

Victoria Legal Aid Means Test Review: Submission

LAW INSTITUTE OF VICTORIA

Date: 26 September 2016

Contact:

Keren Murray, Principal Lawyer
(03) 9607 9475
KMurray@liv.asn.au

Andrew Tabone, Paralegal
(03) 9607 9385
ATabone@liv.asn.au



TABLE OF CONTENTS

Table of Contents

INTRODUCTION	2
General principles.....	2
LIV consultation	4
Table of recommendations	4
MEANS ASSESSMENT	8
ELEMENTS OF THE MEANS TEST	10
Income Test.....	10
Assets Test.....	16
Financially Associated Persons.....	19
ESTIMATION OF LEGAL COSTS	23
CONTRIBUTIONS POLICY	29
EXEMPTIONS	32
DISCRETION	34

INTRODUCTION

The Law Institute of Victoria ('LIV') welcomes Victoria Legal Aid's ('VLA') Means Test Review ('Review'). The LIV appreciates being given the opportunity to respond to the Means Test Review Consultation Paper ('the Consultation Paper') and looks forward to providing further feedback throughout this Review. The LIV acknowledges its ongoing involvement in an advisory capacity to the Review as a member of the Project Steering Committee.

General principles

The LIV's response to the Review is informed by the following overarching principles that the LIV submits should guide the Review.

Additional funding is critical

VLA's ability to ensure that the Means Test is fair and that legal aid is available to those who need it is currently hampered by significant underfunding of legal aid by both the state and federal governments. The LIV acknowledges that the parameters of this Review are limited by the existing legal aid funding envelope. It may be possible to make the test internally fairer by adjusting elements such as the income and assets tests. However, to make access to legal aid truly equitable, the thresholds for these tests need to be raised significantly to enable more people to qualify for legal aid. Ultimately, any significant changes to the thresholds will require additional funding.

The Means Test must be updated to reflect modern financial arrangements and personal circumstances

In seeking feedback from our members, it has become apparent that there are a number of categories of expenses, debt, assets and different financial and personal circumstances that are not adequately reflected in the current Means Test. As a result, the application of the test unfairly differentiates between disadvantaged people, and therefore needs adjustment. For example, the primary asset excluded from the test remains the family home, up to the equivalent of \$500,000, yet there is no adjustment made for renters who are arguably more disadvantaged. Similarly, there is no adjustment for consumption debt, yet many people rely on credit cards to manage their finances.

The approach to Financially Associated Persons (FAPs) should be modernised and narrowed to reflect current expectations regarding relationships and financial support; and to better align with other legislative approaches to this issue.

The need for fairness in individual cases must be balanced against administrative costs

Adjustments aimed at making the Means Test fairer in individual cases carry the risk of increasing the administrative burden and associated costs. This issue arises across various elements of the means tests, including deductions for expenses in determining disposable income, administration of the Contributions Policy and the application of discretion.

For example, expanding the number of deductible expenses may result in more paperwork being required as proof. Increasing the administrative burden may have the unintended effect of deterring people from making or processing an application. It is also likely to increase the costs of compliance, which will either be borne by VLA or the private practitioners responsible for processing applications. In the context of a finite funding pool, these costs may erode the funds available for legal assistance. They may also be a disincentive to private practitioners to provide legally aided assistance. In addition, people who experience disadvantage often experience more chaotic lives. This can make it more challenging for them to provide requisite supporting paperwork.

The LIV would welcome further consultation on how best to achieve this balance across the Means Test as there are potentially a range of solutions. For example, VLA could consider applying an automatic amount to cover a range of additional deductible expenses for all applicants such as utility bills and consumption debt. This amount could be adjusted based on the number of dependants in a household. Alternatively, VLA could consider increasing the threshold for disposable income overall to account for these expenses, as well as increasing the amount that is deducted for dependants.

Transparency and understanding of the Means Test must be increased

The workings of the Means Test are opaque to many potential clients and users of the justice system. Private practitioners play a critical role in explaining the Means Test and making it accessible. To assist this process and to ensure the operation of the Means Test is better understood by justice-system users generally, the Review should ensure that so far as possible the Means Test is more transparent and can be communicated clearly and simply. This principle is linked to the need to balance administrative clarity with fairness: a simpler administrative process is likely to generate less confusion about the test overall.

This process will be further assisted by the creation of fact-sheets and more accessible information as part of the implementation of a revised Means Test. These resources will assist practitioners to step clients through the process.

The Means Test must be regularly and automatically indexed

The Means Test has not been indexed since 2008. As a result, it has become progressively harsher due to inflation. It is essential that a mechanism is built into the Means Test to update all elements of the test on at least an annual basis.

The interaction between the Means Test and other VLA tests should be subject to ongoing review

In addition to means, an individual's entitlement to a legal aid grant assistance is determined by whether the type of legal issue is covered (eligibility guidelines) and the strength of their case (merit). The LIV acknowledges that these tests are outside the scope of this Review. However, these tests are integral to the distribution of legal aid funds and access to those funds by the most disadvantaged people in our community. The application of the eligibility guidelines effectively skews the allocation of VLA funding for grants of assistance to more serious criminal cases. This is to ensure that in serious cases in which there is a risk of imprisonment a defendant is provided with legal representation to ensure a fair trial. In the context of a limited and insufficient funding envelope, this has a negative impact on VLA's ability to fund legal representation as a form of early intervention and support for less serious matters or civil matters, even if a person qualifies under the Means Test.

LIV members report that the interaction between these tests can cause some confusion for users of the justice system. For example, it is increasingly common for the same family to be involved in multiple cases, e.g. intervention order proceedings, family law (property settlement and/or parenting and/or maintenance), criminal proceedings (for breach of intervention order) and/or child protection proceedings. It is confusing for

consumers that different tests can apply to the same family members depending on the nature of the matter for which they require legal assistance at that time.

The LIV welcomes the various reviews of the tests VLA has engaged in, and encourages ongoing monitoring of the impact of recent changes. The LIV also encourages VLA to provide clear information to justice-system users to build understanding of the application and interaction between these tests.

LIV consultation

To inform the LIV’s response to the Consultation Paper, the LIV developed a Means Test Review Survey (‘the LIV Survey’). The LIV Survey drew upon key questions in the Consultation Paper. The LIV Survey was circulated to the LIV’s 19,000 members through its daily e-bulletin ‘LawNews’ as well as to all 1,400 of LIV’s Practice Section Committee members. The LIV also actively promoted VLA’s Means Test surveys to LIV members for completion by members of the community, legal practitioners and community legal centre staff.¹

The LIV acknowledges its members’ assistance in responding to the LIV Survey. These responses form the basis of this submission. The LIV Survey instrument is attached at Appendix A. A summary of the LIV Survey methodology and respondent profiles is attached at Appendix B.

Table of recommendations

Number	Recommendation
1.	<p>The LIV recommends that:</p> <ul style="list-style-type: none"> • The State increase legal assistance funding for civil matters by \$24 million per year. • The State increase legal assistance funding of criminal and family matters in proportion with increasing demand on these services.
2.	<p>The LIV recommends that VLA:</p> <ul style="list-style-type: none"> • Increase the non-contribution threshold for assessable income to reflect the actual disposable income of ‘low-income’ households. • Undertake to use an independent measure of household wealth data as the basis for the revised non-contributions threshold.
3.	<p>The LIV recommends that, where an applicant is employed on a casual basis, VLA make allowances for evidence of income that extends beyond the three month period. The LIV submits that VLA ought to control any additional administrative burden which may arise from gathering income evidence, including pay slips and bank account statements, over a longer period by allowing for sufficient flexibility and discretion.</p>
4.	<p>The LIV recommends that the assessable income test be indexed at least annually against an independently determined index.</p>
5.	<p>The LIV recommends that VLA:</p> <ul style="list-style-type: none"> • Ensure that up to date plain language information on the Means Test is easily accessible on the VLA website.

¹ VLA, ‘Take a Survey’, *VLA Means Test Review Website*, <<https://yoursay.vla.vic.gov.au/take-a-survey>>.

	<ul style="list-style-type: none"> • Collaborate with the LIV to ensure that changes to the VLA Means Test are clearly communicated to the profession.
6.	The LIV recommends that VLA undertake a feasibility study for the implementation of a means test that takes into consideration allowances based on standardised household expenditure, adjusted according to the number of dependants in a household.
7.	The LIV recommends that VLA incorporate additional allowances for household energy costs and distributed water costs which are indexed using independently collected data.
8.	The LIV recommends that VLA incorporate an additional allowance for reasonable telecommunications expenses.
9.	The LIV recommends that VLA incorporate an additional allowance for repayments of pre-existing consumption debts.
10.	The LIV recommends that VLA raises the assessable assets non-contribution threshold to at least \$2000.
11.	The LIV recommends that the home equity threshold be indexed at least annually against an independently determined index.
12.	The LIV recommends that VLA raise the motor vehicle equity threshold for vehicles modified to support persons with disability.
13.	<p>The LIV recommends that VLA:</p> <ul style="list-style-type: none"> • Incorporates into the asset test an additional allowance for non-homeowners for the purpose of assisting non-homeowners to service rent. • Index the additional allowance with reference to an independently determined index.
14.	<p>The LIV recommends that:</p> <ul style="list-style-type: none"> • VLA amend the Financially Associated Person Policy so that an individual is automatically excluded from being a FAP where that individual is an alleged perpetrator of family violence against the applicant. • VLA consider ways to exclude income attributed to individuals but which is not actually received by them, especially in matters involving family violence.
15.	The LIV recommends that VLA amend the Financially Associated Person Policy so that an individual is automatically excluded as a FAP where that individual may be a party to anticipated or potential proceedings involving the person they are deemed by VLA to be financially associated with.
16.	The LIV recommends that VLA consider ways to address the practical difficulties that arise in instances where a FAP does not provide the required financial information.
17.	The LIV recommends that VLA should consider adopting a financial associated person test that is analogous to that employed by Centrelink.
18.	The LIV recommends that VLA undertake to formally review the cost categories estimates using a more complete set of statistical data.
19.	The LIV recommends that VLA should raise estimated legal costs of Cost Category One to represent the actual cost of obtaining legal assistance from a private lawyer.

