paid work, between \$1.4 and \$7 billion in increased wages and between \$2 and \$3 billion in reduced government spending on social support.¹⁵

2. Meeting the cost of legal need¹⁶

VLA considers the Productivity Commission is best placed to quantify the resources required to meet the legal needs of disadvantaged Australians and would be happy to work with the Commission by providing any resources that may assist in its analysis of this important question. Any calculation of these costs should consider both the quantity of unmet legal need and the eligibility criteria for publicly funded legal assistance.

2.1 Precise quantification of unmet legal need

Unmet demand for legal services is not an accurate measure of the level of legal need in our society. One reason for this is the common failure to identify a problem as a legal problem. Another is the common failure to seek legal advice or information about an identified legal problem.

The nature and extent of legal need experienced by those who do not come forward is a 'known unknown'. A practical way to address this is to improve accessibility to and awareness of legal

¹¹ Allard et al (2014) "The monetary cost of offender trajectories: Findings from Queensland (Australia)" *Australian & New Zealand Journal of Criminology* 47(1), p82.

¹² Coumarelos, C. et al (2012) *Legal Australia-Wide Survey: Legal Need in Victoria*, p83.

¹³ Coumarelos, C. et al (2012) *Legal Australia-Wide Survey: Legal Need in Victoria*, p84.

¹⁴ Commission on Social Determinants of Health (2008) *Closing the gap in a generation: Health equity through action on the social determinants of health* Final report of the Commission of Social Determinants of Health, World Health Organisation: Geneva ; Australian Institute of Health and Welfare (2012) *Australia's Health 2012* Australian Institute of Health and Welfare: Canberra, p13.

¹⁵ Brown, L., Thurecht, L. & Nepal, B. (2012) *The Cost of Inaction on the Social Determinants of Health* National Centre for Social Economic Modelling: Canberra pp13,18, 21.

¹⁶ Productivity Commission Draft Report 2014 – Information request 21.4.

services. This may occur for example through expanded community legal education, improved referrals and efforts to go to the problem or the client through for example co-location of legal services with other service providers such as community health services.¹⁷

However, there still remains the issue that while there is some data about which category of unidentified legal problems are the most common and the severity of their impact on lives,¹⁸ it is far less clear what types of response would be suitable and therefore what kind of service is needed for these legal problems.

2.2 Which disadvantaged people?

Before there can be an assessment of costs or the quantity of resources required, a judgement about who should be eligible for legal assistance must also be made. Put simply, what type and level of disadvantage is required before legal costs should be covered by public funds?

VLA notes the Productivity Commission's paper on *Deep and Persistent Disadvantage in Australia*¹⁹ evaluated the relative merits of the different measures of disadvantage. As noted in that report, disadvantage is a complex concept. While a nuanced approach to disadvantage will always look beyond income indicators alone, *relative income poverty* (as defined by the OECD)²⁰ is a well established evidence base from which to start.

The OECD data set (current to 2011) shows that 14.4 per cent of people in Australia were living in relative income poverty.²¹ Therefore VLA suggests that a reasonable starting point may be that anyone in the lowest 14.4 per cent (updated to reflect current data) of income earners by household should be eligible for a grant of legal assistance.

While relative income can act as a good proxy for disadvantage, it does not tell the whole story.²² In assessing who is disadvantaged for the purposes of determining who should be eligible for legal assistance, the nature and severity of the legal problem and the cost of obtaining legal services is relevant. While those in relative income poverty could be expected to suffer relative disadvantage in the purchase of all goods and services (such as groceries, housing, transport etc) a higher percentage of the population should be considered as 'disadvantaged' with respect to the purchasing of legal services.²³

¹⁷ For example, [Intouch Legal Centre](#) and [Advocacy-Health Alliances in Australia: Better Health through Medical-Legal Partnership](#) or Health Law Partnership – *Bedside legal aid scheme at Alfred*, Herald Sun, 20 May 2014, Angus Thompson, p3.

