

Review of Lawyers' Practising Certificate Fees

Response to Victoria Legal Services Board + Commissioner

30th March 2017

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Written requests should be directed to Victoria Legal Aid, Research and Communications, 350 Queen Street, Melbourne Vic 3000.

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About Victoria Legal Aid

Victoria Legal Aid (VLA) coordinates the provision of legal advocacy, advice and assistance to socially and economically disadvantaged Victorians, via a network of employed lawyers, accredited private firms, and Community Legal Centres. Our organisation works to improve access to justice and pursues innovative ways of providing assistance to reduce the prevalence of legal problems in the community. People receive help with their legal problems at courts, tribunals, prisons and psychiatric hospitals as well as in our 14 offices, and the offices of around 260 private law firms, across Victoria. We also deliver early intervention programs, including community legal education, and assist more than 100,000 people each year through Legal Help, our free telephone advice service.

In the six months to December 2016:

- We provided 20,295 grants of legal assistance.
- Duty lawyers assisted clients in 44,871 instances.
- Our Legal Help telephone service took 59,655 calls, providing legal advice or triaging to other Legal Aid services.
- We provided 20,887 instances of minor assistance, where some legal help is provided without a formal grant of legal aid.

To enable us to deliver our services, we employ around 430 lawyers who hold Victorian Practising Certificates (PC's). Our lawyers are currently charged the same fee for PC's as lawyers working in other sectors of the legal profession, and this cost is met by VLA from its general operating budget.

In the six months to 31 December 2016, 72 per cent of our grants of legal assistance were assigned to private practitioners (14,601 matters) – an increase of 4 per cent on the previous year. In the family law field, around 90 per cent of matters were handled by private practitioners. The growth in grants of assistance is predominantly serviced by firms external to VLA. This increased participation reflects their capacity to scale up quickly in response to increased demand. These practitioners deliver services to clients within the fixed fee structure set by VLA each year.

VLA is funded by a mixture of State Government and Commonwealth Government funding, with a proportion also coming from the Public Purposes Fund (PPF). In the past three years, PPF funds have accounted for 15% of VLA's annual budget. Therefore, changes to the underlying model setting PC fees impacts VLA in the key areas of costs and funding.

Key contacts

Katie Miller

Executive Director

Legal Practice

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Executive Summary

Victoria Legal Aid (VLA) is uniquely affected by the proposals set out in the Discussion Paper which is the subject of this submission. Changes to the practising certificate fee model have the potential to impact:

- VLA's own operating costs;
- the costs of its external service providers; and
- a significant proportion of its funding revenue.

VLA acknowledges the need to take a broad perspective and consider the impact of the changes in all three areas, and to support the outcome which is most likely to benefit its priority clients, and promote access to justice more widely.

Practising Certificate fees and PPF funding

Options 1 and 2 provide the greatest benefit to VLA's funding revenue, as they result in the largest increase in funds available for distribution via the Public Purposes Fund (PPF). However, these options present financial risks to VLA's external service providers and the wider legal profession which could result in fewer lawyers being available to carry out legally aided work. They would also result in a large increase in the fees payable for VLA staff lawyers' practising certificates.

Options 3 and 4 are preferable, because they reduce these risks, while still delivering the potential for a modest increase in funding for VLA from the PPF. In particular, we support Option 3, which retains the "tiered" approach to fees, reflecting the higher level of regulation required for practitioners authorised to manage client funds held in trust.

Other options for fees based on different criteria

VLA supports the principle cited in the Discussion Paper that the cost of regulating the legal profession should be recovered from those who benefit from, or give rise to the need for, regulation. It has long been accepted that the management of client monies held in trust gives rise to a greater need for regulation, and this has been reflected both in the use of the interest stream for funding regulation, and in the imposition of a higher practising certificate fee for authorised practitioners.