20.	The LIV recommends that VLA should raise estimated legal costs of Cost Category Two to represent the actual cost of obtaining legal assistance from a private lawyer.
21.	<p>The LIV recommends that:</p> <ul style="list-style-type: none"> • VLA should raise estimated legal costs of Cost Category Three to represent the actual cost of obtaining legal assistance from a private lawyer. • The lower limit of Cost Category Three should be amended in accordance with the revised upper limit of Cost Category Two.
22.	<p>The LIV recommends that VLA amend the Contributions Policy so that:</p> <ul style="list-style-type: none"> • Applicants with a net disposable income of less than or equal to the 'low-income household' threshold should not be required to make contributions. • The threshold for initial contribution based on income should be increased significantly. • Applicants with assessable assets of up to \$2000 should not be required to make contributions. • The threshold for initial contribution based on assets should be increased significantly. • The income range above the non-contribution threshold should be broadened to: <ul style="list-style-type: none"> ○ Accommodate revised cost estimates that reflect the market value for legal work; and ○ allow for a greater number of persons to be eligible for legal aid with contributions.
23.	<p>The LIV recommends that VLA publish, in the upcoming Means Test Review Options Paper:</p> <ul style="list-style-type: none"> • The average duration taken for contributions to be repaid. • Updated figures on the percentage of self-generated income from contributions as a share of total income. • Updated figures of the quantum of outstanding non-current client contributions. • The annual cost of administering the Contributions Policy compared to annual revenue from contributions.
24.	The LIV recommends that the Contributions Policy be amended so that it does not apply to persons on little or no income who are unable to borrow against their assets, regardless of their home equity.
25.	The LIV recommends that an upfront contribution should not be adopted for all grants of legal assistance
26.	<p>The LIV recommends that VLA should examine grants data to determine:</p> <ul style="list-style-type: none"> • Which vulnerable groups are most often seeking an exercise of discretion • For the vulnerable groups that are most prevalent: <ul style="list-style-type: none"> ○ The relative means of these vulnerable groups; and ○ the economic impact of an exemption of these groups on VLA's forward estimates.

27.	The LIV recommends that VLA publish data on the most commonly granted reasons for the exercise of discretion in the Means Test Options Paper.
28.	The LIV recommends that VLA include potential guidelines for the exercise of discretion in the Means Test Options Paper for consideration and comment.

MEANS ASSESSMENT

The present Means Test is excessively restrictive. The LIV commends VLA's commitment to increasing access to justice by expanding eligibility for grants to enable more people to obtain legal assistance.

The current shortfalls in funding limit the services provided to some of the most disadvantaged people in the community. Those who cannot afford legal representation or advice, but who do not qualify for legal aid, add significant strain to the entire justice system, increasing the number of self-represented parties in the courts. This increases the prospect of mistrials, miscarriages of justice² and increases delay for parties to resolve their matter.

Due to the shrinking pool of legal aid funds in Victoria, there has been a dramatic decline in the number of Victorians who are eligible for legal aid. There has also been a significant reduction in the number of Victorian private practitioners accepting legally aided work. LIV members report that it is increasingly common for smaller firms and for firms in the regional areas to withdraw from providing legally aided services. In these areas, the impact on clients can be significant if there is no-one willing to take their case at legal aid rates.³

LIV members report that when they do accept legal aid clients, a substantial amount of the work required to be undertaken on the matter is not covered by the legal aid. In effect, these private practitioners are subsidising legally aided clients by performing this work for no charge.

The LIV has been vocal in its concerns about legal aid funding being only available to 8% of Australia's population, despite the fact that 14% of the population lives on or below the poverty line, and that Victorians now receive the lowest per capita funding of all the States.

The LIV notes that the number of people actually assisted by legal aid is impossible to identify because the statistics cover cases, not people. A total of 34,681 grants of legal assistance were provided in 2014-15.⁴ In the same year, 888 people who made an application for a grant of legal assistance missed out due to their financial circumstances. We note that this number does not include people who did not apply because they didn't think they would be eligible or were told by someone they would not be eligible and did not proceed with their application.

The LIV submits that the Means Test should, as a minimum, enable those living below the poverty line to access legal aid. Consequently, the VLA funding envelope should be increased to expand access to grants of aid. As noted in the LIV's submission to the Department of Justice and Regulation (DJR) Access to Justice Review, increased funding is required to ensure the efficient and fair functioning for the Victorian justice system and to address increasing demand in criminal law and family law services. The LIV supports the Productivity Commission's recommendation that \$200 million per year is required immediately for civil justice

² LIV, *Submission to the National Partnership Agreement Review* (2013).

³ *Ibid.*

⁴ VLA, *Annual Report 2014/2015* <<http://annualreport.vla.vic.gov.au/grants-legal-assistance>>.

services across Australia.⁵ Of this amount, on a per capita basis, Victoria should receive \$60 million. The State should contribute 40% (\$24 million) of this amount, as recommended by the Productivity Commission.⁶ This recommendation is only the minimum required in the short term. A long term increase in funding is needed to ensure the legal assistance sector is sustainable, not only for civil justice, but for criminal justice and child protection matters as well.

The LIV's submission noted that:

"Between October 2010 and September 2015, recorded offences in Victoria have increased by approximately 26 percent, with a 4 percent increase in the past year.⁷ ...[T]he number of people incarcerated in Victoria has also increased significantly.⁸ Demands on child protection legal services are also increasing. Between 2009/10 and 2013/14, the number of substantiated child protection notifications increased by 81 percent overall, and by 70 percent per 1000 children.⁹ Similarly, reported incidents of family violence have increased by more than 60 percent in the past five years....¹⁰

The rise in family violence will continue to increase demand for child protection legal services noting that family violence is a factor in most child protection matters.

It is broadly recognised that under-funding legal assistance can lead to increased costs in other areas of government spending, in addition to the more obvious impact on community safety and on unrepresented individuals who are unable to get access to legal assistance.¹¹ As stated by the Productivity Commission:

"Advocating for increases in funding (however modest) in a time of fiscal tightening is challenging. However, not providing legal assistance in these instances can be a false economy as the costs of unresolved problems are often shifted to other areas of government spending such as health care, housing and child protection. Numerous Australian and overseas studies show that there are net public benefits from legal assistance expenditure.¹²"

Recommendation 1:

The LIV recommends that:

- The State increase legal assistance funding for civil matters by \$24 million per year;
- The State increase legal assistance funding of criminal and family matters in proportion with increasing demand on these services.

⁵ Productivity Commission, *Inquiry into Access to Justice Arrangements*, Report No 72, (2014) 63.

⁶ Ibid 738.

⁷ Crime Statistics Agency, *Recorded Offences*.

<<http://www.crimestatistics.vic.gov.au/home/crime+statistics/year+ending+september+2015/recorded+offences>>.

⁸ By 40.5% between 2009 and 2014, <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>>.

⁹ Australian Institute of Health and Welfare, *Child Protection Australia 2013-14* (Child Welfare Series No 61) (2015), 81-82 <<http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129554513>>.

¹⁰ LIV, *Submission to the Access to Justice Review* (2016), 87-88 <<http://www.liv.asn.au/Staying-Informed/Submissions/submissions/March-2016/Department-of-Justice-and-Regulation-Access-to-Jus>>.

¹¹ A Rebuli, 'The Cost of Cutting Legal Assistance Funding' (2015) 20 *Access to Justice Bulletin Extracts* 20-21.

¹² Productivity Commission, *Inquiry into Access to Justice Arrangements*, Overview, 30-31.

ELEMENTS OF THE MEANS TEST

The LIV submits that amendments can be made to every element of the current Means Test. The LIV Survey found that a significant proportion of respondent practitioners (83.3%) have had clients, or potential clients, that would be refused a grant of legal assistance because of their financial circumstances. Respondents were asked to rank the reasons for refusal from 1 (not common) to 5 (very common). The following options were provided:

- Income;
- Assets; and
- Financially Associated Persons.

Income was the most common reason for refusal, followed by assets, and lastly Financially Associated Persons.

Income Test

The income test has been identified by practitioners as being the most common reason for refusal of an application of a grant of legal assistance and the majority of respondents to the LIV Survey perceived the income test to be unfair.¹³

Comments received in response to the question “what are your perceptions of the fairness of the income test?” included:

- “[I] understand why they are at the levels they are, but they exclude people who desperately need assistance.”
- “It’s too stringent – it would make more sense to fund people to stay out of the system early.”
- “[It] fails to identify impact of [legal] costs on low income earners without assets to borrow money.”

How can we make the assessment of income test fairer to make sure people who need legal assistance are eligible for help?

Raising the thresholds

The LIV submits that the assessable income test should be raised to maintain parity with the actual disposable income of low-income households with reference to household wealth data collected by the Australian Bureau of Statistics (ABS).¹⁴

¹³ In response to the question “What are your perceptions of the fairness of the VLA means test?” 12 out of 14 respondents made a negative assessment, the remaining 2 respondents were neutral.