¹⁸ Coumarelos, C. et al (2012) *Legal Australia-Wide Survey: Legal Need in Victoria*, p3.

¹⁹ Productivity Commission, (2013) *Deep and Persistent Disadvantage*, Chapter 3.

²⁰ A person is living in relative income poverty if their income is less than 50% of the median household equivalised income. Equivalised income is income adjusted for the size and composition of the household. VLA does not have access to more recent information.

²¹ OECD, *OECD Income Distribution Database: Gini, poverty, income, Methods and Concepts*, date of publication unknown, <<http://www.oecd.org/els/soc/income-distribution-database.htm>>.

²² Productivity Commission, (2013) *Deep and Persistent Disadvantage*, p90.

²³ This is supported by the Commission's observations regarding unpredictable or lumpy costs exposure, as well as data on average legal costs in selected tribunals where representation is used; for example small business VCAT matter (2013) \$8180; NSW Dust Diseases Tribunal matter (2007) \$48356; AAT matter applicant costs (2013) \$19655.

The de-identified case study below, expressed in the applicant's own words, demonstrates the issues faced by those who do not qualify for assistance, but are still unable to afford private representation and must fend for themselves.

Case study – Kate's experience

“I went to Legal Aid for information in relation to how to go about my situation with my baby's father in relation to access[...]Because of our relationship and the way he was, that wasn't working. I was relenting to a situation that wasn't satisfactory for my daughter, because of his drug issues. He was powerful and coercing me into things I know weren't right. He manages to control and dominate me.

I went back to Legal Aid to get more advice because I was putting my daughter at risk. I needed more authority to implement a plan that was satisfactory for her safety. I was advised that a round table dispute with a lawyer was best, as opposed to standard mediation. I applied for a grant of aid which would have allowed me do this. I was rejected because of approximately \$14,000 savings in my bank account. I have a serious [non-life threatening] medical condition.... [If it flairs up] I will require surgery ASAP. If I don't get it, I would be totally immobile which I can't be with a one year old baby. My savings are for my security, to allow me to get this surgery [straight away] if I need it. I'm not working. I'm a full time single mum. My condition has stopped me from working in the past.²⁴

In the mean time, we had the standard mediation even though it was against the legal advice. Now I'm once again trying to manage the situation by myself. It's having a pretty devastating impact on me personally and emotionally [started to cry].

If I had have had the round table with the lawyer, I'm not sure I would have agreed to what I agreed to. My baby's father hasn't followed what we agreed to anyway.”²⁵

If Kate had have been eligible for legal assistance, she would have had a lawyer with her while negotiating access to her daughter. In our experience, having a lawyer present means that parties are less likely to be intimidated and less likely to agree to terms which they later regret. VLA estimates that if Kate had have gone to a private lawyer after having been refused assistance, the lawyer would have charged her between \$350 and \$500 per hour. Our calculations estimate that the time spent dealing with her matter, including one breach of the order could have cost her \$10,000 with further costs if the father continued to contravene the orders.

VLA believes any definition of disadvantage used to determine the category of people who should be eligible for a grant of legal assistance needs to consider these issues. With this in mind, any analysis along these lines is therefore likely to lead to an increase to the 14.4 per cent of people who should be eligible for a grant of assistance. In addition, the concept of disadvantage should

Average legal costs are obviously considerably more in respect of matters taken to superior courts, but less when a matter is resolved outside of formal dispute resolution.

²⁴ Edits, as indicated by square brackets, have been made to protect the client's anonymity.

²⁵ \$14,000 would not preclude Kate from a government allowance (ie parenting payment single). Of itself, it would have no effect at all under the Centrelink asset test, and no impact under the income test. If it were a new claim it may have some, probably minimal, effect on the start date due to the liquid assets waiting period.

recognise acknowledged social indicators of disadvantage, such as disability, mental illness, youth, low literacy skills or those experiencing or at risk of violence or abuse.