VLA submits that this principle should be extended to other risk-based categories of practitioners. The Submission outlines a comprehensive set of procedures and functions provided by VLA which work to educate, monitor and improve the practices of all those involved in delivering legally aided services. The scale and reach of VLA's practice – 430 in-house practitioners, as well as 260 external law firms with 386 individual certifiers, providing state-wide services across a broad range of legal practice areas – means that these measures substantially reduce the regulatory burden on the LSB+C.

As the cost of regulating these practitioners is lower, it is equitable that this should be reflected in the practising fee model. It is submitted that lawyers carrying out legally aided work should be identified as a different category of practitioner, and charged a lower fee accordingly.

LIV's response

VLA notes the approach of the Law Institute of Victoria, in questioning some of the fundamental assumptions of the Discussion Paper. In the time available, VLA has decided to limit its submissions to the Options and Consultation Questions presented in the Discussion Paper. Should the opportunity arise to explore the broader issues raised by the LIV, VLA may wish to comment on those issues.

Summary of recommendations

Recommendation 1:

VLA recommends that **Option 3** should be adopted as the new model for setting practising certificate fees for the following reasons:

- It results in the lowest increase in fees for all practitioners, reducing the impact on VLA's costs, as well as private practitioners performing legally aided work
- The retention of the tiered system reflects the goal of ensuring that the costs of regulation are funded by those who benefit from, or give rise to the need for, regulation
- It results in a modest increase in the funding which may be available to grant recipients, including VLA, from the PPF

This Option is the fairest, as it strikes a balance between VLA's need to maximise its funding to assist vulnerable clients, and the need to have an effective legal services market, which gives access to justice for those who are entitled to Legal Aid funding, as well as those who are not.

Recommendation 2:

VLA's in-house legal practitioners, and private practitioners performing legally aided work, should be recognised as a different category of practitioners presenting a lower regulatory risk, representing a lower regulatory burden on LSB+C. As a consequence, practising certificates for these lawyers should be available at a reduced fee.

Discussion

1. Background

This submission is made in response to the LSB+C's Discussion Paper in advance of setting new fees for practising certificates in Victoria for the 2018-2019 financial year and beyond.

The Discussion Paper sets out the considerations the LSB (the Board) must take into account when making a recommendation regarding fees, and gives four options for setting the fees in this context. It invites public comments and submissions to be considered by the Board in the development of a preferred option, and poses 16 "consultation questions" to promote discussion around the those options.

The options are divided by risk profile (whether or not a practitioner is authorised to manage money held in trust for clients), and by the extent to which PC fees contribute to the regulatory costs of the profession (either funding 100% or 50% of those costs). These options have different effects on the level of fees to be charged, and the amount of money which may be left in the PPF after the costs of regulation, to be distributed to bodies such as VLA.

VLA is uniquely affected by the proposed changes: in responding to the Discussion Paper, we have had to consider the impact on our operating costs, the impact on the operating costs of private practitioners who perform legally aided work, and the potential impact on our own funding which would follow from the various funding models.

On 28 February 2017, the Law Institute of Victoria (LIV) provided a response to the Discussion Paper, entitled "Fundamental Issues and Questions" (LIV's Submission). LIV's Submission makes some important points about the fundamental assumptions in the Discussion Paper, including whether the "whole of system context" has been effectively assessed. These issues have not been addressed in this Submission. While limiting our comments to the options presented in the Discussion Paper, we may wish to comment on the broader issues raised by the LIV at a later stage in the process, if appropriate.

2. Victoria Legal Aid in context

Practising certificate fees

In delivering legal services, VLA employs around 430 lawyers who hold practising certificates, 426 of whom are employees without trust authorisation. We pay the same PC fee as lawyers working in other sectors of the profession, and this cost is met by VLA from its limited annual budget. In the 2017-18 financial year, PC fees (excluding Fidelity Fund fees) will cost VLA \$152,113.

In the year to 31 December 2016, 72 per cent of our grants of legal assistance were assigned to private practitioners (14,601 matters). In the family law field, around 90 per cent of matters were handled by private practitioners. These professionals deliver services to clients for the fixed fees set by us each year. They are responsible for obtaining and funding their own practising certificates, and do not have the ability to pass any increase in PC costs on to legally aided clients through increased fees.