The Means Test does not reflect current living costs. It has not been indexed in Victoria since 2008. In comparison to other state jurisdictions, Victoria's Means Test is arguably the harshest in Australia. The LIV notes that this is in part due to Victoria receiving the lowest level of Commonwealth funding per capita compared to other States and Territories¹⁵ and reiterates the need for greater investment in legal aid funding to help alleviate the harshness of the Means Test.

The LIV commends VLA's modest relaxation of financial eligibility criteria which commenced in March 2016 as a first step towards a more equitable Means Test. However, it is clear from the Survey of Income and Housing (SIH) 2013-14 that the discrepancy between assessable income and the actual weekly disposable income for low income households has not been remedied by recent changes to the criteria. The average weekly disposable income for low income households in the 2013-2014 financial year was \$407, 11.5% more than \$360 allowable under the current Means Test without incurring contributions.¹⁶

The gap between the current Means Test and actual financial capacity of economically disadvantaged Victorians results in a significant proportion of people below the commonly used ABS poverty line of 60% of the median household income being unable to qualify for VLA funding.¹⁷

Comments and data received in response to the LIV Survey support the contention that the assessable income test unfairly precludes disadvantaged Australians from accessing legal aid grants of assistance. When requested to provide their perceptions of the fairness of the VLA Means Test, respondents overwhelmingly reported on the failure and inflexibility of the income test to appropriately service applicants with legitimate unmet legal need.

As discussed below, private practitioners often engage in an informal assessment of a client's, or potential client's, eligibility for aid, before deciding whether to make a formal application. Respondents to the LIV Survey reported that even in instances where an application was not made, many clients or potential clients were still of limited financial means. It was suggested that in the majority of matters where an application was not made it would have been appropriate for VLA to assist in funding these matters. The circumstances which influenced practitioners' beliefs regarding the appropriateness of VLA funding were tied to the financial circumstances of the client. Practitioners noted that clients often had limited income and no access to legal assistance without funding.

Recommendation 2:

The LIV recommends that VLA:

- Increase the non-contribution threshold for assessable income to reflect the actual disposable income of 'low-income' households;
- Undertake to use an independent measure of household wealth data as the basis for the revised non-contributions threshold.

¹⁴ The ABS defines 'low income' as those households in the lowest economic quintile. The LIV has adopted this definition for the purposes of this submission.

¹⁵ VLA, *Submission to the Access to Justice Review* (March 2016), 35.

¹⁶ Australian Bureau of Statistics, *Household Income and Wealth, Australia, 2013 – 2014*.

<<http://www.abs.gov.au/ausstats/abs@.nsf/mf/6523.0>> & VLA, *Criteria for the extended financial eligibility* <<https://www.legalaid.vic.gov.au/information-for-lawyers/grants-guidelines/means-test-changes-to-financial-eligibility-thresholds>>.

¹⁷ Australian Bureau of Statistics, *Household Income and Wealth, Australia, 2013 – 2014*, Wealth of Low Income Households <[http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/6523.0~2013-14~Feature%20Article~Wealth%20of%20Low%20Income%20Households%20\(Article\)~30](http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/6523.0~2013-14~Feature%20Article~Wealth%20of%20Low%20Income%20Households%20(Article)~30)>.

Modern working arrangements

The LIV submits that the VLA income assessment should allow for casual workers to provide evidence of six months of earnings as the basis for the assessment of their income. Assessment of income at a point in time, based on earnings over a three month period, has the potential to be discriminatory to workers engaged in seasonal or casual work.

Casual workers make up a significant proportion of the Australian workforce, and it is likely that many grants applicants who are employed rely upon fluctuating income. LIV members have reported that this has the potential to lead to situations where a grant application is adversely effected by a temporary increase in earning capacity which does not reflect the real means of the applicant to obtain private legal assistance.

Across Australia in 2012, there were 9.3 million persons aged 15 years and over who were employees in their main job, excluding owner managers of incorporated enterprises.¹⁸ Of these employees, 22% worked on a casual basis and did not have paid leave entitlements and 25% had earnings/income that varied from one pay period to the next.

Recommendation 3:

The LIV recommends that, where an applicant is employed on a casual basis, VLA make allowances for evidence of income that extends beyond the three month period. The LIV submits that VLA ought to control any additional administrative burden which may arise from gathering income evidence, including pay slips and bank account statements, over a longer period by allowing for sufficient flexibility and discretion.

Indexing

The LIV submits that the Means Test should be indexed at least annually across all thresholds.

As noted above, the Means Test has not been indexed since 2008. This has resulted in a progressively harsher Means Test over time. To ensure that the Means Test keeps pace with living and other expenses, indexation should be periodically applied. The LIV suggests applying an independently determined index, such as the ABS Consumer Price Index or Residential Property Prices Index, as discussed below.

Recommendation 4:

The LIV recommends that the assessable income test be indexed at least annually against an independently determined index.

¹⁸¹⁸ Australian Bureau of Statistics, *Working Time Arrangements, Australia 2012*, Summary of Findings, <<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/6342.0Main%20Features2November%202012?opendocument&tabname=Summary&prodno=6342.0&issue=November%202012&num=&view=>>>.

How can we make it easier for people to understand if they are eligible for a grant of assistance based on their income?

The LIV submits that VLA ought to take steps to ensure that the parameters of the Means Test are clearly communicated to justice-system users, including clients, court staff, the judiciary and practitioners. The LIV submits that VLA is primarily responsible for providing easily accessible and understood information relating to the Means Test. As well as informing the public, such information would assist practitioners to explain the Means Test to clients.

The LIV submits that private practice lawyers are routinely triaging clients' eligibility for a grant of legal assistance before making a formal application for assistance to VLA. As a result of this informal triaging, the true number of clients, or potential clients, missing out on grants of legal aid is significantly under-reported.¹⁹

The LIV Survey found that 78.3% of practitioners have informally assessed a client's, or potential client's, financial circumstance prior to making an application for a grant of legal assistance. Specifically:

- 46.9% made an assessment in more than 75% of their matters;
- 18.8% did so in at least half of their matters (>50%);
- 3.1% did so in at least a quarter of their matters (>25%); and
- 31.2% did so occasionally (<25%).

Results of the LIV Survey indicate that the informal assessments undertaken by practitioners influence whether or not a practitioner will proceed with making an application for a grant of legal aid funding. Practitioners often did not proceed with making an application for a grant of legal aid funding based on their informal assessment. Some LIV members are reluctant to take on legally aided clients noting the significant amount of time spent informally assessing and making the applications for grants.

VLA clients routinely access grants of assistance through a lawyer and clearly private practitioners play an important role in assessing eligibility. Accordingly, the LIV recommends that VLA collaborate with the LIV to ensure that changes to the VLA Means Test are clearly communicated to the profession.

Recommendation 5:

The LIV recommends that VLA:

- Ensure that up to date plain language information on the Means Test is easily accessible on the VLA website;
- Collaborate with the LIV to ensure that changes to the VLA Means Test are clearly communicated to the profession.

What changes do you think there should be to the financial information required to support a grant of legal assistance?

The LIV submits that VLA should undertake to offset any additional administrative burden created by incorporating additional allowances to the income assessment test. If left unchecked, administrative

¹⁹ In FY2014/15 888 people missed out on a grant of legal assistance missed out because of their financial circumstances: VLA, *Means Test Review Consultation Paper* (2016), 3.

workload may deter potential clients and practitioners from engaging with the VLA Means Test and undermine the objective of the Review.

The LIV submits that, where possible, efforts should be made to streamline the grants application process. The LIV recommends that VLA investigate developing and implementing a process by which allowances based on standardised household expenditure for low-income and low-net worth household are automatically taken into consideration, and adjusted according to the number of dependants in a household. This is similar to the approach used in the Commonwealth child support regime to calculate the standard costs of children.²⁰

The LIV submits that Means Test already places a large administrative burden on practitioners, and that this burden is particularly apparent in relation to applications for persons who are self-employed. The LIV submits that this an area that should be reviewed with the aim of reducing administrative costs.

Recommendation 6:

The LIV recommends that VLA undertake a feasibility study for the implementation of a means test that takes into consideration allowances based on standardised household expenditure, adjusted according to the number of dependants in a household.

Should there be any additional allowances for household costs? If so, what should they be?

The LIV submits that VLA should give consideration to the following additional allowances:

- Bills for household utilities, including energy (gas, electricity and other household fuels) and water;
- Bills for telecommunications (telephone and data usage); and

LIV members have suggested that the VLA Means Test does not adequately allow clients, or potential clients, to provide the information required to paint an accurate picture of their financial circumstances in the first instance. The LIV recognises that VLA is able to provide discretionary allowances; however, the essential nature of abovementioned categories justifies their inclusion in the VLA Means Test.

Expenditure for energy and water

The LIV submits that the fairness of the VLA Means Test would be enhanced if household expenditure of energy were accounted for in the assessment. Utilities bills can be a source of financial stress. In 2009-10 “more than one in ten households (14%) reported being unable to pay electricity, gas or telephone bills on time.”²¹ The LIV notes the results of the ABS Household Expenditure Survey (HES), which found in 2009-10 that “electricity and gas... accounted for \$32 per week of household expenditure”, almost a 16% increase from 2003-04.

The LIV recommends that VLA take into consideration average weekly expenditure on gas and electricity. Any additional allowance for expenditure on household energy should be indexed against increasing energy cost. In the five year period between June 2007 and June 2012 Australia’s retail electricity prices rose by

²⁰ ‘Costs of the Children’ Table s5, *Child Support (Assessment) Act 1989* (Cth), Part 5, s155.

