



Victoria Legal Aid
Independent Review of
Victoria Legal Aid Chambers

15 November 2019

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Abbreviations

ALS	Aboriginal Legal Services
CEO	Chief Executive Officer
CMIA	Crimes of Mental Impairment and Unfitness to be tried
CPD	Continuing Professional Development
FPM	Financial Performance Model
FTE	Full-time Equivalent
ICC	Indictable Crime Certificate
ICL	independent children’s lawyer
ILS	International Law Section
LAC	Legal Aid Commission
LAQ	Legal Aid Queensland
LIV	Law Institute of Victoria
MHC	Mental Health Court
NDIS	National Disability Insurance Scheme
NSW	New South Wales
OPP	Office of Public Prosecutions
PBL	Preferred Barristers List
PDO	Public Defenders’ Office NSW
PLE	Professional Legal Education
PO	Professional Officer
QLD	Queensland
SES	Senior Executive Service
SET	Senior Executive Team
SO	Senior Officer
SSODSO	Serious Sex Offenders’ Detention and Supervision Orders
VALS	Victorian Aboriginal Legal Service
VIFM	Victorian Institute of Forensic Medicine
VLA	Victoria Legal
VLAC	Victoria Legal Aid Chambers

Part 1 | Executive Summary

A. Introduction

This report contains our findings and recommendations based on our independent review of the model for Victoria Legal Aid Chambers (**VLAC**) ('the Review'). The key objectives of the Review are to:

- consider:
 - whether the model maximises value for money in advocacy services; and
 - alternative models in other Australian jurisdictions; and
- make recommendations to ensure the appropriate model for the delivery of publicly funded advocacy services is in place in Victoria.

In addressing the core objectives above, we have been asked to consider:

- the structure and governance of VLAC;
- the performance of the current VLAC model; and
- the appropriate future model for the delivery of efficient and effective publicly funded advocacy services, including a comparison of the costs/benefits of relevant options.

The focus of the Review is on the examination of the structure and governance of VLAC and the performance of the current VLAC model, including an assessment of cost effectiveness based on a sample set of data produced specifically for the purpose of the Review.

The Review seeks to provide a framework for consideration of an appropriate future model for VLAC in the context of the findings and recommendations made in respect of the governance, structure and performance of the current model. The ability for the Review to make findings in respect of an appropriate future model is, however, constrained by the limited data available to be analysed to conduct a cost effectiveness analysis.

The development of any future model should be informed by a comprehensive cost effectiveness analysis, which because of the data limitations (discussed below) was not able to be conducted as part of this Review.

B. Structure and governance of VLAC

VLAC currently has 23 (full-time and part-time) advocates on staff which represents approximately 1% of the number of private barristers currently practising in Victoria at the Victorian Bar.

Approximately 75% of VLAC's work is in the criminal jurisdiction, 13% in family law and 12% in civil law matters.

In terms of all legally aided matters, VLAC's work constitutes 7.4% of the total criminal law work briefed, 22% of the civil law work briefed and 2.6% of the family law work briefed.

Given its relatively small staff size, VLAC is briefed in a small percentage of legally aided cases. Notwithstanding its small size in terms of advocates, VLAC appears to have made some impact in the market particularly in its civil law areas of practice.

VLA has a Preferred Barristers List (**PBL**) from which it selects barristers to brief to appear in indictable criminal matters. It is a requirement for private barristers to either have or be applying to have an Indictable Crime Certificate (**ICC**), to ensure an appropriate level of skills and experience in appearing in indictable criminal matters. There are approximately 250 private barristers currently listed on the PBL.

A total of 687 private barristers are identified as practising in criminal law at the Victoria Bar.¹ Overall, stakeholders agreed that there is sufficient depth of experience and availability of counsel at the private Bar to brief for advocacy services where VLAC is not briefed by the VLA staff practice and more generally when briefed by the private profession.

I. VLAC size and composition

VLAC advocates practice across criminal, family and civil law. The vast majority of advocates practice in criminal law, currently 16 criminal law advocates with 3 family law advocates and 2 civil law advocates. Due to VLAC's size, the representation of VLAC advocates across each jurisdiction and across each work type is therefore relatively low in the context of the total share of advocacy work funded by VLA.

Although the size of VLAC is small in comparison to the VLA staff practice and in comparison to the Victorian Bar, it was uniformly considered by internal stakeholders consulted that the current size of VLAC is appropriate to facilitate the delivery of a mixed model of legally aided advocacy services in Victoria in accordance with VLA's strategic goals. External stakeholders also considered that VLAC was a sufficient size overall and did not consider there was any need for VLAC to be increased in size. In comparison to other models, the current size of VLAC is broadly comparable with the size of Legal Aid Queensland's (LAQ) in-house chambers model and The Public Defenders' Office (PDO) in NSW.

II. Relationship between role of funder and provider of advocacy services

All stakeholders were asked about the relationship between VLA's role as a funder and provider of advocacy services with reference to the independence of advice provided by VLAC advocates. Stakeholders did not express concern as to VLAC advocates ability to provide independent advice to clients of VLA.

Further, stakeholders did not consider that VLAC advocates were compromised in being able to provide independent advice to clients by reason of their employment with VLA. All stakeholders agreed that VLAC advocates are bound by and must adhere to the same ethical duties to their client and to the court in the performance of their role under the Legal Profession Uniform Law, in the same way as all practising solicitors and barristers are required to adhere to professional rules and standards.

III. Resourcing levels

VLAC advocates are considered to be appropriately qualified to deliver advocacy services across a broad range of matters in each of the criminal, civil and family jurisdictions. However, both internal and some external stakeholders observed that the current composition of advocate levels of experience is weighted at a more junior level than it has been in the past. It was also noted that the level of seniority and experience of staff advocates will necessarily affect the type and complexity of matters in which advocates can be briefed.

The observations made as to the seniority levels of VLAC are supported by the data provided by VLA, which suggests that there has been a steady increase in the number of VLA4 level advocates over the last 5 years (from 3 in 2014 to 7 in 2019) and a decrease in the number of VLA6 level advocates (from 10 in 2016 to 8 in 2019). There has been a corresponding reduction in the average ages of advocates within VLAC over time (from 44.12 years in 2014 to 41.54 in 2019).²

IV. Application of resources

The change in the composition of advocate levels of experience may have had an impact on the types of criminal advocacy work undertaken by VLAC, with a general decline since 2016 in the number of the more serious indictable offences briefed to VLAC, including homicide, drug and related offences, robbery and state sexual offences. However, VLAC continues to be briefed in indictable criminal matters at a significantly high rate at approximately 50% of all VLA assigned matters briefed and approximately 7% of

¹ Information available on the Victorian Bar website advanced search, practice area 'criminal law'.

² Based on payroll data provided by VLAC.

all legally aided indictable criminal matters, which represents a relatively significant market share in terms of VLAC's size and composition as compared to the private Bar.

There are two dedicated civil law advocates in VLAC. The volume and type of matters for which funding is available for legal aid in civil law matters is also relatively low as compared to criminal matters. However, the services provided to VLA clients by the civil law advocates constitutes the largest proportion, in percentage terms, across VLA's three program areas. The VLAC advocates appear to have had a market impact within the civil law jurisdiction in mental health and disability work, where VLAC has been briefed in VLA funded matters in more cases than the private Bar since the 2016 financial year.

Similarly, while VLAC is briefed in only a low proportion of the overall number of family law matters briefed, family law advocates have developed particular expertise in child protection matters.

Internal stakeholders consider that a significant value of VLAC is that the presence of VLAC as a "centre of excellence" enhances the provision of legally aided services within the organisation by ensuring representation for clients in regional Victoria, through the development of VLAC's expertise in specialist work types and through the organisational contributions made in training, development and other support provided.

External stakeholders consistently reported that they had a limited knowledge and understanding of the operations of VLAC, its practice composition, utilisation and areas of focus. However, there was general agreement amongst a number of external stakeholders that VLAC is uniquely placed to structure its resources and operations to make a positive contribution in both regional Victoria and in respect of particular specialist matter types.

C. The performance of the current model including quality of services, availability of services, cost effectiveness and other organisational or system-wide benefits

I. Quality of services

There is no available data to measure the quality of VLAC's advocacy services.³ However, internal stakeholders within the VLA staff practice reported consistently that the quality of the VLAC advocates across each practice group was of a high quality.