Funding for VLA's services

VLA makes grants of legal assistance, and funds its own operations, using a mixture of State and Commonwealth government funding, with a proportion of funding also coming from the PPF. In the past three years, PPF funds have accounted for around 15% of VLA's annual budget. However, this source of income is not stable, for two reasons.

Under the *Legal Profession Uniform Law Application Act (Vic) 2014* (the Act), the Board is obliged to make a distribution to VLA from the PPF every year (s.143(1)). However, the exact amount or proportion to be allocated at the Board's discretion, subject to a cap of 35% of the available funds payable in any one year (s.143(2)) which may be exceeded in certain circumstances (s.146)).

Secondly, as identified in the Discussion Paper, PPF interest income – including trust account interest – is subject to any changes made by the Reserve Bank of Australia in the official cash rate. Therefore, the amount which may be available for distribution at the end of each financial year is dependent upon the interest earned by these funds, and the skill with which these investments are managed. Due to this potential variation, funding from the PPF, while welcome, cannot be used to make long-term decisions about Legal Aid spending.

Risk profile of legally aided practitioners

VLA solicitors, and those in the private sector carrying out legally aided work, present a low regulatory risk compared to the rest of the profession in Victoria. This is because VLA has comprehensive measures in place to ensure compliance with practice and quality standards, meaning that there is a reduced regulatory burden (and cost) on the LSB+C.

These measures include:

Practice Standards

VLA's Practice Standards model appropriate standards of professional practice for all lawyers involved in delivering legally aided services to clients, incorporating both minimum professional obligations and additional quality standards. This includes matters such as client confidentiality, conflicts of interest, record-keeping, practising certificates and insurance notifications, as well as internal practice standards applicable to particular areas such as duty lawyers and outreach services.

Lawyers can access a range of resources, or directly contact dedicated staff who can provide immediate guidance on key issues.

Complaints and Statutory Compliance

Complaints about internal and external legal aid practitioners are managed and resolved by VLA's Complaints and Statutory Compliance function (CaSC).

In the first instance, such complaints are usually handled at manager level in accordance with VLA's Complaints policy. While many client complaints are able to be resolved at manager level, CaSC handles complaints directly with clients where they cannot be resolved locally.

The outcome of the complaints procedure is used to address service quality issues, and identify training needs. Where the complaints procedure results in a negative finding about an external (panel) practitioner, this is reported as a potential breach of VLA's Practice Standards, and this data helps VLA target quality auditing at panel firms posing the greatest risk of poor quality service.

The LSB+C sometimes refers complaints about a legally-aided matters to CaSC for management and resolution, and these complaints are usually about VLA staff or services.

In 2016, CaSC received a total of 339 complaints: 156 were referred to VLA managers for resolution and the remaining 183 were handled by CaSC. Of the 183 handled by CaSC, 111 were complaints about panel practitioners.

Training

VLA offers professional legal education (PLE) to lawyers through an ongoing program of training activities, with a goal of keeping skills and knowledge up-to-date in a wide range of areas, including:

- technical legal knowledge
- compliance and governance
- communication
- ethics
- understanding priority clients

Legal Practice Essentials, a program of 20 foundation modules, is compulsory for VLA lawyers. Other PLE training activities are selected by practitioners based on their practice area and areas of interest.

All VLA staff members are encouraged to attend PLE activities. Lawyers and volunteer lawyers from Community Legal Centres are also regularly invited to attend VLA's PLE events. Events are occasionally opened to members of VLA Panels and the Victorian Bar.

Records of training are centrally maintained and support practitioners' compliance with Practising Certificate requirements.