²¹ Australian Bureau of Statistics, *Australian Social Trends 2012*, Household Energy Use and Costs <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features10Sep+2012#Costofenergy>>.

72% and the price of gas and other household fuels rose by 45%. These increases can be distinguished against Consumer Price Index which only increased by 15% in the same period.

In addition to household energy costs, the VLA Means Test would be made more equitable by the addition of an allowance for expenditure on distributed water. The LIV recommends that VLA take into consideration the average household expenditure on distributed water when assessing household income. Any additional allowance for water costs should be indexed against rising water costs derived from the annual ABS Water Account. The LIV notes that between 2012-13 and 2013-14 the average price paid for urban distributed water rose by 24% in Victoria.

Recommendation 7:

The LIV recommends that VLA incorporate additional allowances for household energy costs and distributed water costs which are indexed using independently collected data.

Expenditure for telecommunications

Mobile phones and internet access through tablets and other devices have become essential for communication and connection to services. For many of the most vulnerable members of our community, a mobile phone is the only reliable means of contact.

The LIV submits that the VLA means test should be amended to incorporate an additional allowance for access to telecommunications networks, including internet and telephone.²²

Recommendation 8:

The LIV recommends that VLA incorporate an additional allowance for reasonable telecommunications expenses.

Should there be any additional allowances for other types of expenses? If so, what should they be?

Consumption Debts

The LIV submits that the current categories of allowable deductions should be expanded to include repayments of pre-existing consumption debt (including credit card debt, vehicle loan debt, and 'other' consumption loan debt, i.e. personal loans).²³

²² Australian Bureau of Statistics, *Household Use of Information Technology 2014-2015 Key Findings* <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/8146.0> & Australian Bureau of Statistics, *Internet Activity 2015, Mobile Handset Subscribers* <<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/8153.0Main%20Features5December%202015?opendocument&tabname=Summary&prodno=8153.0&issue=December%202015&num=&view=>>>.

²³ The LIV has used the Australian Bureau of Statistics definition of Credit Card Debt – "Credit card debt is the amount owing on the latest account statement (including any government, interest or financial institution charges), regardless of whether it was paid off by the due date. Specialised retail shopping cards have been included and Visa and Mastercard debit cards have been excluded."

Consumption debt is a common feature of Australian household wealth. The Australian Bureau of Statistics, *Australian Social Trends 2014* report concluded that “credit card debt has been a relatively common type of household debt” with 53% of Australian households owing credit card debt.²⁴ The LIV notes research undertaken by the ABS, in which it is reported that “while credit card debt is relatively common, the amount owed tends to be small in comparison with other forms of household debt. In 2011-12 dollars, the average amount owed by households who had net credit card debt was around \$5300 in 2009-10 and 2011-12.”²⁵

In addition:

- 14% of Australian households have borrowed money to purchase a motor vehicle for private purposes.
- 6% of Australian households have ‘other types of consumption debt’.
- The average size of this debt was \$19,500 in 2011-12.²⁶

It is well established that recipients of legal assistance services often have multiple and overlapping legal problems. This is supported by the findings of the *Legal Australia-Wide Survey: Legal Need in Victoria* which reported that, in Victoria, credit and debt issues often occur in conjunction with family issues and consumer issues often occur in conjunction with criminal matters.²⁷ Consumption debt and financial abuse generally is also a key feature in many matters involving family violence. It is not uncommon for the perpetrator spouse to pressure the victim into putting consumption debts for the benefit of the perpetrator and/or the household into the sole name of the victim. There is increased recognition of this in the Royal Commission into Family Violence (RCFV) report in which the need for greater legal assistance to victims of financial abuse was identified. It would be inconsistent with the RCFV if VLA did not include consumption debt as an allowable deduction when determining financial eligibility.

A high proportion of grant applicants would be adversely affected if this change was not made, particularly noting the high proportion of matters involving family violence in legal aid grants across all areas of law.

Recommendation 9:

The LIV recommends that VLA incorporate an additional allowance for repayments of pre-existing consumption debts.

Assets Test

The assets test has also been identified as an unduly prohibitive barrier to legal aid funding for low income earners. Respondents to the LIV Survey suggested that the assets threshold for assistance should be raised and broadened considerably. The LIV submits that the current threshold precludes a large number of disadvantaged individuals, who lack the financial capacity to fund their matters, from being able to access a grant of legal aid funding.

²⁴ Australian Bureau of Statistics, *Australian Social Trends 2014*, Credit Debt
<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4102.0main+features402014#credit>>.

²⁵ Australian Bureau of Statistics, *Australian Social Trends 2014*, Credit Debt
<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4102.0main+features402014#credit>>.

²⁶ *Ibid.*

²⁷ Law and Justice Foundation, *Legal Australia-Wide Survey: Victoria*, xiv & p 159.

Respondents to the LIV Survey have specifically suggested that:

- The assessable assets threshold be raised.
- The home equity threshold be raised.
- Additional asset allowances should be considered by VLA.

The LIV acknowledges that VLA has recently increased the home equity threshold by 66 percent and commends this step.

How can we increase fairness in the assessment of assets?

Raising the assessable assets threshold

The LIV submits that the assessable assets threshold should be raised. As it currently stands, it is likely that 49.5 per cent of households (under the age of 65)²⁸ in the poorest quintile of Australia would not pass the assessable assets threshold as they have equivalised²⁹ liquid assets of over \$1000.³⁰ This is supported by the Productivity Commission finding in the *Access to Justice Arrangements Report* that “the low threshold for assessable assets means that the constraint on other assets – predominantly liquid assets – renders about 80% of all households ineligible for aid without making a contribution.”³¹

The majority of respondents to the LIV Survey were critical of the low threshold of the assets test.³² The ABS indicator of financial stress is whether a household has the ability to raise \$2000 in an emergency. The current assets test sits well below this figure.

Recommendation 10:

The LIV recommends that VLA raises the assessable assets non-contribution threshold to at least \$2000.

Raising the current home equity threshold

The LIV submits that the home equity threshold be adjusted on a periodic basis to account for fluctuations in house prices.

The LIV suggests that VLA consider indexing the home equity threshold accordance with the ABS Residential Property Prices Index (RPPI) for Melbourne.³³ The RPPI measures the weighted average of price movements for residential properties and is calculated quarterly.

²⁸ Those older than 65 comprise less than 3 per cent of VLA clients: Productivity Commission, *Access to Justice Arrangements Report* (2014), 1020.

²⁹ Equivalised total household income is household income adjusted by the application of an equivalence scale to facilitate comparison of income levels between households of differing size and composition, reflecting that a larger household would normally need more income than a smaller household to achieve the same standard of living.

<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2901.0Chapter31502011>.

³⁰ Australia Bureau of Statistics, *Household Wealth in Australia, 2013-2014*, Wealth and Debt

<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/6523.0~2013-14~Main%20Features~Wealth%20and%20Debt~31>.

³¹ Productivity Commission, *Access to Justice Arrangements Report* (2014), 1017.

³² Out of 8 respondents to the question “what changes do you think could be made to make the assessment of income fairer?”, 6 respondents suggest that assets test threshold should be raised, 1 did not have an opinion and 1 suggested that it is fine as is.

³³ Australian Bureau of Statistics, *Residential Property Price Indexes: Eight Capital Cities June 2016*
<http://www.abs.gov.au/ausstats/abs@.nsf/mf/6416.0>.

The LIV notes that adjustment in accordance with the RPPI would require the home equity threshold be raised by 0.8% in accordance with the March quarter RPPI (2016).³⁴ The LIV submits that the revised home equity threshold be further adjusted in late September in anticipation of the June quarter RPPI.

Recommendation 11:

The LIV recommends that the home equity threshold be indexed at least annually against an independently determined index.

Should VLA consider a person's whole assets pool or should the separate asset categories be maintained?

Respondents to the LIV Survey were generally supportive of maintaining the current separate asset categories for homes. Respondents did not express a view on other assets.

What assets should be excluded under the assets test?

Equity in a motor vehicle or second motor vehicle that has been modified to support an individual with disability

Respondents to the LIV Survey have suggested that issues occasionally arise whereby an applicant has equity in a motor vehicle(s) that exceeds the \$20,000 equity threshold prescribed by VLA due to modification of the vehicle(s) to support a disability.³⁵ The LIV submits that the vehicle equity threshold should be increased to accommodate people who require modification to the vehicle.

Recommendation 12:

The LIV recommends that VLA raise the motor vehicle equity threshold for vehicles modified to support persons with disability.

Should the assets test treat homeowners and non-homeowners differently? Why or why not?

Assets for the purpose of servicing rent

The LIV notes that the current allowance for up to \$500,000 equity in a home may lead to a situation where renters are disadvantaged by the Means Test relative to homeowners. Specifically, a homeowner is allowed to have a very valuable asset which is not counted towards the Means Test, compared to a renter who is only allowed approximately \$1000 in assets under the Means Test.

The LIV submits that this would be best remedied by allowing non-homeowners an additional liquid asset allowance. Renting costs are a significant proportion of household expenditure, and it would be desirable to

³⁴ Ibid.

³⁵ VLA, *Allowable Assets* <<https://handbook.vla.vic.gov.au/handbook/12-means-test/assets-test/allowable-assets>>.

include a liquid asset allowance which approximates one month's worth of average rent. The LIV notes that on average, renting households spend 20% of their gross weekly income on housing costs.³⁶

Average costs for a household renting from private landlords in 2013-14 were \$376 per week. For those renting from a state and territory government housing authorities, the average weekly expenditure was \$148 per week.