External stakeholders did not comment as to the quality of advocacy services of VLAC advocates. Some stakeholders made observations as to the levels of experience in the current VLAC staff group, notably there is a lower number of senior public defenders on staff than in previous years.

Internal stakeholders also consistently reported that they were not able to brief VLAC advocates at all times due to the limited availability of the advocates in VLAC. This was noted in particular in respect of family law. However, utilisation rates for family law advocates for the period June 2018 to May 2019 are on average 30% below budgeted targets, suggesting that increased utilisation may be achieved within current resourcing.⁴

II. Early resolution of cases

Internal stakeholders consistently reported a preference to brief VLAC advocates because of the ease of engagement and that engagement (briefing) could occur at an early stage. It was reported that this accessibility and ease of engagement at an early stage facilitates a culture of early trial preparation, which VLAC considers results in the early resolution of cases and better outcomes for clients.

The Atlas grant system data records that approximately 45% of VLAC cases are resolved on plea without first directions hearing compared to approximately 27% of cases briefed to private barristers. It should be

³ It is questionable as to whether meaningful data is able to be collected by VLAC in respect of the quality of advocacy services. The outcome of a criminal trial is not necessarily an indicator of the quality of an advocate's performance. Accordingly, it may be challenging to obtain objective and meaningful data in respect of individual performance.

⁴ Based on utilisation reports for advocates provided by VLAC.

noted however, that early resolution of trials alone is not a reliable measure to assess the quality of advocacy services. There are various factors which may influence early resolution, including the complexity of a matter, the availability of evidence for assessment and the appropriateness of recommending early resolution.

III. Cost effectiveness and data limitations

The ability of the Review to conduct an effective cost effectiveness analysis of the VLAC model has been constrained by various data limitations. While substantial data has been provided by VLA from the Atlas grants system, the grants system has not been designed to facilitate an assessment of cost effectiveness in terms of the VLA staff practice or VLAC.

In addition, VLAC advocates (and the broader staff practice) do not maintain time records or time sheets in respect of work performed. Time recording or robust periodic time recording would provide a robust basis for conducting a cost effectiveness analysis in comparison with amounts paid to the private Bar for comparable legal aid work.

Due to the limitations in the grants data provided by VLA, an alternative data source for comparison was sought from VLAC in order to enable a relatively limited cost effectiveness comparison to be conducted.

IV. Alternative data source – sample cases

VLAC provided a sample data set containing estimates of time spent to prepare a limited number of actual recent cases across four high volume and/or high value criminal matters. The Review focused its assessment of sample data on criminal matters in view of this being the highest volume practice for VLAC and legally aided work more generally.

The accuracy of a cost comparison using the sample data in this way is necessarily limited by the sample size, the degree to which the inferred time estimates capture the actual time spent on case work and the degree to which the small sample of recent cases is representative of common case work briefed between VLAC and the private Bar.

The internal contribution made by VLAC is highly valued by VLA and is likely to be of broader organisational value in both qualitative and quantitative measure. In relation to the external contribution to policy work and law reform, VLAC is well positioned to provide a unique perspective in respect of legally aided matters.

External stakeholders generally agreed that even though VLAC may not be a more cost effective model for the provision of legally aided advocacy services, it is likely to provide broader organisational benefits to VLA, such as specialisation in areas of need, internal training and development benefits.

D. Findings and Recommendations

Finding 1: Data Limitations – Data Collection

While the Review recognises that extensive data collection is undertaken by VLA to record all grants paid, there are significant limitations to the currently available data in terms of enabling a cost effectiveness assessment of the VLAC model. Limitations to the current data collection methodology need to be addressed in order to enable a meaningful assessment of the cost and quality of VLAC's advocacy services to ascertain whether the model maximises value for money in the provision of advocacy services.

Recommendations:

VLA should consider options in respect of implementing a system of time recording to capture the necessary data to enable reliable cost effectiveness analysis to be conducted at appropriate regular intervals. Data captured should enable cost effectiveness to be measured in respect of VLAC's advocacy services and resources contributed to broader organisational or system-wide contributions. This should also facilitate an assessment of the quality of services delivered and inform the appropriate structure of VLAC into the future.

The development of an appropriate data framework should enable VLAC to measure the cost and quality of advocacy services. Any new framework developed should address:

- costs metrics;
- quality metrics (through outcomes and performance and utilisation reviews); and
- metrics for recording non-advocacy services provided by VLAC (whether to the broader organisation or system-wide).

It is recommended that any time recording system implemented should capture the following categories of data in relation to the work undertaken by VLAC advocates in order to enable regular assessments of VLAC's cost effectiveness:

1. *Financial metrics*: recording of time spent by advocates in completing cases.

The most comprehensive approach would be to implement a system of time recording on a day to day basis as part of business as usual practice.

Alternatively, noting VLA does not currently have a time recording system in place in either the staff practice or VLAC, VLA could consider implementing a periodic time recording program conducted over meaningful time periods, across a viable sample size and at appropriate intervals.

2. *Case outcomes*: individual case outcomes should be recorded (at least on a sample basis) and tied to organisational objectives. This will assist in identifying strategic and test cases as well as substantiating the appropriateness of early resolution as a measure of quality and efficiency for VLAC.
3. *Utilisation of advocates*: implementing a process of record keeping as to the level of advocates appearing in each matter type to enable an assessment of the type and number of cases being completed by advocates at different levels to inform resourcing and a recruitment strategy for the future model.
4. *Qualitative contributions*: time recording should capture time spent by VLAC advocates on mentoring, training and development, management tasks and other organisational support provided to enable this contribution to be quantified and taken into consideration when assessing overall cost effectiveness and, more particularly, the overall value of VLAC's services to organisational and system-wide benefits.

Finding 2: Structure and Governance – Size and Composition

Overall, VLAC's size and composition is considered to be at an appropriate level to provide a mixed model legal aid advocacy service.

The size of VLAC is considered to be appropriate in so far as VLAC's size is broadly commensurate with comparable chambers models in Queensland and NSW.

The management and leadership structure of VLAC was generally considered appropriate in consideration of its size and structure.

Finding 3: Structure and Governance – Role of VLA as provider and funder of advocacy services

The role of VLA as funder and provider of legally aided advocacy services is not considered to impact VLAC advocates' ability to act independently in providing advocacy services to VLA's clients. It was agreed by all stakeholders that VLAC advocates are bound by the professional and ethical duties to the Court and to clients, as are all legal practitioners.

Finding 4: Structure and Governance – Staff resourcing

In relation to staff resourcing, VLAC staff diversity is considered to be appropriate for its size. In terms of gender diversity, VLAC compares favourably to the broader profession and the private Bar.

VLAC staff experience levels have varied over time with the noticeable shift in recent years being a decrease in the number of senior advocates and an increase in more junior level advocates.

The more recent focus of VLAC has been to provide coverage across all service areas of the VLA practice, to develop expertise internally and to rely on the private Bar where relevant advocacy expertise is not available in-house.

In the absence of a more comprehensive cost effectiveness analysis being undertaken, it is challenging for VLAC to make informed decisions as to where best to apply its limited resources so as to ensure resources are applied to practice areas, locations and matter types where VLAC can have maximum impact and deliver cost effective outcomes in the delivery of advocacy services.

Recommendations:

Subject to collection of further data, a comprehensive cost effectiveness analysis should be conducted to identify which practice areas and matter types VLAC can best serve to maximise value for money in the delivery of advocacy services.

Any such assessment should also consider the value of the broader organisational and system-wide benefits provided by VLAC.

Finding 5: Structure and Governance – Nature of work undertaken

In relation to criminal matters, VLAC advocates appear in serious indictable crime cases albeit to a lesser extent than in previous years as the levels of experience of VLAC advocates has changed over time. VLA and private solicitors engage VLAC advocates to act in VLA funded matters and continue to brief private barristers to appear in the more serious and complex cases and across all areas of VLA's practice.

VLAC continues to be briefed in indictable criminal matters at a significantly high rate, approximately 50% of all VLA assigned matters briefed and approximately 7% of all legally aided indictable criminal matters, which represents a relatively significant market share in terms of VLAC's size and composition as compared to the private Bar.

In relation to civil law matters, the number of mental health and disability cases briefed to VLAC has since 2016 exceeded the number of cases briefed to the Bar in the civil law sphere in alignment with the VLAC civil law practice's focus on this work type and in consideration of the civil law advocates' expertise in these areas. VLAC's civil advocates also make a broader contribution to VLA through the provision of advice, support and training to the broader staff practice.