Panels accreditation

In order to undertake legally aided work, external practitioners must be members of an appropriate VLA Panel, which sets minimum quality thresholds for lawyers wishing to do legally aided work. There are six specialist panels pursuant to section 29A of the *Legal Aid Act 1978* (LAA): Child Protection, Family Law, Family Violence, Independent Children's Lawyer, Indictable Crime, and Summary Crime. There is also a general panel constituted pursuant to section 30 of the LAA.

Section 29A Panel membership is by firm, while individual practitioners within the firm are offered "Panel Certifier" status. Firms and certifiers enter into written terms and conditions, setting out the standards expected by VLA when undertaking legally aided work. Compliance with these terms may be audited by the Quality Audit team.

Applications are assessed by a committee for each specialist panel comprised of two subject-matter experts (often a VLA Director, Program Manager or Senior Lawyer), and may also include a stakeholder member.

There are currently 260 firms and 386 individual certifiers accredited to provide legally aided services. Since December 2013 VLA has refused panel membership to 2 firms, and 26 individual certifiers.

Quality audit function

In 2015 VLA began auditing Panel members' compliance with quality terms and conditions. Firms are selected for audit based on a risk assessment, taking into account a practitioner's certifier level, their volume of work and case costs, and other factors such as complaints.

Following an audit, practitioners are informed of the outcome, and any action to be taken as a consequence. There may be a requirement for further training or education, taking remedial action, greater supervision of staff, or in the most serious cases, removal from the relevant panel, and referral to the LSB+C or Victoria Police.

Since it was established, the QA team has audited 211 files from 42 panel firms.

Outcomes have included detailed feedback to practitioners, the establishment of quality improvement plans, referrals to the Panels function to consider negative quality audit outcomes, and the identification of a select number of high quality practitioners.

Dedicated grants function

The legal training and education offered to practitioners is supported by VLA's Assignments function, which provides information and assistance to practitioners about the grants process and fees.

Assignments communicates directly with clients, writing to the client and their lawyer simultaneously about the status of their grant. Clients can also speak directly to Assignments about fee structures, conditions of aid, and client contributions to costs, giving them a clear source of information about the funding of their case.

When CaSC receives a complaint about practitioner fees in relation to legally aided work (either directly from a client or via LSB+C), it is referred to the relevant Assignments team for resolution in the first instance.

These programs and functions work together to reduce the risk of problems arising, as well as addressing them in a timely manner if they do arise.

3. Fee Options

This section outlines the potential impacts on VLA and its service providers if the various fee options are adopted, using the terminology of the Discussion Paper; with "fee stream" referring to the funds obtained by the payment of PC fees, and "interest stream" referring to the funds obtained from interest foregone on solicitors' trust fund monies and retained by the Board.

Options 1 and 2

Under Options 1 and 2, it is proposed to recover 100% of the cost of regulation solely from the fee stream; with Option 1 proposing a higher fee for solicitors with trust authorisation ("tiered fees"), and Option 2 proposing a single fee for all practitioners regardless of trust authorisation ("flat fees"). This has several potential impacts:

- (a) An increase in the cost of PC's for VLA lawyers by between 160% - 190% (on 2017 rates), leading to an increase in annual costs of approximately \$243,000 - \$290,000 in the 2018-19

financial year (with the highest impact if the flat fee model is preferred, as VLA only has four solicitors authorised to manage trust monies).

- (b) An increase in the amount of residual funds in the PPF potentially available for distribution to grant recipients, including VLA, because none of the interest stream would be used to fund regulation.
- (c) These large increases in PC fees will also have an impact on private practitioners, particularly small businesses and sole practitioners, including those who perform legally aided work. These practitioners do not have the ability to pass the increased costs on to Legal Aid clients, due to VLA's fixed fee structure.

Fees

The increase in fees under these Options is substantial, and would have to be funded from VLA's limited pool of money. Unlike the majority of private law firms, VLA does not have the ability to offset increased costs by increasing fees to clients. The Discussion Paper makes the point that the costs of regulation should not be drawn from consolidated revenue (by reference to the *Government's Cost Recovery Guidelines*). Yet all of the money used by VLA to pay for PC fees is drawn from State and Commonwealth funding, and from the PPF itself. We question whether this recycling of money is an effective use of the resources of government, and the resources of VLA.