3. The VLA approach

3.1 The VLA tripartite mixed model

VLA already oversees a truly tripartite mixed model of service delivery.

VLA uses the term ‘mixed model’ to describe all three providers²⁶ – legal aid commissions, private practitioners and CLCs. This reflects the fact, also recognised by the Commission (page 576), that each provider plays a unique and complementary role in the delivery of legal assistance to the community.

VLA supports the notion that the mixed model of legal assistance should operate efficiently and effectively. The model should be structured in a way to leverage the particular skills and expertise of each provider, maximise geographical coverage across the state and promote a balance between private and salaried providers that promotes quality benchmarking and cost efficacy.²⁷

There will always be competitive tensions between different suppliers of services within a mixed model. Healthy competition is precisely what is intended. Managed appropriately, an effective mixed model working efficiently constitutes sound economic management. It also aligns with the basic principles of joined-up service delivery.

The design and active management of the mixed model allows for a constant evolution of service offerings, responding to a constantly changing justice system, burgeoning demand, new growth corridors and emerging legal need. Having multiple providers allows for greater flexibility in being able to meet these challenges.

3.2 Collective Impact

The Victorian mixed model draws strongly from the concepts of ‘collective impact’²⁸ as a process for effecting real change across an entire, complex social sector. Collective impact highlights the necessity of bringing organisations together, from within and across sectors, with a common agenda for change. It involves an agreed understanding of the problems facing the sector and a joint approach to solving them.²⁹ Collective impact calls for consistent data and measurement of results, a coordinated plan of action, open communication and a coordinating backbone organisation to assist participating organisations stay on the agreed path.³⁰

In the Victorian mixed model, VLA is increasingly developing this backbone role in ways that some other states are not. Consistent with its enabling legislation VLA is working with the three

²⁶ Noting that the Productivity Commission has described the mixed model as comprised of private practitioners and salaried legal aid lawyers, Productivity Commission, 2014. *Access to Justice Arrangements Draft Report*, April, Canberra, p588.

²⁷ Victoria Legal Aid, (2013). *Submission to the Productivity Commission Issues Paper on Access to Justice*, VLA, Melbourne, sub 102 pp 9-10.

²⁸ Kania, J. & Kramer, M. (2011). ‘Collective Impact’ *Stanford Social Innovation Review* Winter, p35.

²⁹ Ibid, p39.

³⁰ Ibid, p39.

participants in the model (private practitioners, CLCs and VLA's staff practice), acknowledging the unique services provided by each, to coordinate their combined efforts as part of a shared understanding of the problems and solutions for access to justice in Victoria.

At a more discrete level, VLA has engaged collective impact principles to work more collaboratively with CLCs which is discussed in more detail below. This approach is also in line with the recommendations of the report by Professor Peter Shergold AC into service sector reform in Victoria.³¹

3.3 Community legal centres are part of the legal safety net

While there is evidence that there is a need to improve integration of VLA and CLC services, the distinctive role of CLCs should be maintained. As a funder of CLCs, VLA has a responsibility to ensure good use of the Legal Aid Fund and to direct the uses to which our funds are put where necessary. High functioning CLCs have a strong record of responding quickly and effectively to community need and this record is taken into account in determining the extent to which VLA directs the services CLCs provide.

When the system works effectively, CLCs promote access to justice by delivering services that legal aid commissions and private practitioners are unable to, often in a more cost-effective way. The services provided by CLCs can bridge service gaps and reduce pressure on legal aid commissions, particularly for less intensive legal services, such as information and advice. For example, many CLCs can harness the goodwill of the private profession to offer in-person assistance through free evening drop in legal advice sessions, staffed primarily by volunteers. These services not only increase accessibility for legal advice (through after-hours availability or being more conveniently located for some clients) but may be better at meeting a client's needs (for example, allowing for the review or preparation of documentation). This in turn reduces pressure on VLA's Legal Help telephone service and duty lawyers.