The civil law practice is an area where it appears VLAC may be able to apply resources strategically to address a market gap or challenge in otherwise briefing out what was described as quite varied and discrete work across various areas of specialised practice.

In family law, the most significant practice is in child protection matters and VLAC advocates have developed particular expertise in this area. The overall contribution of VLAC to this area of work is relatively small compared to the amount of work briefed to the private Bar. However, VLAC is able to make a valuable contribution in servicing child protection matters, which are wholly funded by VLA, in circumstances where the private Bar servicing this practice area is relatively small. The in-house advocates also contribute to VLA through the provision of advice, support and training to the broader staff practice.

VLAC advocates are considered to be providing valuable representation of client interests through VLA's contribution to legal policy and reform submissions, engagement with the courts and other relevant organisations within the Victorian justice system.

It was generally agreed by stakeholders that VLAC is uniquely placed to service VLA clients appearing in regional areas on circuit.

Recommendations:

VLAC would benefit from a more strategic approach to resourcing and recruitment at particular levels (whether focused internally or externally) and with particular expertise in matter types across practice areas, to ensure a staff composition that best facilitates the most efficient and effective use of VLAC's limited resources.

In order to develop a more strategic approach to resourcing and recruitment, VLA should first conduct a further cost effectiveness analysis based on a comprehensive time recording project across all practice areas (criminal, civil and family law), advocate levels and types of matters in which VLAC is briefed.

In the interim, VLAC may consider focusing resources in respect of regional court matters to locations and areas of highest need, where it is considered more challenging to brief appropriately skilled and experienced barristers from the private Bar, and to maximise the efficient use of permanent resources located in regional areas.

Finding 6: Performance – Quality of Services

VLAC is highly valued within VLA and the in-house VLAC advocates are considered to be a valuable resource who contribute positively to the organisation and enhance VLA's ability to continue to ensure the provision of high quality legal services to members of the community eligible for grants of aid.

The Review acknowledges that VLAC advocates' involvement in training and mentoring programs are of great assistance to the professional development of VLA and VLAC staff and increase the quality of VLA's services. In addition, VLAC advocates are able to provide unique insights on behalf of VLA and its client base to inform legislative and policy reform.

The quality of services provided by VLAC has received positive feedback from internal stakeholders. Stakeholders highlighted that the VLAC advocates being able to be briefed early in the conduct of a matter contributed to the ability of VLAC to have higher rates of early resolution of matters.

Stakeholder consultations did not reveal any significant concerns as to the quality of the advocacy services provided by VLAC advocates. Internal stakeholders consulted across each of the practice area programs in VLA provided consistent feedback that the advocacy services being delivered in each practice area were of a high quality.

No significant concerns as to the quality of VLAC advocacy services were raised by external stakeholders. The majority of external stakeholders made no comment as to the quality of the VLAC advocates' advocacy services. The professionalism and quality of VLAC advocates was endorsed by all internal stakeholders and was not questioned by external stakeholders.

In comparison to other comparable models, particularly LAQ, VLAC does not have the same level of quality assurance and review and may consider implementing further improvements to monitor quality and performance in respect of VLAC advocates.

Recommendations:

VLAC consider implementing more formal quality assurance processes, performance reviews and a system to conduct client feedback surveys.

To further enhance quality assurance processes, VLA should give consideration to capturing data aligned with quality measures considered appropriate for a publicly funded provider of advocacy services. These may include:

- case outcomes;
- client satisfaction feedback (where appropriate);
- VLA staff practice satisfaction feedback;
- 360-degree feedback and peer review; and
- accessing specialist advocacy skills training from external providers.

Finding 7: Performance – Availability of Services

The number of briefs from private solicitors is currently immaterial and given the limited size of VLAC it is not likely this will substantially increase in the future. There may however be an opportunity for VLAC advocates to assist private solicitors in some regional areas.

Due to the limited size of VLAC practice, VLAC advocates are often unavailable to be briefed by the VLA staff.

It is considered that there is a sufficient number of barristers at the private Bar who can be briefed when VLAC advocates are not available or do not have the requisite skills or experience for a particular matter.

VLAC's size is considered to be appropriate and is comparable to other state models.

Finding 8: Performance – Cost Effectiveness

The Review's cost analysis, based on the sample data, indicates that the private Bar is more cost effective than VLAC across all matter types in the sample. Further detail and discussion as to the limitations of the data and the Review's assessment of cost effectiveness is contained in Part 4 of this report.

In relation to the cost effectiveness analysis undertaken by the Review, the limitations to data collection prevented a more robust cost effectiveness analysis being conducted.

While the results show the private Bar to be cost effective, there are a number of considerations and limitations which impact the interpretation of the cost findings.

A comparison with alternative models in other jurisdictions shows that one major difference is the complexity of matters undertaken by in-house barristers at VLAC in comparison to the NSW and Queensland chambers models. Accordingly, briefing the private Bar on more serious and complex cases is a cost-effective decision which VLAC may consider following. This will also inform how VLAC proceeds to assess talent recruitment and development to ensure a more cost-effective practice.

In order to ensure an appropriate future model for the delivery of efficient and effective public advocacy services, an accurate cost effectiveness analysis must be completed based on actual time spent by VLAC advocates in providing advocacy services. We recommend that a comprehensive time recording project is conducted by VLAC advocates for a meaningful test period. While any time recording project should accommodate the corporate culture and practice requirements of VLAC, it must produce a meaningful sample to facilitate a cost effectiveness analysis on a regular basis. The results of future cost effectiveness analysis could then be confidently applied in determining the most appropriate work to be completed by VLAC and setting the strategic direction for the provision of VLAC's advocacy services.

Recommendations:

As outlined in Finding 1, the Review recommends that time recording is completed by advocates on a day to day basis, or alternatively through time recording projects conducted over reasonable periods of time to enable a more efficient cost effectiveness analysis in the future.

It is recommended that any cost effectiveness project undertaken by VLAC include a cost comparison review of regional court work completed by VLAC as compared to the private Bar to determine whether it is more cost effective to brief VLAC advocates or private barristers (whether local or from the Melbourne Bar) in the regions.

In the interim, it is recommended that VLAC engage and consult regularly with court co-ordinators and the judiciary in the regions to identify opportunities for block briefing.

Finding 9: Performance – Organisational and System-wide Benefits

Although it is difficult to assess the quantitative value of the organisational and system-wide benefits provided by VLAC, based on our consultations with internal stakeholders it is evident that the provision of advocacy services by VLAC is one of many organisational benefits provided by VLAC.

Stakeholders referred to other organisational contributions made by VLAC, including:

- VLAC is an invaluable resource and “centre of excellence” that can be accessed for advice and support by the VLA staff practice;
- VLAC offers mentoring, training and development opportunities for VLA staff and therefore enhances increased staff quality, satisfaction and retention rates;
- through early briefing and involvement in complex cases, VLAC contributes to VLA’s high rate of early resolution of cases;
- VLAC provides invaluable assistance and guidance in relation to strategic litigation and test cases;
- VLAC assists in identifying trends in advocacy and strategic litigation practices that informs the operation of the VLA practice more generally; and
- VLAC provides a valuable contribution to VLA’s policy development work and law reform and legal policy submissions.

Internal stakeholders consistently reported that they felt that the value of VLAC should be assessed on both qualitative and quantitative measures and not solely on the basis of cost effectiveness or utilisation rates, citing the numerous qualitative organisational benefits provided by the presence of VLAC and its advocates to the staff practice.

Recommendation:

In accordance with recommendations made by the Access to Justice Review, VLA should develop a system to assess and document the value of all work performed by VLAC advocates including qualitative organisational and system wide contributions.

Finding 10: Future Model – Staff Resourcing and Governance

It is recommended that VLA take steps to enable it to conduct a comprehensive cost effectiveness review of VLAC to inform the development of an appropriate future model of VLAC.

This will assist in determining an appropriate composition of staff levels based on cost as well as considerations including empirical evidence of market failure and evidence of VLAC’s strategic impact in the market for legally aided advocacy.

The findings can be used to underpin a strategic decision relating to briefing for work types as between the Bar and VLAC and within VLAC based on advocate levels and experience and will take into consideration work types where VLAC is making, or could make, a market impact in the provision of advocacy services.⁵

This will require VLA to collate and retain additional data including time recording, recording type and length of trials and the number and type of matters conducted by respective VLAC advocate levels.