The LIV submits that if VLA were to institute an additional allowance for renters, that the allowance be indexed with reference to renting costs as determined by the ABS SIH or CPI.

Recommendation 13:

The LIV recommends that VLA:

- Incorporates into the asset test an additional allowance for non-homeowners for the purpose of assisting non-homeowners to service rent;
- Index the additional allowance with reference to an independently determined index.

Financially Associated Persons

Respondents to the LIV Survey suggested that the definition of a Financially Associated Person (FAP) should be narrowed. The LIV submits that VLA should consider adopting a test analogous to that employed by Centrelink.³⁷ Centrelink may preclude an individual from accessing benefits based on means assessment that takes into consideration whether that individual is "member of a couple" and "parent", based on definitions used in the *Social Security Act 1991* (Cth).³⁸

Members of the LIV also suggested that the Means Test would be improved if exclusion categories were adopted by VLA. It was suggested that individuals may unwittingly find themselves being classified as FAP after rendering assistance to a family member, friend or new partner, despite having no intention to provide ongoing financial assistance to that person. This was raised in a number of different contexts, including:

- Parents of adult children, particularly grandparents with sole custody over their grandchildren who allow their adult children to reside with them;
- Individuals acting as a surety for bail, particularly parents who may undertake this role but do not wish or are unable to provide their children with any further assistance;
- New partners who would not fall into the category of partner under the Means Test employed by other service providers;
- Individuals who are involved in a legal matter against the person whom VLA deems they are financially associated with. This is problematic particularly in matters involving family violence where financial abuse is used as a means of control against the applicant.

³⁶ Australian Bureau of Statistics, *Housing Occupancy and Costs 2013-13*, Key Findings, <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4130.0>>.

³⁷ Department of Social Services, *Guide to Social Security Law* <<http://guides.dss.gov.au/guide-social-security-law/1/1/m/120>>.

³⁸ *Social Security Act 1991* (Cth) pt 1.2.

Some respondents suggested that FAPs should be removed as a consideration from the Means Test entirely. Comments made by survey participants included:

- “effectively by including the income of the financially associated person, we are asking that person to fund litigation that they are not a party to”;
- “it is unreasonable to assume that a partner should have to pay legal fees”; and
- “FAPs are often unwilling to fund family charged with criminal conduct.”

Should Financially Associated Persons continue to be included in the assessment of a person’s financial resources? Why or why not?

The LIV recommends that the certain categories of Financially Associated Persons should not continue to be included in the assessment of a person’s financial resources.

Perpetrators and victims of family violence

The LIV submits that individuals should be excluded as a Financially Associated Person where that individual is an alleged perpetrator of family violence against the grant applicant.

LIV members have expressed concern that these types of matters are currently being determined by VLA on a discretionary basis. The LIV recognises that discretion is important when considering these applications as the extent to which family violence impacts on the financial support provided, or available, to the victim varies from case to case.

However, the default starting position should be that the alleged perpetrator of family violence should be excluded from the assessment of a grant applicant’s financial resources except in special circumstances where the grant applicant has means of obtaining financial support from the alleged perpetrator that is independent of the alleged perpetrator. For example, there may be an enforceable order in favour of the grant applicant entitling them to receive a portion of the alleged perpetrator’s financial benefit directly from the benefit provider e.g. garnished wages, superannuation pension, or court order requiring employer or trustee to pay the spouse from the other party’s entitlements.

Cases in which the grant applicant has an intervention order provide clear evidence of the alleged family violence. However, evidentiary issues arise for those cases in which there are no intervention order proceedings. Retaining a discretionary approach also allows the grant applicant to provide VLA with the relevant information enabling VLA to assess whether or not family violence is obstructing the access of the victim to financial resources they would otherwise be deemed to have. The grant applicant should be guided through the application to ensure that only the relevant information is provided to avoid re-traumatising the grant applicant by requiring them to re-live the violence when they recount their family violence ordeal in the application process.

A person’s assessable income should exclude income that is attributed to them, but which is not actually received by them especially in matters involving family violence. For example, it is common in family law matters for the perpetrator spouse to take advantage of the victim’s lower income bracket by attributing income from a partnership, trust or divided to them. Rarely does this victim actually receive the income notwithstanding they are ultimately liable for the tax arising from that attributed income. By not excluding this, the perpetrator spouse is able to effectively prevent the victim from receiving legal aid and continue to exercise control over the victim.

Recommendation 14:

The LIV recommends that:

- VLA amend the Financially Associated Person policy so that an individual is automatically excluded from being a FAP where that individual is an alleged perpetrator of family violence against the applicant.
- VLA consider ways to exclude income attributed to individuals but which is not actually received by them, especially in matters involving family violence.

Party to an associated matter

The income of any Financially Associated Person should be excluded from the income test if that associated person is likely to be a party to any anticipated or potential proceedings.

Recommendation 15:

The LIV recommends that VLA amend the Financially Associated Person policy so that an individual is automatically excluded as a FAP where that individual may be a party, to anticipated or potential proceedings involving the person they are deemed by VLA to be financially associated with.

How can the resources of a household be assessed in a fair and transparent way?

Members of the LIV have raised concerns with the willingness of FAPs to provide financial information to VLA. It has been suggested that the further removed the FAP is, the less willing they usually are to provide this type of information. This issue is particularly evident where the FAP is a new 'partner' (i.e. one that would be unlikely to fall within the definition of partner used by other like organisations such as Centrelink). This can potentially stall or prevent an application being made for assistance.

The LIV submits that narrowing the FAP test will alleviate some of the difficulties that arise from the reported unwillingness to provide the required financial information.

In this submission on page 14 the LIV has recommended that VLA investigate developing and implementing a process by which allowances based on standardised household expenditure for low-income and low-net worth household are automatically taken into consideration, and adjusted according to the number of persons and dependents in a household. Such a process may be able to give an indication of the baseline means which could substitute for a FAP's financial information in limited circumstances.

Recommendation 16:

The LIV recommends that VLA consider ways to address the practical difficulties that arise in instances where a FAP does not provide the required financial information.

Should the definition of 'Financially Associated Person' be changed? If so, how?

The definition of 'Financially Associated Person' as currently used by VLA is uniquely broad in comparison to other like service providers. The LIV recommends that VLA look to the means tests of other like organisations, in particular the definitions employed by Centrelink that effect household means assessment.

The LIV suggests that the revised definition be limited to partners and dependants. This approach is in line with the assessment of means tested welfare provided by the Department of Human Services.

Recommendation 17:

The LIV recommends that VLA should consider adopting a financial associated person test that is analogous to that employed by Centrelink.

ESTIMATION OF LEGAL COSTS

Respondents to the LIV Survey considered that estimates of legal costs do not represent the true value of the legal services provided under the relevant cost categories. The LIV recommends that the cost categories should be expanded to more accurately reflect the value of the legal services and assistance being provided. The LIV recommends that VLA conducts a more comprehensive survey of legal costs to determine fair market rates.

Do you have any examples where you think the estimation of legal costs has been unfair or could be improved?

As discussed below, the LIV recommends that VLA broaden the cost categories so that they are better representative of actual private lawyer costs.

Are the cost categories appropriate? Do they reflect the actual cost of obtaining legal assistance from a private lawyer? If not, how can the cost categories be changed to better reflect the actual cost of private representation?

The LIV submits that the cost categories do not reflect the actual cost of obtaining legal assistance from a private lawyer. In order to gain an understanding of the accuracy of the current cost categories, respondents to the LIV Survey were requested to provide estimations of legal costs for the three categories. Responses received indicated that the cost categories estimates should be increased.

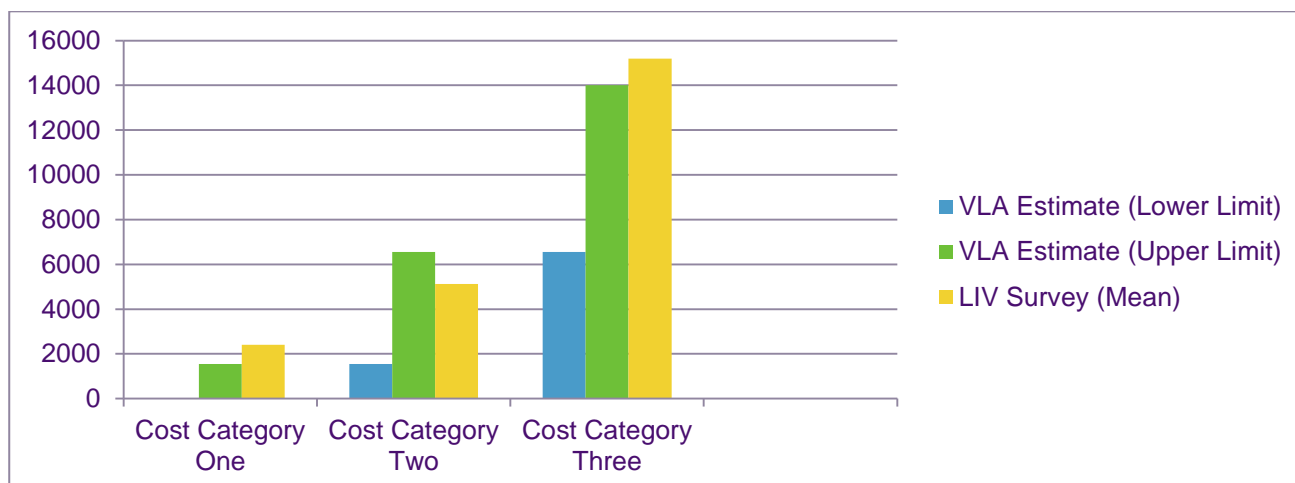
Responses have been adjusted for outliers; outliers have been defined as a figure 1.5 times the interquartile range of the dataset away from either the lower or upper quartiles.³⁹ Excluding outliers the LIV received 12 estimates for cost category one; 8 estimates for cost category two; and 9 estimates for cost category three. Due to the limited data set, the LIV submits that caution be exercised when considering the estimates provided by LIV Survey respondents.