The draft report (pp 644 – 645) highlights the differences in eligibility criteria between legal aid commissions and CLCs, with a draft recommendation (21.3) to align eligibility between legal aid commissions and CLCs for civil law cases, to avoid forum shopping and promote equity of access. While there are opportunities to reduce fragmentation, promote more and better joined up services across the sector, and to ensure that all CLCs are effectively targeting services to need, we do not believe that establishing consistent eligibility criteria is the best approach. Having diversity in service offerings, particularly where they are designed to be complementary, ultimately benefits the community and increases access to justice.

Legal aid commissions are not able to offer the same flexibility that CLCs can offer. Due to our overall size and exposure to the variable costs of privately assigned grants of assistance, as well as the rights of applicants to administrative review processes, VLA must offer and decide upon services in predictable ways. The absence of administrative review processes and CLCs' smaller scale allows them greater flexibility in responding to legal need including for those people who may fall just shy of eligibility or have a legal problem not covered by legal aid.

³¹ Shergold, P (2013) *Service Sector Reform: a roadmap for community and human service reform*.

While the services of legal aid commissions can be seen as a ‘safety net’ to catch all Victorians, it is important that CLCs are able to tailor their services (and eligibility) to best meet the needs of their local communities. This allows CLCs to quickly and often innovatively respond to local legal need.³²

There are sound reasons for CLCs to offer services that VLA cannot, and vice-versa, and this is a key feature of the success of the mixed model in Victoria. VLA makes a significant number of referrals to CLCs each year, with over 17,500 matters referred to them in 2012-13. This is in direct recognition of the different services that CLCs can provide to vulnerable and disadvantaged communities.

3.4 CLC administration in Victoria

In proportionate terms, Victoria has the best funded CLC sector of all the states. There are currently 50 CLCs in Victoria. VLA grants and administers funding for the Federation of Community Legal Centres and 40 centres across Victoria through the Community Legal Services Program (CLSP)³³. Victoria is the only state where the Commonwealth is the junior funder of CLCs. VLA is the largest provider of funds to CLCs in Victoria, exercising considerable discretion to allocate the state component of CLC funding as it sees fit (63% of total CLC funds), but not the Commonwealth component (37%).

The VLA Board has a record of making sensible and fair decisions about the distribution of funds appropriated to it for CLCs and is best placed to make assessments of legal need across the state and how best to adjust resource allocation within the mixed model, to achieve beneficial and cost effective outcomes for the community. This process of making careful and conscious choices between the three providers under the mixed model is a core statutory function of the Board.³⁴

VLA does not agree that legal aid commissions have a conflict of interest (p658) in administering CLC funds. The suggestion of a conflict presumes that the VLA Board would preference the VLA staff practice ahead of its statutory functions, despite clear obligations on the VLA Board, to economically manage the Legal Aid Fund. Neither is the suggestion of conflict borne out in practice having regard to the size and nature of CLC and private practitioner involvement in service delivery. There are also sound reasons why a legal aid commission is best place to administer CLSP funding, not least that we are already subject matter experts in collaborating with CLCs to support better service delivery. It is also questionable whether value would be added, from the additional time and resources needed to build this capacity and expertise in a government department, that is removed from the client coalface.

One alternative to trilateral funding agreements would be that Commonwealth provide its share of funds directly to a legal aid commission (directly or via a national agreement) and the commission determines where these funds are allocated, and enters into bilateral agreements with CLCs relating to these funds. This would replicate the existing model in relation to the majority of CLC funding in Victoria and enable the successful existing reform agenda to continue.

³² For example, the partnership between Inner Melbourne Community Legal and Dousta Galla Youth Services working together to help prevent family violence through the local secondary school system. The project also aims to build the capacity and willingness of young people to act as information sources for their family and friends on family violence.

³³ [Victoria Legal Aid Annual Report 2012-13](#).

³⁴ *Legal Aid Act 1978*, s4.