Based on this analysis and assessment of VLAC's resourcing requirements, VLAC could review its recruitment strategy and recruit to fill staffing requirements at identified levels to best serve the organisational needs of VLA.

Finding 11: Future Model – Quality Standards and Professional Development

In order to enhance VLAC's existing quality assurance processes it is recommended that VLAC commence recording and capturing data that aligns to quality measures considered appropriate for a publicly funded advocacy services provider. As set out in relation to Finding 6, these may include:

- case outcomes;
- client satisfaction feedback (where appropriate);
- VLA staff practice satisfaction feedback;
- 360-degree feedback and peer review;
- accessing specialist advocacy skills training from external providers; and
- other performance measures as determined to be appropriate by VLA to assess and strengthen quality assurance standards and processes.

A cost effectiveness analysis may be enhanced by an analysis of the quality of advocates skills at an individual level and by assessing utilisation levels of advocates against appropriate benchmarks.

Finding 12: Future Model – Scope of Work to be undertaken by VLAC

In developing an appropriate future model, VLA should identify which work types VLAC can deliver most cost effectively to maximise the value in its delivery of advocacy services. The results of this analysis should also inform the allocation of current resources and any future recruitment strategy.

The strategic direction for appropriate work may include the following:

- work that is as or more cost effectively briefed to VLAC rather than to the private barristers;
- work conducted in specialist jurisdictions where VLAC has greater expertise and/or where there is a public interest in VLAC conducting the work in-house;
- work that enables VLAC to maintain a presence in the market so that costs can be controlled and to meet priority needs in the community;
- work that should be undertaken to provide staff development and variety in work opportunities to staff; and
- work where there is market failure in advocacy in matter type or location.

The costs of any model must be considered in the broader context of quality and outcomes. That is, whatever the strategic direction adopted by VLAC following a cost effectiveness analysis, it must be assured that VLAC advocates have the best skills and expertise to provide the relevant services and achieve the best outcomes for clients.

⁵ This strategic decision-making has been successfully achieved by the civil law practice in relation to work types including mental impairment.

An appropriate future model for advocacy services may, in addition to cost effectiveness, equally apply a strategic lens to the types of cases which should be briefed to VLAC based on considerations as to where VLAC's engagement delivers broader organisational value and benefit to access to justice. These may include:

- cases in specialist work types where VLAC has or is able to develop specialist expertise (such as mental impairment or SSODSO);
- cases where there is a public interest in VLAC conducting the trial. For example, strategic/test case to assess efficacy of new laws; and
- cases that provide appropriate opportunities for staff development.

Part 2 | Consolidated Findings and Recommendations

#	Subject	Findings	Recommendations	Page reference
1	Data Limitations – Data collection	While the Review recognises that extensive data collection is undertaken by VLA to record all grants paid, there are significant limitations to the currently available data in terms of enabling a cost effectiveness assessment in respect of VLAC. Limitations to the current data collection methodology need to be addressed in order to enable a meaningful assessment of the cost and quality of VLAC’s advocacy services to ascertain whether the model maximises value for money in the provision of advocacy services.	<p>VLA should consider options in respect of implementing a system of time recording to capture the necessary data to enable reliable cost effectiveness analysis to be conducted at appropriate regular intervals. Data captured should enable cost effectiveness to be measured in respect of VLAC’s advocacy services and resources contributed to broader organisational or system-wide contributions. This should also facilitate an assessment of the quality of services delivered and inform the appropriate structure of VLAC into the future.</p> <p>The development of an appropriate data framework should enable VLAC to measure the cost and quality of advocacy services. Any new framework developed should address:</p> <ul style="list-style-type: none"> • costs metrics; • quality metrics (through outcomes and performance and utilisation reviews); and • metrics for recording non-advocacy services provided by VLAC (whether to the broader organisation or system-wide). <p>It is recommended that VLA capture the following categories of data in relation to VLAC in order to enable regular assessments of VLAC’s cost effectiveness and to facilitate an assessment of quality service and structure of VLAC to ensure that VLAC is achieving VLA’s objectives under the Act:</p> <p>a) <i>Financial metrics</i>: recording of time spent by advocates in completing cases.</p> <ol style="list-style-type: none"> To be able to assess cost effectiveness at any point in time it would be necessary for time recording to be completed on a day to day basis as part of business as usual practice. 	33

- ii. In the context where we understand that VLA does not require either the broader staff practice or VLAC staff to time record, implementing daily time sheet recording may not be an immediately viable option.
 - iii. Alternatively, VLA could consider implementing a periodic time recording program. This could be achieved through time recording projects conducted over reasonable time periods (e.g. 3 months) across a viable sample size and at appropriate intervals (e.g. 2 years). This would enable cost effectiveness to be measured over time and is capable of being adjusted to capture and reflect increases in staff salary and associated costs.
 - iv. If a periodic time recording program is implemented, VLAC should consider the time period selected to ensure that a statistically significant number of matter types, including high volume ('expensive') criminal matters across each of the categories in VLA's coordinated Briefing Policy are captured in the sample.
- b) *Case outcomes*: individual case outcomes should be recorded (at least on a sample basis) and tied to organisational objectives for the existence of VLAC. This will assist in identifying strategic and test cases as well as substantiating the appropriateness of early resolution as a measure of quality and efficiency for VLAC.
 - c) *Utilisation of advocates*: although records are maintained of monthly budgets and targets achieved on a per advocate basis, the available Atlas data does not readily reveal the level of advocate appearing in each case. This data would be useful in determining the types and numbers of cases completed by advocates at different levels and inform the required staff composition and recruitment strategy for VLAC.

#	Subject	Findings	Recommendations	Page reference
			d) <i>Qualitative contributions</i> : time recording should capture time spent by VLAC advocates on mentoring, training and development, management tasks and other organisational support provided to enable quantification of this work.	
2	Size and composition	Overall, the size of VLAC is considered to be appropriate and is generally comparable to the alternative models in Queensland and NSW.	N/A	35
3	Management and leadership structure	VLAC advocates are bound by the professional and ethical duties of all legal practitioners and are considered to be capable of observing these duties irrespective of employment with VLA. Overall, the management and leadership structure of VLAC is generally considered appropriate.	N/A	36
4	Role of VLA as funder and provider of advocacy services	VLAC advocates are bound by the same professional and ethical duties of all legal practitioners and are considered capable of observing these duties irrespective of employment with VLA.	N/A	36
5	Staff resourcing	a) VLAC staff diversity is considered to be appropriate for its size. In terms of gender diversity, VLAC compares favourably to the private Bar. b) VLAC staff resourcing would benefit from a more strategic approach to recruitment at particular levels (whether focused internally or externally) to ensure a staff composition that is best able to meet VLA's advocacy services requirements. c) The development of a staff resourcing and recruitment strategy should be informed by a further cost effectiveness analysis (discussed further in this report).	N/A	37

#	Subject	Findings	Recommendations	Page reference
6	Share of market for different types of advocacy	<p>Since inception in 2012, VLAC has been briefed in approximately 6.4% of matters funded by grants of legal aid.</p> <p>There has been some variance over the years in the number of cases briefed to VLAC, with it being briefed less across each of the criminal, civil and family law areas in recent years. This may be a reflection of the variance in matter types for which funding is granted and the composition of advocate levels and specialisations over the years.</p>	N/A	41
7	Spread of service provision	<p>a) In 2019 approximately 72% of VLAC cases were in metropolitan courts. This constitutes approximately 7% of all legally aided matters run in the metropolitan courts.</p> <p>b) Since inception in 2012, on average, approximately 74% of all VLAC cases are in metropolitan courts and approximately 26% in regional courts. VLAC appearances in regional courts peaked in 2014 at 35% of cases and has reduced to between 24% to 29% since 2014.</p> <p>c) Stakeholders consider that VLAC's presence in regional Victoria is of value and could be utilised more effectively to address gaps in the market particularly in regional areas.</p> <p>d) VLAC's advocates' presence at regional offices provides additional organisational quality benefits including assisting in the development of trial strategy for complex cases, providing specialist legal advice and assisting in professional development of the staff practice through mentoring, shadowing and training.</p> <p>e) There has been a reduction of approximately 20% in cases in which VLAC has been briefed in both the metropolitan and regional courts over recent years. The reason for this is unknown. While VLAC plays a greater role in some regional areas, such as Bendigo and</p>	<p>a) VLAC consider implementing a more formal strategy to facilitate block briefing in regional circuit work when briefing VLAC and the private Bar where reasonable and appropriate, and take steps to collect data to assess the cost effectiveness of this strategy.</p> <p>b) Subject to collection of further data, a comprehensive cost effectiveness analysis should be conducted to identify which regional locations and matter types VLAC can best serve to maximise value for money in the delivery of advocacy services.</p> <p>c) Any such assessment should also consider the value of the broader organisational benefits provided by the VLAC's presence and provision of services in regional locations.</p>	44