Recommendation 18:

The LIV recommends that VLA undertake to formally review the cost categories estimates using a more complete set of statistical data.

³⁹ i.e. $< Q1 - 1.5 \times IQR$ or $> Q3 + 1.5 \times IQR$. The LIV notes that a number of LIV Survey participants opted not to complete the questions requiring them to provide an estimate of legal costs for each cost categories.

Table 1: VLA estimation of legal costs compared to LIV Survey estimation of mean legal costs



Cost category one

The LIV submits that the estimates provided by respondents to the LIV Survey with respect to Cost Category One indicate that the estimate for this category should be increased.

The estimated legal cost for a Cost Category One matter is current less than \$1,555. The average estimate for a Cost Category One matter, as provided by respondents to the LIV Survey, was \$2,404.⁴⁰

Cost Category One currently covers the following matters:

- Summary crime;
- Family violence;
- Personal safety intervention orders; and
- Infringements.

Respondents to the LIV Survey were asked to estimate the legal costs for these types of matters. The following data was extracted from LIV Survey responses:

- Mean estimate: \$2,404
- Median estimate: \$2,100

The mean estimated legal cost for a Cost Category One matter (\$2,404) was \$869 higher than the VLA estimate (\$1,555). The LIV submits that the estimates provided by respondents to the LIV Survey should be taken into consideration.

⁴⁰ The range and median of the estimates provided are expressed graphically in the box plot located at Appendix C, Table 2 of this submission.

Recommendation 19:

The LIV recommends that VLA should raise estimated legal costs of Cost Category One to represent the actual cost of obtaining legal assistance from a private lawyer.

Cost category two

The LIV submits that, based on the cost estimates received from respondents to the LIV Survey, the upper limit of Cost Category Two should be increased.

Respondents to the LIV Survey were asked to estimate the legal costs for Cost Category Two matters. The following data has been extracted from the LIV Survey responses:⁴¹

- Mean estimate: \$5,125
- Median estimate: \$5,250

Cost Category Two spans between \$1,555 and \$6,560. The estimated average legal cost for a Cost Category Two matters, as per the LIV Survey, falls within the top 20% of this range at \$5,125. The LIV submits that the VLA estimate should be increased accordingly.

Recommendation 20:

The LIV recommends that VLA should raise estimated legal costs of Cost Category Two to represent the actual cost of obtaining legal assistance from a private lawyer.

Cost category three

The LIV submits that the estimated legal costs of Cost Category Three matters also require amendment. As above, responses received suggest that the lower limit of Cost Category Three would need to be raised dramatically in order to accommodate the actual cost of obtaining legal assistance for a Cost Category Two matter.

Whilst Cost Category Three is 'unlimited' in that there is no upper limit set by VLA, the data received by the LIV indicate that the current estimates are unrepresentative of the actual legal costs of Cost Category Three matters. The following data has been extracted from the LIV Survey responses:

- Mean estimate: \$15,200
- Median estimate: \$15,000

Recommendation 21:

The LIV recommends that:

- VLA should raise estimated legal costs of Cost Category Three to represent the actual cost of

⁴¹ The range and median of the estimates provided are expressed graphically in the box plot located at Appendix C, Table 3 of this submission.

obtaining legal assistance from a private lawyer;

- The lower limit of Cost Category Three should be amended in accordance with the revised upper limit of Cost Category Two.

Are there any other issues with the estimated legal costs?

Although fees for private practitioners have not substantially increased, there has been a large increase in the complexity and gravity of legally aided matters being conducted by private practitioners in criminal law matters. This means that the work required for each aided matter has increased. A number of factors have contributed to this increasing complexity. The eligibility for legal aid in summary crime matters has been tightened to provide that aid is only available where there are serious consequences for the defendant.⁴²

Private practitioners in criminal law have absorbed much of the work of administering legal aid grants with the introduction of section 29A panels and the simplified grants process. This has resulted in a cost saving to VLA and puts an additional level of responsibility onto private practitioners. Private practitioners are required to assess applications for aid and to obtain and hold all relevant paperwork supporting an application. Practitioners are also subject to audits of their files. There are significant consequences for practitioners if an error is made, even if that error was made in good faith. Practitioners can be issued with restitution notices and be required to repay the grant of aid including fees that have been paid to counsel or to other third parties for items such as psychological and medical reports.

The rates that are paid by VLA for criminal law matters fall significantly below the market rate for equivalent matters. As noted above, legal aid matters are likely to be complicated and have serious consequences for the accused. Legally aided clients are also more likely to present with complicated personal histories including intellectual disability, mental health issues or drug and alcohol problems (and often a combination of these).

The disparity between legal aid fees and private fees shows that private clients are effectively subsidising legally aided clients. While this may be manageable in the short-term it is not a viable long-term strategy and it cannot take the place of a properly funded legal aid scheme.

In 2008, the LIV surveyed criminal law practices representing approximately 40 criminal lawyers to determine an average private rate for a range of different matter types. The table below shows the range of fees charged to private clients in each matter and the average private rate in comparison to VLA's payment for the same matter.

While the figures are not completely accurate due to some increase in legal aid fees, these figures demonstrate that VLA fees have fallen far short of the 80% that has been considered a fair proportion of private fees in the past. At their highest, VLA rates do not even reach 50% of average private fees and in most areas fall significantly short of this.

⁴² VLA, *Guideline 1.1 – 'not guilty' plea in the Magistrates' Court* <<http://handbook.vla.vic.gov.au/handbook/3-criminal-law-guidelines/guideline-11-not-guilty-plea-in-magistrates-court>>.

Matter type	VLA rate payable	Range of fees for private client	VLA rates as a percentage of the range of private fees	Average fees for private client	VLA rates as a percentage of average private fees	80% of average private fees
Magistrates' Court plea	\$602	\$1100-\$3850	16 - 54%	\$2370	25%	\$1896
Magistrates' Court contest	\$721	\$2000-\$8450	9 - 36%	\$3884	18%	\$3107
Bail application (Magistrates' Court)	\$444	\$1100-\$4400	10 - 40%	\$2821	15%	\$2256
Committal – 1 day – solicitor/client costs only *	\$914	\$2000-\$9350	10 - 45%	\$4600	20%	\$3680
County Court plea	\$2720	\$3000-\$10756	25 - 91%	\$6145	44%	\$4916
County Court - 5 day trial – solicitor/client costs only	\$5077	\$6500-\$19500	26 - 78%	\$11290	45%	\$9032

*LIV Submission to government 2008

Private sector delivery

The LIV has long advocated that VLA rates do not adequately compensate private practitioners for the amount of work that is required on each legally aided matter.

Legal aid fees tend to be paid as a lump sum rather than an hourly rate. This means that they are unable to account for the complexity of an individual matter. Some matters will be straightforward but others will require many hours of work for the same payment.

In 2008, the LIV had a number of randomly selected legally aided files professionally costed by the LIV Costing Department to obtain an accurate view of the amount of work that is done for a legally aided matter compared to VLA's lump sum payments.

The figures below deal solely with solicitor/ client costs and exclude counsel fees and other disbursements.

Type of matter	Actual cost as assessed by costs assessor	Amount paid by VLA	VLA rates as a percentage of actual costs as assessed by costs assessor
Magistrates' Court plea	\$4157	\$721	17%
Bail application – Magistrates' Court (2 day hearing)	\$4360	\$745	17%
Consolidated plea in Magistrates' Court	\$3090	\$1405	45%
County Court trial A (10 day hearing)	\$11789	\$6632	56%
County Court trial B (13.5 day hearing)	\$14502	\$7919	55%

*LIV submission to government 2008

It is notable from the figures in both of the above tables that legal aid fees in Magistrates' Court matters are particularly low. This is of concern because the majority of matters are heard in the Magistrates' Court and these matters are predominantly undertaken by private practitioners.

Additionally, in regional areas, duty lawyer schemes in the Magistrates' Court are often provided by private practitioners. Duty lawyers play a vital role in providing access to justice for a broad range of Victorians, particularly those who may narrowly miss out on being eligible for legal aid but who cannot afford to pay for private representation. Those private practitioners providing duty lawyer services in regional areas are reporting an ever-increasing demand for duty lawyer services.

CONTRIBUTIONS POLICY

Respondents to the LIV Survey have raised concerns with respect to the formulaic nature of the VLA Contributions Policy. It has been suggested that the policy is too narrow to adequately take into account an applicant's financial circumstances.

The LIV's earlier recommendations regarding non-contribution thresholds for income and assets have inherent trickledown effect on the application of the Contributions Policy, and the LIV submits that raising the non-contributions threshold will enhance the equity of the Contributions Policy if the current income and asset range under which a contribution is payable is also broadened proportionately.⁴³

Members of the LIV have suggested that it may be worth extending the income and asset range under which a contribution becomes payable. This would allow a greater number of low-income earners and modest asset holders to be eligible for a grant of legal assistance within the tight fiscal restraints of Victoria's chronically underfunded legal assistance sector. The LIV submits that this suggestion warrants further investigation by VLA.

For the Contributions Policy to be viable, the majority of payable debts must be recovered by VLA from its clients. The LIV submits that any amendment to the Contributions Policy should be measured against the likelihood of recovery and the administrative costs involved in recovering any outstanding debt.