Most importantly, any increase in PC fees immediately reduces the funding available for legally aided work in Victoria.

Impact on private practitioners

LIV's Submission highlights the risks associated with such a large increase in fees for private practitioners. These issues are even more acute for practitioners who rely solely or largely on legally aided work, where there is no ability to pass any increases on to clients, because of the fixed fees paid by VLA. Where margins are small, this could threaten the business models of these practices, and ultimately reduce the pool of private practitioners willing or able to carry out legally aided work.

Funding available to VLA

We note that this funding model would result in a large increase in the money available at the end of each financial year in the PPF, for potential distribution to VLA and other bodies. This could have two benefits for VLA:

- (a) This increase may compensate VLA for the increase in PC fees proposed under these options.
- (b) It may allow us to increase the fees payable to private practitioners for legally aided work.

However, both of these benefits are contingent upon a consistent increase in PPF funding over a number of years. As pointed out in paragraph 2 of this Submission, PPF funding can vary, depending on interest rates, investment performance, and the manner in which the Board exercises its discretion as trustee of the PPF. VLA cannot make responsible, long-term fee decisions on this basis.

This means that while an increase in funding would be welcome, it is not clear that this would offset the risk to small and medium law firms in Victoria identified above, and the potential reduction in the number of firms able to perform legally aided work. On balance, VLA does not think that it is worth

risking the viability of certain sectors of the legal market in this way, which could undermine its ability to procure services for the very clients it seeks to support.

For these reasons, VLA does not support Options 1 or 2.

Options 3 and 4

Under Options 3 and 4, it is proposed to recover 50% of the costs of regulation from the fee stream, and 50% from the interest stream; with Option 3 maintaining the tiered fees system, and Option 4 proposing a flat fee.

- (a) Under these options, the cost of Practising Certificates for VLA would increase by 30% - 46%, leading to an increase in annual costs for VLA of between \$45,000 – \$70,000 in the 2018-19 financial year (also with the highest impact if the flat fee model is preferred).
- (b) This would also result in a smaller increase in the funds potentially available for distribution from the PPF, as the amount which the interest stream would be contributing to the cost of regulation would be reduced from 64% to 50%.
- (c) Both of these options would result in an increase in the fees payable by private practitioners, but they would be much smaller, and their impact would be less extensive than Options 1 and 2.

These models are preferable to Options 1 and 2, because they reduce all of the risks identified in the discussion above. They would result in a smaller increase in costs for both VLA and its external service providers, while still delivering a more modest potential increase in funding for VLA from the PPF (which may offset some or all of the PC fee increase).

Compared to Options 1 and 2, VLA considers that these Options strike a more acceptable balance between competing risks for the profession, while protecting VLA's ability to provide services to as many disadvantaged and vulnerable clients as possible.

Tiered fees v flat fees

Options 1 and 3 propose maintaining the current tiered approach, with a higher fee for practitioners with authorisation to manage trust account funds. This has minimal impact on VLA, which has four practitioners with trust authorisation. Under Options 2 and 4, fees would increase for the majority of VLA's lawyers by an additional 16% - 32% (above the tiered options), with costs of regulation spread across all practitioners equally.

VLA supports the principle cited in the Discussion Paper that the cost of regulating the legal profession should be recovered from those who benefit from or give rise to the need for regulation. It has long been accepted that the management of client monies held in trust gives rise to a greater need for regulation, and this has been reflected both in the use of the interest stream for funding regulation, and in the imposition of a higher PC fee for authorised practitioners.

VLA believes that this principle should be extended to other risk-based categories of practitioners, and this is discussed in more detail at paragraph 4 below.