#	Subject	Findings	Recommendations	Page reference
		Ballarat where a full-time advocate is located, the significant majority of regional advocacy work continues to be performed by the private Bar.		
8	Civil law program and work types	The number of mental health and disability cases briefed to VLAC has since 2016 exceeded the number of cases briefed to the Bar in civil law matters, suggesting that VLAC may be addressing a market gap in this area of practice.	N/A	46
9	Family law program and work types	<p>a) VLAC's most significant practice in the family law jurisdiction is in child protection matters.</p> <p>b) Although the impact that VLAC is making in family law advocacy is numerically insignificant in respect of overall market impact, internal stakeholders consider that the family law advocates are a valuable in-house resource for the provision of strategic advice and assistance in professional development.</p> <p>c) Internal stakeholders identified the family violence work type as another gap in the market that the private profession is not consistently available to service. However, the Atlas data does not support this contention with a significant volume of family violence work continuing to be briefed to the private Bar.</p>	a) VLAC may consider prioritising family law advocacy services to regional areas where VLA has experienced difficulty in briefing the private Bar.	48
10	Representation in jurisdiction and work type	<p>a) VLAC's civil law practice is relatively small with only two junior advocates. Due to the breadth of practice in the civil program and the small size of the practice, the most impact in the program can be achieved through public interest strategy and test litigation and specialisation in specific areas of civil law to address market deficiencies.</p> <p>b) VLAC's most significant practice in the family law jurisdiction is in child protection matters. Although the impact that VLAC is making in family law advocacy</p>	<p>a) In developing an appropriate future model, VLA should identify which work types VLAC can deliver most cost effectively to maximise the value in its delivery of advocacy services. The results of this analysis should also inform the allocation of current resources and any future recruitment strategy.</p> <p>b) An appropriate future model for advocacy services in the indictable crime jurisdiction may also equally apply a strategic lens to the types of cases which should be briefed to VLAC based on considerations as to where VLAC's</p>	52

#	Subject	Findings	Recommendations	Page reference
		<p>is numerically insignificant in respect of overall market impact, internal stakeholders consider that family law advocates are a valuable in-house resource for the provision of strategic advice and assistance in professional development.</p> <p>c) The number of criminal law cases briefed to VLAC has gradually reduced over time, (this may be due to the changing expertise and experience of the public defenders). However, VLAC is briefed in a significant proportion of all VLA indictable crime matters both when briefed by the staff practice and overall in proportion to the size of VLAC in comparison to the size of the private Bar. The criminal practice remains VLA's largest private practice area and comprises the largest proportion of VLAC's advocacy work.</p>	<p>engagement delivers broader organisational value, including:</p> <ul style="list-style-type: none"> • cases in specialist work types where VLAC has or is able to develop specialist expertise (such as mental impairment or SSODSO); • cases where there is a public interest in VLAC conducting the trial for example, strategic/test cases to assess efficacy of new laws; and • cases that provide appropriate opportunities for staff development. 	
11	Quality of services	<p>a) Feedback from the internal staff about advocate quality of service is overwhelmingly positive. External stakeholders did not comment specifically on the quality of VLAC advocates. No negative comments were made and it was noted that VLAC provides a good opportunity for junior barristers to develop advocacy skills and have increased opportunity to do high level advocacy work.</p>	<p>a) VLAC would benefit from implementing more formal quality assurance processes and client feedback surveys.</p>	55
12	Availability of services	<p>a) The number of briefs from private solicitors is currently immaterial and given the limited size of VLAC it is not likely this will substantially increase in the future.</p> <p>b) Due to the limited size of the VLAC practice, VLAC advocates are often unavailable to be briefed by the VLA staff.</p> <p>c) It is considered that there is a sufficient number of barristers at the private bar that can be briefed when VLAC advocates are not available or do not</p>		56

#	Subject	Findings	Recommendations	Page reference
		have the requisite skills or experience for a particular matter. There may however be an opportunity to assist private solicitors in some regional areas.		
13	Cost analysis	<p>a) Our comparative analysis of sample cases suggests that it is more cost effective to brief the Bar in some indictable crime matters including homicide, sexual offences and robbery. While the results show the private Bar to be cost effective, there are a number of considerations and limitations which impact the interpretation of the findings.</p> <p>b) A comparison with alternative models in other jurisdictions shows that one major difference is the complexity of matters undertaken by in-house barristers at VLAC in comparison to the NSW and Queensland practices. Briefing the private Bar is more serious and complex cases may be more cost-effective.</p>	<p>a) The Review recommends that improvements to data collection, such as consistent time sheet recording, are made so as to enable VLAC to undertake a more robust cost effectiveness analysis in the future.</p> <p>b) Alternatively, if a daily time recording process is unlikely to be adopted by VLA, VLA could consider implementing a periodic time recording program conducted over a reasonable period of time and across a viable sample size to enable a more efficient cost effectiveness analysis to be undertaken.</p> <p>c) Ideally, any periodic time recording analysis conducted would assess VLAC's performance in respect of the cost of advocacy services across all matter types it is engaged in to inform the strategic allocation of its resources to case types where VLAC can deliver services most cost effectively.</p>	58
14	Organisational and system-wide benefits	<p>a) Whilst the participation of Chief Counsel and other in-house advocates in VLA's involvement in policy and law reform is noted, the Review considers that VLA's contribution is largely an organisational contribution based on the whole of VLA's organisational intelligence and experience. Certainly VLAC advocates do make a valuable contribution when involved and are able to provide unique insights based on their advocacy skills and experience.</p> <p>b) The Report acknowledges the importance of strategic advocacy as an opportunity to provide system-wide reforms to laws and court procedures and that VLAC is uniquely placed to test relevant policy and law reform to provide</p>	<p>a) The amount of time and dollar value of the advocates' time spent on policy and law reform (and other non-advocacy work) should be assessed as part of a comprehensive cost effectiveness analysis of VLAC based on time records maintained by advocates as part of a time sheet keeping or periodic time recording project.</p> <p>b) Both a qualitative and quantitative assessment should be made as to whether VLAC advocates are the most appropriate contributors to the relevant policy and legislative reform activity.</p> <p>c) The quarterly reporting model is simple and could capture expenditure and associated metrics in relation to VLAC. It is recommended that VLA include information relating to VLAC in its</p>	68

#	Subject	Findings	Recommendations	Page reference
		<p>feedback to government about real impacts of reforms across its three programs. It is considered that this is a distinct benefit of VLAC and a viable means of producing system-wide efficiencies and benefits for groups in the community and eventual savings to the legal aid fund in terms of individual client case work.</p> <p>In this regard, the Review reiterates the conclusion of the Access to Justice Review that “[i]t is important for [VLA] to use its resources wisely and consider where it can add value in addition to the other sources of advice to government on a given topic.”</p>	<p>quarterly and annual reports for public access.</p>	
		<p>c) The Review acknowledges that VLAC advocates are able to provide unique insights on behalf of VLA and its client base to inform legislative and policy reform. Any quantitative assessment should also take into account that VLAC comprises a small number of advocates and that the investment required in this type of non-advocacy work diverts time and finite resources away from individual case work for VLA clients.</p> <p>The Review does not consider that VLAC’s involvement in non-advocacy work is contrary to the fundamental basis of VLAC as an in-house model providing specialised advocacy services. Rather, appropriateness and efficiency should be equal drivers for and inform the level of involvement by VLAC advocates in VLA’s participation in legislative and policy reform work.</p>		
		<p>d) VLAC’s advocates are heavily involved in training and mentoring programs which are of value and assistance to professional development in the organisation and contribute to improving the quality of the services at VLA.</p>		