3.5 Reform of CLC funding in Victoria

VLA agrees with many of the problems identified in the draft report, including the current distribution of CLC funding under the CLSP program. VLA is already acting on a number of the issues that the Commission has identified, involving reducing duplication, ensuring services are matched to areas of demand and legal need and simplifying clients' navigation of the legal assistance sector through effective triage and referral.

In late 2012 and early 2013, the VLA Board took a number of decisions about VLA's relationships with CLCs. These included:

- Opting not to reduce overall funding to CLCs or to make significant changes to CLC funding, despite making considerable changes to eligibility guidelines affecting other parts of the mixed model.
- Endorsing Guiding Principles on CLC funding (Guiding Principles), ensuring funds are better allocated to address unmet legal need in geographical locations of growth and disadvantage and is apportioned to centres that effectively target services to legal need.

Since the endorsement of the Guiding Principles VLA has sought to implement the principles through additional funding provided to CLCs to better target resources to need, and through a number of joint projects with CLCs to drive reform in the sector. VLA has committed more than \$900,000 in new grants to CLCs for projects addressing address geographic areas of unmet need (particularly in outer-suburban growth corridors and rural areas).

Recent innovative CLC projects funded by VLA

- Women's Legal Service Victoria to use Skype or similar technology to deliver legal advice and assistance to clients in regional and remote locations and to clients facing other barriers to accessing the legal system.
- Brimbank Melton Community Legal Centre to help people with family violence problems attending the Bacchus Marsh Magistrates' Court.
- Springvale Monash Legal Service to fund duty lawyer services to help children and young people with family violence problems at Children's Court sittings in Dandenong.
- YouthLaw to extend its trial service giving legal help via Skype to young people living in remote regional areas.
- Whittlesea Community Connections (Whittlesea Community Legal Service) to help people facing family violence in culturally and linguistically diverse communities.
- Eastern Community Legal Centre to assist in establishing a new community legal centre in Healesville in Victoria's east.

In addition, VLA is currently supporting a project involving four CLCs in the west of Melbourne who have come together to identify legal need in this significant growth corridor, with the aim to better service this need as a collective group. This process has resulted in in-principle support by three centres for a single legal entity servicing a large part of the west of Melbourne.

VLA is also supporting a number of other CLCs to consider similar projects across Melbourne. Collectively, these projects are expected to help remedy the duplication and gaps in CLC service delivery that the Commission has identified as being a feature of the ad hoc nature of the development of the CLC sector across Australia.

The implementation of these Guiding Principles and the collaborative approach to reform around ‘co-production’ of services supports a number of the principles behind the Shergold report into sector reform³⁵ demonstrated in our support for innovative service delivery.

VLA does not support the introduction of competitive tendering.

We think the risks of dislocation and service provider distrust would erode referral pathways for clients and outweigh any perceived benefits.³⁶ The sector does not operate with extravagant costs and VLA believes that reforms made by the VLA Board in collaboration with the CLC sector, are more likely to achieve improved allocation and use of limited funding than competitive tendering.

We do not believe competitive tendering would realise meaningful benefits or lead to better outcomes or resolve any issues around better access to public funded legal services. In light of the distinctive role played by CLCs, VLA would be unlikely to tender to any significant extent for funds currently provided to CLCs.

4. Supporting innovation in the legal assistance sector

4.1 Quarantining of funds

VLA notes the Commission’s draft recommendation that priorities for the legal assistance sector be determined “...based on where the community-wide benefits are the greatest, taking into account the extent to which unresolved legal problems impact on a person’s life and the community more broadly” (p632) as an alternative to the current demarcation between Commonwealth and state priorities.

This implicitly recognises the fact that legal problems experienced in the community are difficult to characterise as ‘Commonwealth’ or ‘state’ legal problems – particularly due to their commonly clustered nature.³⁷ This draft recommendation recognises that a holistic assessment of need is beneficial to prioritisation, planning and budgeting. By extension, this reasoning can be equally applicable to the current delineation in funding, which is dictated by the existing split between priorities at a state and federal level identified by Commission. These current constraints limit the capacity for independent statutory boards³⁸ to allocate funds based on community-wide need and benefit and inhibit a coordinated approach to system-wide change – with the Law and Justice Foundation of NSW noting: “The fragmentation of accountability, policy, funding and delivery

³⁵ Shergold, P (2013) *Service Sector Reform: a roadmap for community and human service reform*, p17.