Recommendation 1:

VLA recommends that **Option 3** should be adopted as the new model for setting practising certificate fees for the following reasons:

- It results in the lowest increase in fees for all practitioners, reducing the impact on VLA's costs, as well as private practitioners performing legally aided work
- The retention of the tiered system reflects the goal of ensuring that the costs of regulation are funded by those who benefit from or give rise to the need for regulation
- It results in a modest increase in the funding which may be available to grant recipients, including VLA, from the PPF

This Option is the fairest, as it strikes a balance between VLA's need to maximise its funding to assist vulnerable clients, and the need to have an effective private legal services market, which gives access to justice for those who are entitled to Legal Aid funding, as well as those who are not.

4. Other options for fees based on different criteria

Consultation Question 16 asks: **“Should the Board be considering other options for the setting of fees based on different criteria? Please share your views and in particular outline your rationale and supporting data for a different approach.”**

In its Discussion Paper, the Board sets out the key principles underpinning its review of practising certificate fees. It notes that under section 156(2) of the Act, regulations setting fees are made on the recommendation of the Board taking into account factors including “the costs of regulating different classes of legal practitioners”. In the past, this principle has been taken into account when setting a higher fee for practitioners with authorisation to manage trust accounts.

The Discussion Paper also notes that in recommending new practising certificate fees, the Board must ensure compliance with the principles outlined in the Government's Cost Recovery Guidelines. Failure to do so will mean that the Office of the Commissioner for Better Regulation will not certify the relevant regulatory impact statement (RIS). It states that it is “an overarching consideration of the Board is to ensure that the costs of regulating the legal profession can continue to be recovered from those who benefit from or give rise to the need for regulation without drawing on consolidated revenue”.

VLA supports this approach, which is reflected in its expressed preference for retaining tiered fees for authorised and non-authorised practitioners. We consider that there is clear scope for extending this principle to other categories of practitioners.

This Submission describes the comprehensive set of procedures and functions provided by VLA which work to educate, monitor and improve the practices of those involved in delivering legally aided work. The scale and reach of VLA's practice – 430 in-house practitioners, as well as 260 external law firms and 386 individual certifiers, providing state-wide services across a broad range of legal practice areas – means that these measures substantially reduce the regulatory burden on the LSB+C. The costs of regulating these practitioners is lower, and it is equitable that this should be reflected in a reduced fee.

As well as providing a more equitable foundation for the fees, this would reduce the cost of practising certificates for VLA's practitioners, so less of VLA's funding (which is derived in part from the PPF in any event) would be spent on fees, and more would be available to fund its essential work with disadvantaged Victorians. This would also reduce the inefficiencies associated with the "recycling" of money between VLA and the PPF.

Extending this reduction to private practitioners performing legally aid work would reduce the burden on their business costs, offsetting the risks identified in our commentary on Options 1 and 2, above.

Recommendation 2:

VLA's in-house legal practitioners, and private practitioners performing legally aided work, should be recognised as a different category of practitioners presenting a lower regulatory risk, representing a lower regulatory burden on LSB+C.

As a consequence, practising certificates for these lawyers should be available at a reduced fee.

5. Funding non-regulatory legal services

Consultation Question 12 asks: **"How much significance should the Board place on ensuring there is sufficient revenue to fund non-regulatory legal services (eg Victoria Legal Aid) when setting fees for practising certificates?"**

VLA notes that under the Act, the Board is obliged to make a distribution to VLA from the PPF every year, although the exact amount or proportion is not specified (s. 143(1)). The legislature clearly intended that VLA's work (and the work of other organisation providing non-regulatory legal services) should be supported by funds from the PPF.

In this submission, VLA has expressed its support for the fee-setting model described in Option 3, and has not recommended adopting the approach in Options 1 and 2, which would increase the amount of money available for distribution from the PPF at the end of each financial year. VLA recognises that a balance needs to be struck between maximising the availability of legally aided services, and maintaining the viability of the legal services market in Victoria more generally, both for the benefit of private practitioners performing legally aided work, and for those providing essential legal services for those not eligible for legal aid assistance.

Beyond this, VLA does not propose to make a recommendation in response to this question.