#	Subject	Findings	Recommendations	Page reference
		<p>e) An assessment as to whether VLAC compensates for market deficiencies has not been able to be made due to the lack of quantitative data and relevant data in the Atlas system in respect of types and complexity of matters. It is noted that internal stakeholders agreed that VLAC advocates assist in filling market gaps in respect of regions and work in specialist areas.</p>		
15	Future Model for VLAC	<p>The strategic direction for work to be briefed to VLAC may include the following:</p> <ul style="list-style-type: none"> a) Work that is as or more cost effectively briefed to VLAC rather than to the private barristers; b) Work conducted in specialist jurisdictions where VLAC has greater expertise and/or where there is a public interest in VLAC conducting the work in-house; c) Work that enables VLAC to maintain a presence in the market so that costs can be controlled and to meet priority needs in the community; d) Work that should be undertaken to provide staff development and variety in work opportunities to staff; and e) Work where there is market failure in advocacy in matter type or location. 	<ul style="list-style-type: none"> a) The cost effectiveness of any model must be considered in the broader context of quality and outcomes. That is, whatever the strategic direction adopted by VLAC following a cost effectiveness analysis, it must be assured that VLAC advocates have the best skills and expertise to provide the relevant services and achieve the best outcomes for clients. 	69

Part 3 | Introduction

A. Background

VLA is a statutory authority established under the *Legal Aid Act 1978 (Act)* to provide legal aid and associated services. The objectives of VLA under the Act (section 4) include:

- to provide legal aid in the most effective, economic and efficient manner;
- to manage its resources to make legal aid available at a reasonable cost to the community and on an equitable basis throughout the state;
- to ensure the coordination of the provision of legal aid so that it responds to the legal and related needs of the community;
- to ensure the coordination of the provision of legal assistance information so that the information responds to the legal and related needs of the community, including by being accessible, current, of high quality and sufficient breadth;
- to provide to the community improved access to justice and legal remedies; and
- to pursue innovative means of providing legal aid directed at minimising the need for individual legal services in the community.

The Act also sets out the functions, powers and duties of VLA. These include to control and administer the legal aid fund and to ensure that legal aid is provided in the most effective, efficient and economic manner. Further, in performing its functions, VLA must consult with professional bodies including the Law Institute of Victoria (**LIV**) and the Victorian Bar.

Following notable growth of VLA, VLAC was established in 2012 with the purpose of better supporting the advocacy priorities of VLA across its three law programs criminal, civil and family law, and to manage costs in the provision of legally aided advocacy services. *“The purpose of establishing [VLAC was] to manage a greater range of high-cost legal work through its fixed-cost staff practice, instead of purchasing advocacy services from private barristers on a daily rate.”*⁶

At the time of establishment of VLAC, VLA had 17 pre-existing advocacy positions which were consolidated into the current model together with a few additional staff advocates. Based on our consultations with internal stakeholders, we understand that the growth of VLAC since establishment has been organic.

VLAC advocates can be briefed to appear for clients by the VLA staff practice and external private solicitors. In addition to advocacy services, VLAC provides services to the broader VLA organisation and benefits to the legal system including:

- identifying and conducting strategic and test case litigation to challenge the law and its outcomes;
- providing advice for the staff practice on complex applications for grants of legal assistance, complex case management and ethical issues;
- participating in justice and law reform activities; and
- training VLA staff and other government bodies.

⁶ Victorian Auditor-General’s report *Access to Legal Aid* (2014) p 10.

VLA has a mixed model for the delivery of legally aided advocacy services. VLA staff can brief VLAC advocates or engage private barristers (based on the PBL in criminal matters). The mixed model enables VLA to address any gaps in the market for the delivery of publicly funded advocacy services, as staff advocates can be directed to develop expertise in emerging areas, specialise in areas of practice and appear in regions which private barristers are unable or unwilling to service. Theoretically, the mixed model also provides access to a greater pool of expertise, increased client choice in the selection of legal representation and an increased scope to manage conflicts of interest. These benefits have been reinforced by recent amendments to VLA's Coordinated Briefing Policy discussed below.

B. Context for the Review

We have been asked to review the VLAC model to consider whether the model maximises value for money in advocacy services and to also consider alternative models in other jurisdictions in order to make recommendations for an appropriate future model.

This Review is a result of Recommendation 6.14 of the *Access to Justice Review* report (2016) which provided:

"[VLA] should commission an independent review of the model for [VLAC] and consider whether the model maximises value for money in advocacy services. The review should include consideration of an alternative model based on the Public Defenders in other Australasian jurisdictions, some of which have more institutional separation from the Legal Aid Commission and a number of more senior advocates.

*Victoria Legal Aid should obtain agreement from the Department of Justice and Regulation to the terms of reference for the independent review and consult with the Attorney-General about the implementation of its findings."*⁷

The cost effectiveness of the VLAC model had been previously brought into focus in 2014 by the Victorian Auditor-General's report *Access to Legal Aid* (2014), which reviewed VLA's performance, including VLAC. The objective of the Victorian Auditor-General's audit was to:

"assess whether VLA is performing its functions and duties and achieving its objectives under the Act. To address this objective, the audit assessed the arrangements in place to:

- effectively and efficiently plan the supply of legal aid services;*
- effectively, efficiently and economically deliver legal aid services; and*
- effectively monitor performance in the provision of legal aid."*⁸

In its consideration of VLAC, the Victorian Auditor-General stated:

"In part to contain costs, VLA has taken steps to bring legal services in-house, specifically increasing its in-house advocacy capacity. In July 2012, VLA established its [VLAC] ...

*While VLA believes that bringing legal services in-house is likely to reduce costs, it does not yet have sufficient evidence to demonstrate this. VLA commissioned a review in 2011 of staff practice costs, which identified that VLA was more cost effective in seven of the 13 program areas."*⁹

⁷ *Access to Justice Review* report (2016) p 423.

⁸ Victorian Auditor-Generals report *Access to Legal Aid* (2014) p ix.

⁹ Victorian Auditor-General's Office, *Access to Legal Aid* (2014) p 10.

The call for evidence of the cost effectiveness of VLAC was echoed in the *Access to Justice Review* report (2016), which noted that stakeholders had raised significant concerns about both the cost and quality of advocacy services provided by VLAC. The *Access to Justice Review* concluded that:

*"[w]hile [VLAC] uses a relatively small proportion of [VLA's] resources (at two per cent of the organisation's expenditure), an expenditure of \$3.86 million is still substantial. The [Access to Justice] Review has examined the evidence, and the evidence to date suggests a low cost-recovery rate by [VLAC]. The [Access to Justice] Review concludes that [VLA] is unable, at present, to quantify and demonstrate persuasively the value of [VLAC]."*¹⁰

The *Access to Justice Review* further concluded that:

"On the information before the [Access to Justice] Review, the current model of [VLAC] is difficult to justify. The Review acknowledges that this finding does not take into account other potential efficiencies, such as early settlement rates and mentoring and training of other staff, as the Review has seen insufficient data to test these issues. Equally, however, the mixture of traditional advocacy, advocacy skills development and more administrative functions in the current [VLAC] model is unlikely to maximise efficiency. Such a mixture of advocacy and non-advocacy work runs counter to the logic of specialisation as a driver of efficiency, such as that adopted by the Office of Public Prosecutions and Public Defenders offices in other jurisdictions. The Review notes that the skills development with other [VLA] staff can, however, improve the effectiveness of the organisation as a whole. The balance and elements of value of [VLAC] should be examined further.

Accordingly, [VLA] should commission an independent review of the model for [VLAC].

*[VLA] should develop a way of assessing and documenting the value of the full complement of work performed by [VLAC] (just as it puts a value on the contributions staff lawyers make to online materials and community legal education), then assess which purchasing options offer best value for money. The value for money proposition must include consideration of quality."*¹¹

The second recommendation made in relation to VLAC, Recommendation 6.15, provides that VLA should, in supporting its purchasing decisions:

- review fees paid to private barristers each quarter to monitor distribution and inform its briefing processes;
- scope options for producing more activity costing data in relation to staff advocates to inform VLA's value for money assessment and support the culture of accountability within VLA; and
- ensure that its policy and fee structure for briefing counsel are publicly available.¹²

VLA has published guidelines for briefing counsel on its website as guidance for legal practitioners;¹³ however, VLA's Coordinated Briefing Policy is not available on its website. We note that VLA's available data does not yet facilitate activity costing for staff advocates.