³⁶ Pleasance P, et al (2014) *Reshaping legal assistance services: building on the evidence base A discussion paper* (draft), p80.

³⁷ Coumarelos, C, et al, (2012) *Legal Australia-Wide Survey: legal need in Australia*, Law and Justice Foundation of NSW, Sydney, p87.

³⁸ *Legal Aid Act 1978*, s.11.

presents a particular challenge to coordinating a system-wide change in a public legal assistance services sphere that is continuously being reformed.”³⁹

VLA notes the Commission’s proposal to ‘ earmark’ certain funding to be used for civil law purposes, possibly by pooling Commonwealth and state funding before separating funding for non-criminal matters⁴⁰.

Whilst we strongly support the Commission’s recognition of the importance of adequate investment in addressing civil law problems, VLA does not consider the establishment of an additional constraint on funding allocation to be the most effective way to address underinvestment in civil law services. This requirement will simply add ‘red tape’ and unnecessarily fetter the VLA Board in giving effect to its statutory functions⁴¹ to provide legal aid efficiently and equitably across the state and further increase the existing fragmentation in priorities, funding and reporting obligations that is inconsistent with a cohesive and ‘joined-up’ model of service delivery.

We consider that independent statutory boards are best placed to identify and respond to legal need and to manage and direct funds effectively, in keeping with community expectations. Improved access to civil law services is best achieved by governments supporting statutory boards by actively prioritising and investing in assistance for civil law problems, noting the significant downstream benefits associated with such investment.

4.2 Bridging the gap – Legal expenses contribution scheme

VLA supports in principle the proposal for a Legal Expenses Contribution Scheme (LECS), whilst noting its preferred position that legal assistance should be available to meet the core needs of all Australians living in relative income poverty. For those earning above this income threshold but who cannot afford legal services in the private market, LECS offers a possible mechanism to support legal assistance while ensuring cost recovery in appropriate cases.

VLA believes that further examination by the Commission on how the scheme may operate and what body would administer the scheme is warranted and would support the proposition of a small pilot. However, VLA considers that any responsibility placed on legal aid commissions for the administration of any such scheme would need to be consistent with its statutory objectives and strategic priorities. Consideration would also need to be given to commensurate additional resources.

Should LECS not be administered by LACS, the prices of legal services undertaken by eligible service providers and paid for through the scheme would need to be adequately controlled. Consumers facing deferred and costless debt to satisfy their immediate need are unlikely to be price responsive, and as such there would be a real risk that its introduction could lead to unscrupulous commercial behaviour and an inflation of legal fees generally. In order to ameliorate these risks, we would draw attention to some of the documented financial cost and quality difficulties experienced by jurisdictions who rely exclusively or overwhelmingly on private practitioners to deliver publicly funded legal services, with inadequate oversight. The experience in New Zealand and the relatively

³⁹ Pleasence, P, et al, (2014) *Reshaping legal assistance services: building an evidence base*, Discussion Paper, Law and Justice Foundation, Sydney, p165.

⁴⁰ Productivity Commission Draft Report, 2014, p32

⁴¹ *Legal Aid Act 1978*, s.4.

high cost of legal aid in the UK, are explored in further detail in our earlier submission to this inquiry.⁴²

Conclusion

The opportunity for the Commission to collect the evidence to offer authoritative guidance on the costs of meeting legal need is considered by VLA to be a once in a generation opportunity.

We look forward to expanding on this submission and making further contributions at the public hearings in Melbourne in June 2014.

⁴² Submission of Victoria Legal Aid to the Commission's enquiry into Access to Justice Arrangements, no. 102, pp 9-10, 14.