Recommendation 22:

The LIV recommends that VLA amend the Contributions Policy so that:

- Applicants with a net disposable income of less than or equal to the 'low-income household' threshold should not be required to make contributions.
- The threshold for initial contribution based on income should be increased significantly.⁴⁴
- Applicants with assessable assets of up to \$2000 should not be required to make contributions.
- The threshold for initial contribution based on assets should be increased significantly.
- The income range above the non-contribution threshold should be broadened to:
 - Accommodate revised cost estimates that reflect the market value for legal work; and
 - Allow for a greater number of persons to be eligible for legal aid with contributions.

⁴³ VLA, *How the initial contribution is calculated based on income*, <<https://handbook.vla.vic.gov.au/handbook/12-means-test/income-test/how-initial-contribution-is-calculated-based-on-income>> & VLA, *How the initial contribution is calculated based on assets* <<https://handbook.vla.vic.gov.au/handbook/12-means-test/assets-test/how-initial-contribution-is-calculated-based-on-assets>>

⁴⁴ The average weekly disposable income for low income households in the 2013-2014 financial year was \$407 <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/6523.0>>

The LIV notes that contributions make up 3% of VLA's total income and outstanding non-current client contributions make up a 36% of VLA's total assets.⁴⁵

Recommendation 23:

The LIV recommends that VLA publish, in the upcoming Means Test Review Options Paper:

- The average duration taken for contributions to be repaid.
- Updated figures on the percentage of self-generated income from contributions as a share of total income.
- Updated figures of the quantum of outstanding non-current client contributions.
- The annual cost of administering the Contributions Policy compared to annual revenue from contributions.

Are there any circumstances where a contribution is not appropriate?

The LIV submits that circumstances may arise where an individual may have equity in a home that exceeds the non-contribution asset threshold, yet the equity is inaccessible to that person. This arises in cases where a person with little or no income is unlikely to be able to borrow against their sole asset.

Examples where this is likely to occur include:

- Grandparents with primary care of children in family law who have a family home but are beyond working age;
- Persons who have inherited an asset that exceeds the threshold but have no regular or secure income;
- Persons who have secured an asset through property settlement but have no regular or secure income.

The LIV submits that, in instances where it can be substantiated that such equity is inaccessible, the Contributions Policy should not apply.

Recommendation 24:

The LIV recommends that the Contributions Policy be amended so that it does not apply to persons on little or no income who are unable to borrow against their assets, regardless of their home equity.

Is it fairer to have an upfront contribution for all grants of legal assistance?

The LIV submits that an upfront contribution would not be a workable solution.

⁴⁵ Productivity Commission, *Access to Justice Arrangements Report (2014)*, 755.

Respondents to the LIV survey were almost unanimously opposed to reintroduction of an upfront contribution. The LIV submits that this would lead to a situation where “clients are faced with the prospect of being made to make a contribution that they are ill-equipped to afford.”⁴⁶

Recommendation 25:

The LIV recommends that an upfront contribution should not be adopted for all grants of legal assistance

Are there any issues with the recovery of debts from people who receive a grant of legal assistance?

The LIV has received anecdotal reports from members that a significant proportion of client contributions are not recovered by VLA.

The LIV notes Recommendation 21.9 of the Productivity Commission’s Access to Justice Arrangements Inquiry report, in which the Productivity Commission recommended:

Legal aid commissions should only seek a contribution from their clients where there is a strong likelihood of an award of damages against which the commission’s cost can be defrayed. The practice of allowing deferred payments, especially unsecured deferred payments should be phased out.

The LIV refers to its recommendations on contributions above, particularly in relation to the need for more information on recovery of debts compared to administrative costs.

⁴⁶ Ibid 755.

EXEMPTIONS

The current VLA Means Test does not adequately take into consideration the fact that many legal assistance clients have vulnerability factors which are concurrent to their legal needs. The Legal Australia-Wide Survey: Legal Need in Victoria found that:

- People with a disability are more likely to experience legal problems and are more vulnerable to a wide range of legal problems;⁴⁷
- Welfare recipients tend to have an increased prevalence of criminal and family law problems;
- Crime victimisation status is an indicator of legal problems;
- Non-English speaking groups may be unaware of their legal rights which exacerbate the legal problems they experience.⁴⁸

The VLA Means Test should acknowledge that vulnerability factors compound and contribute to complex legal, financial and health problems. The LIV submits that the Means Test should be amended to exempt vulnerable groups would be particularly at risk to ensure that they receive appropriate legal assistance when needed.

Should any additional groups of people be exempted from the Means Test?

Respondents to the LIV Survey suggested that the following groups of people may be suitable for exemption:

- Grandparents who have primary care of children
- Carers
- Disability pensioners
- Victims of family violence
- Asylum seekers.

How should VLA decide which other matters or groups of people to exempt from the Means Test?

The LIV submits that further information is needed to determine which groups are exempted, and suggests that this information should be included in the Means Test Review Options Paper. The recommendation below suggests data that would assist in making an assessment of which other matters or groups should be exempt from the Means Test.

⁴⁷ Law and Justice Foundation, *Legal Australia-Wide Survey: Victoria*, 18.

⁴⁸ *Ibid*, 24.

Recommendation 26:

The LIV recommends that VLA should examine grants data to determine:

- Which vulnerable groups are most often seeking an exercise of discretion;
- For the vulnerable groups that are most prevalent:
 - The relative means of these vulnerable groups;
 - The economic impact of an exemption of these groups on VLA's forward estimates.

DISCRETION

Respondents to the LIV Survey were generally of the view that ‘use of discretion’ applications are being handled appropriately, although it was indicated that there was some variance between assessors of such applications. As such, LIV submits that there is potential for further refinement of the ‘use of discretion’ application process. The LIV recommends that VLA consider:

- Developing further guidance, including publication of relevant factors used to decide applications for use of discretion; and
- Whether the most commonly granted reasons for discretion could more appropriately and effectively be dealt with through amendment of the Means Test;

The LIV suggests that further information should be included in the Means Test Review Options Paper, including:

- Draft guidelines for comment by the profession;
- Relevant factors used to decide applications for use of discretion; and
- The most commonly relied upon reasons for discretion.

Should some of the matters that are currently considered on a discretionary basis be specified in the Means Test? For example, medical expenses, disability aids and financial hardship?

The LIV submits that VLA should provide information on the most commonly granted reasons for the exercise of discretion. This would be a suitable starting point for determining the types of factors that can appropriately and effectively be dealt with through amendment of the Means Test.

Recommendation 27:

The LIV recommends that VLA publish data on the most commonly granted reasons for the exercise of discretion in the Means Test Options Paper.

Should there be more structure or guidance to the exercise of discretion? What do you think should be included?

The LIV submits that guidance, including guidance as to what is considered relevant for determination of a use of discretion application, would be of assistance to practitioners. The LIV suggests that guidance should be developed with reference to commonly relied upon reasons for the exercise of discretion and in consultation with the profession.

Recommendation 28:

The LIV recommends that VLA include potential guidelines for the exercise of discretion in the Means Test Options Paper for consideration and comment.

Appendix A – Survey Methodology

LIV Survey methodology and respondent profiles

The LIV Survey captures a selection of the focus questions in the Consultation Paper. The LIV Survey went live on 8 August 2016 and responses were collated on 26 August 2016.

58 LIV members responded to the LIV Survey.

Respondents to the LIV Survey were asked threshold questions to gather and trace demographical data.

Of the respondents to the LIV Survey:

- 14.5% had 0 – 3 years post admission experience
- 11% had 3 – 5 years post admission experience
- 20% had 5 – 10 years post admission experience
- 54.5% had 10+ years post admission experience.

The geographical locations of the respondents were as follows:

- 65.5%, Metropolitan Melbourne
- 20%, Outer-Metropolitan Melbourne
- 12.7%, Rural and Regional Melbourne
- 1.8%, Did not wish to answer.

The majority of respondents worked in private practice. A full break-down is as follows:

- 80.8%, Private practice
- 15.4%, Community Legal Centre
- 3.8%, VLA practitioner.

Appendix B – LIV Survey

Introduction

Victoria Legal Aid (VLA) has released a Consultation Paper on various components of the VLA means test. To seek your feedback on these issues, the following LIV survey captures a selection of focus questions arising from the [VLA Means Test Review Consultation Paper](#).

Your feedback will inform the LIV's submission to the review. You can also contribute to VLA directly through its [Practitioner Survey](#) and your clients and the public are encouraged to contribute through VLA's [Community Survey](#).

The survey will take approximately 20 minutes to complete. If you do not wish to answer any particular questions, please click 'next' to skip to the next set of questions.

To assist us in compiling the results of this survey, please complete the following de-identified questions.

1. Number of years post-admission experience

- 0 - 3
- 3 - 5
- 5 - 10
- 10 +

2. Where is your practice located?

- Metropolitan Melbourne
- Outer Metropolitan Melbourne
- Rural and Regional Victoria
- Do not wish to answer

3. Practice size

- Sole practitioner
- Less than 10 lawyers
- 10 - 50 lawyers
- More than 50 lawyers
- Do not wish to answer

4. Type of practice

- Private practice
- Community Legal Centre
- VLA Practitioner

Refusal of Legal Assistance

5. Have any of your clients, or potential clients, been refused, or would likely be refused, a grant of legal assistance because of their financial circumstances?

Yes

No

6. What are the most common reasons for refusal in your experience?

	Not common				Very common
Income	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Assets	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Financially Associated Person	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Other (please specify)

Pre-application Triage and Assessment of Legal Assistance

7. Have you ever informally assessed a client's, or potential client's, financial circumstances prior to making an application for a grant of legal assistance?