The *Access to Justice Review* report also concluded that VLA, as the central legal assistance service, is best placed to be the system manager but that it needed to introduce mechanisms to increase its accountability and transparency including (as Recommendation 6.4) *"the regular publication of VLA's expenditure and performance data against indicators approved by the Attorney-General, so that other service providers are better appraised of the basis on which [VLA] is allocating its resources and circumstances that could affect service provision across the sector."*¹⁴

¹⁰ *Access to Justice Review* p 422.

¹¹ *Access to Justice Review* report p 423.

¹² *Access to Justice Review* report p 424.

¹³ <https://www.legalaid.vic.gov.au/information-for-lawyers/doing-legal-aid-work/our-practice-standards/general-practice-standards/34-briefing-counsel>.

¹⁴ *Access to Justice Review* report p 20.

We understand that VLA reports quarterly to the Department of Justice. These reports provide a snapshot of service delivery by the organisation, although VLA does not specifically report about the performance of VLAC as a division of the organisation.

VLA is required to report against measures outlined in Budget Paper No 3 which refer to practice areas but does not include specific reference to VLAC, although some information on VLAC is included in VLA's Annual Report. In our consultation with the Department of Justice, we were advised that the Department is primarily concerned with ensuring VLA continues to be accountable for the use of public money and that funding is used in the most effective way overall but that the Department does not have any expressed views on the internal operation of VLAC, including its cost, its size, composition or nature of the work undertaken by VLAC.

As part of our Review, it was revealed through stakeholder consultations that performance data and associated indicators have not been established in relation to VLAC. Our independent Review is the first step in addressing the issues raised by the Access to Justice Review Report as to the effectiveness and efficiency of the use of VLAC advocates.

The Access to Justice Review concluded that the justice system requires improvement in relation to data, research and evaluation capability and to make better use of technology. This is relevant to VLA in respect of VLAC, based on our review of the VLAC model. Principally, the type of data retained by VLA does not provide a viable basis for a robust cost effectiveness analysis, making it difficult to determine:

- the true costs of VLAC;
- how resources dedicated to legally aided advocacy services could be best directed within VLAC (for example, in strategic or test litigation, high costs cases or in matter types where VLAC is demonstrably cheaper or making an impact in work type); or
- how to ascertain a cost effective and efficient future model.

C. Objectives of the Review

The aim of this Review is to address the Access to Justice Review Recommendation 6.14 and independently review the VLAC model to consider:

- whether the model maximises value for money in advocacy services;
- alternative models in other Australasian jurisdictions, and

make recommendations to ensure the appropriate model is in place in Victoria.

The Terms of Reference

The Review was specifically asked to examine:

1. the structure and governance of VLAC, including:
 - a. size and composition, including:
 - i. number of staff;
 - ii. comparison with staff practice size; and
 - iii. comparison with private profession;
 - b. management and leadership structure;
 - c. relationship between VLA's roles as funder and provider of advocacy services, with reference to the independence of advice provided by VLAC's advocates;
 - d. staff resourcing, including qualifications, experience, and diversity; and

- e. nature of work undertaken, including:
 - i. share of the market for different types of advocacy;
 - ii. spread of service provision, for example, across regional Victoria;
 - iii. representation in work type; and
 - iv. representation in jurisdiction;
2. the performance of the current VLAC model, including:
 - a. quality of services:
 - i. VLAC's advocacy work (for example, availability of skilled practitioners; early resolution; duration of trials; outcomes for clients; continuity of care; errors leading to appeals);
 - ii. quality of VLAC's advocacy compared with private practitioners;
 - iii. recruitment and retention of appropriately qualified advocates; and
 - iv. VLAC's quality assurance processes, with reference to other quality assurance models;
 - b. availability of services:
 - i. to the private profession; and
 - ii. to the VLA staff practice;
 - c. cost effectiveness:
 - i. cost of providing services through VLAC advocates compared with the cost of private practitioners performing similar services, including a discussion of the cost of outsourcing work currently assumed by VLAC advocates to the private Bar; and
 - ii. competitive neutrality between VLA in-house advocates and private practitioners;
 - d. other organisational or system-wide benefits (such as contribution to the achievement of broader government and VLA objectives), including:
 - i. diversity and equitable briefing;
 - ii. contributions to policy and law reform;
 - iii. professional development and career pathways for both in-house VLA staff and non-staff advocates;
 - iv. training, mentoring and practitioner collaboration;
 - v. contributions to managing conflicts of interest;
 - vi. early resolution and avoided trials;
 - vii. system-wide time savings or productivity increases attributable to Chambers;
 - viii. compensating for market deficiencies (such as geography, subject matter, or lack of experienced advocacy in remote or regional areas);
 - ix. cooperation and innovation with courts; and
 - x. market intelligence and representation in jurisdictional forums;
3. the appropriate future model for the delivery of efficient and effective publicly funded advocacy services, including a comparison of the costs/benefits of relevant options and reference to:
 - a. staff resourcing and governance, including reference to advocacy, support, leadership and management roles;
 - b. quality standards and professional development, including the role of senior advocates;
 - c. the scope of work that should be undertaken, including consideration of the types of matters that would be most cost-efficient; and
 - d. existing data and performance measures that can be used to monitor effectiveness and efficiency into the future.

In examining these matters, the Review was asked to have regard to:

- alternative models in other jurisdictions, including consideration of cost, scale (for example, measuring staffing and funding levels on per capita or sector-wide measures, or as against a jurisdiction's legal aid commission), level of institutional separation from a jurisdiction's legal aid commission, and the role of senior advocates;
- the *Access to Justice Review* report (2016);
- the Productivity Commission's *Access to Justice Arrangements: Inquiry Report* (2014);
- the Victorian Auditor-General's report into *Access to Legal Aid* (2014); and
- the independent review of VLA's coordinated briefing policy (2016/17).

This Review has considered and compared the alternative advocacy models in each of Queensland and NSW; however, it is not an objective of this Review to provide the benchmarking with those jurisdictions detailed in Recommendation 6.19 of the *Access to Justice Review* report. The Review seeks to provide context for a roadmap for an appropriate model for VLAC in consideration of these alternative models in the context of the findings and recommendations in respect of each of the structure and governance of VLAC and the performance and current model. This includes:

- consideration of appropriate mechanisms for data collection to facilitate cost and performance effectiveness analysis;
- consideration of staffing composition to ensure the future model has appropriate staff composition, size and focus for service delivery across the three law programs; and
- other relevant qualitative and quantitative considerations.

D. Our Approach

In order to satisfy the objectives of the Review, we have:

- received data from VLA for the period between 2012 to 2019 financial years¹⁵ extracted from its Atlas funding platform (**Atlas data**), as well as other documents, and information relevant to the terms of reference (**VLA data**);
- received data from LAQ and the PDO NSW in relation to the comparable models in Queensland and NSW respectively;
- completed consultations with internal and external stakeholders to gain greater insight around VLAC's practice and the qualitative organisational and system-wide benefits provided by VLAC; and
- completed our own desktop research and analysis.

It was agreed with the VLA project team that we would consider the in-house chambers model in LAQ and the PDO NSW as the alternative comparable models in other jurisdictions. The LAQ in-house chambers model was selected because it is a similar model to VLAC. The PDO NSW was selected as a comparable model notwithstanding it is significantly different to the VLAC model, that it is independent of government and Legal Aid NSW.

Information relating to LAQ's in-house chambers model was provided by LAQ, through stakeholder consultation and desktop research. Information relating to PDO NSW was obtained via desktop research from publicly available information and through direct liaison with PDO. A summary of the information obtained in respect of comparable models examined is contained in Annexure 1.

¹⁵ Data relevant for the 2019 financial year was provided up to May 2019.

As part of our stakeholder consultations, we conducted interviews with the following internal stakeholders:

- Marcus Williams, Managing Lawyer, Bendigo office;
- Deirdre McCann, Managing lawyer, Dandenong office;
- Peter Noble, Executive Director Services & Innovation;
- Tim Marsh, Chief Counsel, Victoria Legal Aid Chambers;
- Nicole Rich, Executive Director Family, Youth and Children’s Law and Executive Director for Gippsland region;
- Rowan McRae, Executive Director, Civil Justice, Access and Equity and Executive Director for the Goulburn region; and
- Dan Nicholson, Executive Director, Criminal Law, and Executive Director for Western suburbs region.