- Yes
 No

8. How did you determine whether or not to proceed with an application? (select all that apply)

- ATLAS Inquiry
 From your previous experience and knowledge of the VLA Means Test

Other (please specify)

9. How often do you make an informal assessment?

- In most of your matters ($\geq 75\%$)
 In at least half of your matters ($\geq 50\%$)
 In at least a quarter of your matters ($\geq 25\%$)
 Occasionally ($< 25\%$)

10. Of the matters that you assessed prior to making a formal application, how often did you not proceed with making an application for a grant of legal aid funding based on that assessment?

- In most of your matters ($> 75\%$)
 In at least half of your matters ($> 50\%$)
 In at least a quarter of your matters ($> 25\%$)
 Occasionally ($< 25\%$)

11. Of the matters where you did not proceed with making an application, how often did the client or potential client present with limited financial means (i.e. that it would not be inappropriate for VLA to assist in funding their matters)?

- In most of your matters ($> 75\%$)
 In at least half of your matters ($> 50\%$)
 In at least a quarter of your matters ($> 25\%$)
 Occasionally ($< 25\%$)

12. In matters where you did not proceed with making an application what are the circumstances that would lead you to believe that VLA funding for a matter would be appropriate?

Types of Matters

In responding to the questions on this page please take into consideration the three categories of matters as described in the VLA Cost Categories:

Category 1 matters:

- Summary crime
- Family violence
- Personal safety intervention orders
- Infringements

Category 2 matters:

- Family law (up to and including trial)
- Child protection
- Criminal appeals to the County Court;
- Family law appeals

Category 3 matters:

- Indictable crime
- Family law (trial)
- Criminal appeals to the Court of Appeal

13. What sort of matters are most common in your practice? (select all that apply)

- Summary crime
- Family violence
- Personal safety intervention orders;
- Infringements
- Family law (up to and including trial)
- Child protection
- Criminal appeals to the County Court
- Family law appeals
- Indictable crime
- Family law (trial)
- Criminal appeals to the Court of Appeal

14. For Category 1 matters: (please only provide numerical answers)

What is the average duration of the matter? (in days)

What percentage of these matters are resolved by settlement?

What percentage of these matters are resolved at pre-trial hearing?

What is the average legal cost of these matters?

15. For Category 2 matters: (please only provide numerical answers)

What is the average duration of the matter? (in days)

What percentage of these matters are resolved by settlement?

What percentage of these matters are resolved at pre-trial hearing?

What is the average legal cost of these matters?

16. For Category 3 matters: (please only provide numerical answers)

What is the average duration of the matter? (in days)

What percentage of these matters are resolved by settlement?

What percentage of these matters are resolved at pre-trial hearing?

What is the average legal cost of these matters?

17. In which of these matters would you most likely make an application for a grant of legal assistance? (please list)

Category 1

Category 2

Category 3

18. What makes these matters more appropriate to legal assistance funding?

The severity of the consequences

The emotional burden on the client

The ease of resolution

The difficulty of resolution

Other (please specify)

Perceptions of Fairness

19. What are your perceptions of the fairness of the VLA means test?

What are your perceptions
of fairness of the income
test?

What are your perceptions
of the fairness of the asset
test?

What are your perceptions
of the fairness of the VLA
contributions
policy/estimation of legal
costs?

20. In your experience, what are client perceptions of the fairness of the VLA means test?

21. In your experience, what are client perceptions of the fairness of the justice system generally and is this affected by their ability to access legal aid assistance?

22. Do you have any further comments with regards to the availability of grants of legal assistance and the fairness of the VLA means test? Feel free to include any examples of where an application for a grant of funding was not made, or made and rejected, despite the client being of limited financial means.

Proposals for Changes

23. What changes do you think could be made to make the assessment of income fairer?

24. What changes do you think could be made to make the assessment of assets fairer?

25. Should there be any additional allowances/exclusions under the asset test? (eg: assets that have been modified or are needed to support people with disabilities)

26. Should VLA consider a person's whole assets pool or should the separate asset categories be maintained? (eg: currently equity in a home up with \$500,000 is excluded – does this lead to inequity between homeowners and rental households?)

27. Should there be any additional allowances for other types of expenses or increased allowances for expenses currently included in the test? (eg medical expenses, transport, education, telephone and internet, child/dependent expenses, credit card or personal loan repayments, other debts or infringements owed)

28. What changes do you think there should be to the financial information required to support an application for a grant of legal assistance? Do the current requirements present an unreasonable or inappropriate barrier?

29. What changes do you think could be made to make the assessment of financially associated persons fairer ?

Should financially associated persons continue to be included in the assessment of a person's financial resources? Why or why not?

How can the resources of a household be assessed in a fair and transparent way?

Should the definition of "financially associated person" be changed? If so, how?

Are there any other issues with the assessment of financially associated persons?

30. What changes do you think could be made to the contributions policy to make it fairer?

Would it be fair to have an upfront contribution for all grants of legal assistance?

Are you aware of any issues with recovery of debts from people who receive a grant of legal assistance?

Exemptions from the Means Test

Statutory exemptions from the VLA Means Test and Contributions Policy exist for the following groups of people:

- **Children**
- **War veterans**
- **Any person subject to a supervision order under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997***

Additionally, there are also other matters, such as indictable criminal matters and family violence proceedings, where VLA may be required to provide representation to people would did not satisfy the Means Test.

31. Should any additional groups of people of be exempt from the means test?

32. Should certain types of legal matter be automatically exempt from the means test?

Use of Discretion

33. In your opinion, are 'use of discretion' applications being handled appropriately?

34. Should there be more structure or guidance to the exercise of discretion?

35. In what circumstances should discretion be exercised?

Estimation of Legal Costs

When answering this question please take into consideration the VLA Cost Categories as set out below:

Category 1:

Includes: summary crime, family violence, personal safety intervention orders, infringements: Less than \$1,555

Category 2:

Includes: family law (up to and including trial stage), child protection, criminal appeals to the County Court, family law appeals: Between \$1,555 and \$6,560

Category 3:

Includes: indictable crime, family law (trial stage), criminal appeals to the Court of Appeal: More than \$6,560

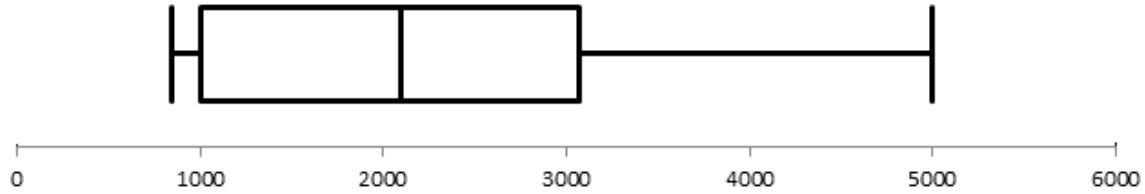
36. Do the above categories reflect the actual cost of obtaining assistance from a private lawyer?

37. How should they be changed?

38. Are there any other issues associated with the estimation of legal costs and how can this process be made fairer?

Appendix C – Cost Category Box Charts

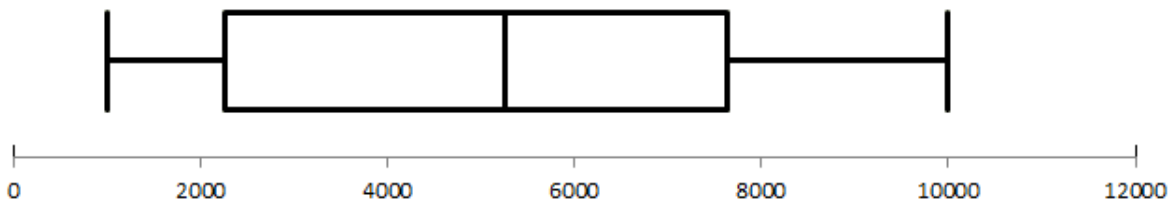
Table 2: Cost Category One Estimates



Estimates of legal costs for Category One matters ranged between \$850 and \$5,000.

50% of respondents provided estimates between \$1,000 - \$3075, with a median estimate of \$2,100 and an average estimate of \$2,040.

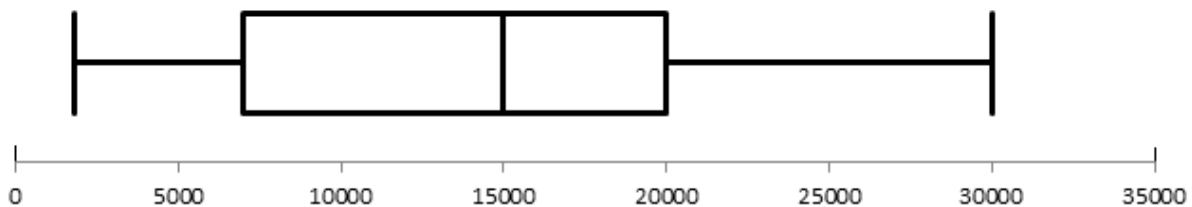
Table 3: Cost Category Two Estimates



Estimates of legal costs for Category Two matters ranged between \$1,000 and \$10,000.

50% of respondents provided estimates between \$2,250 - \$7,625, with a median estimate of \$5,250 and an average estimate of \$5,125.

Table 4: Cost Category Three Estimates



Estimates of legal costs for Category Three matters ranged between \$1,800 and \$30,000.

50% of respondents provided estimates between \$7,000 - \$20,000, with a median estimate of \$15,000 and an average estimate of \$15,200.