We also conducted interviews with the following external stakeholders:

- Stuart Webb, President, Law Institute of Victoria;
- Gemma Hamzi, General Manager of Policy, Advocacy & Professional Standards, Law Institute of Victoria;
- Marcus Dempsey, Barrister, Criminal Bar;
- Justin Hannebery QC, Barrister, Criminal Bar;
- Mark Gamble J, Head of Criminal Division, County Court of Victoria;
- Judy Small J, Federal Circuit Court;
- Paul Davey, (Former) Deputy CEO, Legal Aid Queensland (since retired);
- John Cain, Solicitor for Public Prosecutions, Office of Public Prosecutions Victoria;
- Fiona McLeay, Legal Services Commissioner, Victoria Legal Services Board; and
- Jessica Symonds, Manager, Legal and Policy, Criminal Law Governance and Resources, Justice Policy and Data Reform, Department of Justice and Community Safety.

Stakeholders were identified and selected in consultation with the VLA project team. Internal stakeholders were selected to provide focussed information and insights relating to each of VLAC’s practice in each of VLA’s three programs of family law, civil law and criminal law. External stakeholders were selected to represent and provide the perspective of the legal professional bodies, the courts, the Department of Justice and the LAQ comparable model in Queensland.

Our interviews with the stakeholders sought to address the objectives of the Review and questions were aligned to the Terms of Reference.

Details of observations and comments made by stakeholders are contained throughout this report and a detailed summary of stakeholder consultations is included in Annexure 2.

E. Data

I. Available Data

VLA provided extensive data which was extracted from its Atlas grants system. Atlas is a data system used by VLA to record all grants paid against a case funded by VLA. The Atlas system is also used to record notional payments made to VLAC in respect of matters briefed to and conducted by VLAC advocates.

From the Atlas data it was possible to identify and extract the following information:

- the amount of legal aid dollars paid in respect of each legally aided case in respect of the private profession;
- the notional cost of briefing VLAC advocates based on grant of aid that would be paid to the private profession for the same work / appearance;
- the jurisdiction and matter types of legally aided cases;
- the court and geographical location where a case was heard;
- whether a case was conducted by VLAC or a private barrister;
- whether a case was briefed to VLAC by the VLA in-house staff or a private solicitor; and
- the stage at which a case was concluded (whether conducted by VLAC or the private profession).

II. Data Limitations

The Atlas data is extensive. However, it only contains data for grants of aid payable to the private profession and notional payments made to VLAC in instances where VLAC advocates have lodged notional invoices. Therefore, as a preliminary matter, the Atlas data may not be an accurate record of all matters in which VLAC has been briefed because it does not capture details of cases for which advocates may have failed to submit notional invoices.

Further, the Atlas data does not capture cases where a private solicitor has briefed a private barrister and the private barrister has not invoiced VLA directly but rather, the barrister's fees appear as a disbursement on the invoice submitted by the private solicitor.

As Atlas is a grants system, it does not record the type of data required to undertake a comprehensive cost effectiveness analysis. Accordingly, our cost effectiveness analysis of the VLAC model has been constrained by the following data limitations:

- lack of availability of robust information, especially in relation to the time VLAC advocates spend on completing cases;¹⁶
- limitations to data accuracy extending from an inability to reliably extract cost calculations from the grants payments data. Utilisation of the Atlas data has been informed by consultation with VLA and a conservative approach has underpinned all analysis involving the Atlas data; and
- VLAC advocates do not maintain time records which would provide a robust basis on which to conduct a cost effectiveness analysis.

Our review of other qualitative considerations was also impacted by the limitations in the Atlas data. Accordingly, anecdotal evidence derived from our consultations with internal stakeholders about the quality of VLAC's advocacy skills or whether VLAC is addressing market failure in relation to work types and circuit trials could not be verified by the available data (except in relation to addressing market gaps in respect of one work type in the civil law program).¹⁷

¹⁶ Arguably, there is an embedded limitation in even time data when attempting to measure a service in a finite or unit manner because in reality the service may be open-ended in nature. That is, the time spent by advocates in cases within the same matter types may still vary due to the variables intrinsic to each matter (facts, legal issues etc) and therefore, the amount of time spent in the delivery of advocacy service required. However, time recording would provide the most accurate basis for a cost effectiveness analysis particularly through averaging. In addition, this limitation exists in respect of analysing time spent by barristers briefed from the private Bar on VLA funded matters in so far as barristers invoice VLA or solicitors for the amount of the funding grant for each service as opposed to billing on a per hour basis based on time recording.

¹⁷ It is questionable as to whether meaningful data is able to be collected by VLAC in respect of the quality of advocacy services. The outcome of a criminal trial is not necessarily an indicator of the quality of an advocate's performance. Accordingly, it may be challenging to obtain objective and meaningful data in respect of individual performances.

The key limitation of using grants data for a cost effectiveness analysis is the degree to which costs are recorded accurately and in totality. This limitation stems from work practices from both private barristers and VLAC advocates in distinct ways.

Barristers invoice for the amount allocated under the funding grant for the relevant advocacy service briefed. While this would mean the costs recorded are accurate, it does not necessarily represent the true costs in total.

A similar related consequence of limited resources or work practices in the private profession may also be the risk of payments to private barristers being inaccurately recorded as a different work item. For example, a barrister cost being inaccurately recorded as a cost for solicitor services, if the solicitor submitted the invoice. Despite these caveats, private barristers' services will only be reimbursed if they invoice against a grant of aid. This incentive means that the total payments to a private barrister under a grant of aid represent a useful estimation of the total cost of those services to the VLA fund for the purpose of a cost comparison.

Conversely, VLAC advocates will be remunerated at their salaried rate regardless of what items they notionally invoice against a grant of aid. While VLAC has put in place mechanisms to incentivise staff to accurately and promptly invoice services notionally, our consultation with the manager of VLA's Reporting Team has indicated that there remain significant limitations to the accuracy and totality of VLAC notional costs recorded when drawn from the grants data.

To account for the limitations associated with using grants data to estimate VLAC costs, an alternative approach to obtain a comparable, albeit limited, data source was employed. A small sample of recent VLAC cases with dedicated time estimates was gathered from VLAC advocates. Estimates of time were inferred from advocates' calendars, where time had been allocated to work on a specific case.

The accuracy of a cost comparison using the sample data is limited by:

- the sample size;
- the degree to which the inferred time estimates capture the actual time spent on case work; and
- the degree to which the small sample of recent cases is representative of common case work between VLAC and the Bar.

Accordingly, although the adopted approach enables a limited cost comparison, the absence of time recording, and associated data limited the ability of this Review to reach a conclusive assessment of the cost effectiveness of VLAC on a cost per unit basis in comparison to briefing the private Bar or in comparison to alternative models. The available data does not facilitate an analysis:

- enabling identification of matter types which are more cost effectively conducted by VLAC; or
- whether it is more cost effective to brief VLAC or the Bar in relation to regional court matters.

Data Collection: Key Findings and Recommendations

There was broad support for a framework for future data collection in respect of VLAC. The development of an appropriate data framework should enable VLAC to measure the cost and quality of advocacy services. Any new framework developed should address:

- costs metrics;
- quality metrics (through outcomes and performance and utilisation reviews); and
- metrics for recording non-advocacy services provided by VLAC (whether to the broader organisation or system-wide).

It is recommended that VLA capture the following categories of data in relation to VLAC in order to enable regular assessments of VLAC's cost effectiveness and to facilitate an assessment of quality service and structure of VLAC to ensure that VLAC is achieving VLA's objectives under the Act:

- a) *Financial metrics*: recording of time spent by advocates in completing cases.
 - i. To be able to assess cost effectiveness at any point in time it would be necessary for time recording to be completed on a day to day basis as part of business as usual practice.
 - ii. In the context where we understand that VLA does not require either the broader staff practice or VLAC staff to time record, implementing daily 'time sheet' recording may not be an immediately viable option.
 - iii. Alternatively, VLA could consider implementing a periodic time recording program. This could be achieved through time recording projects conducted over reasonable time periods (e.g. 3 months) across a viable sample size and at appropriate intervals (e.g. 2 years). This would enable cost effectiveness to be measured over time and is capable of being adjusted to capture and reflect increases in staff salary and associated costs.
 - iv. If a periodic time recording program is implemented, VLAC should consider the time period selected to ensure that a statistically significant number of matter types, including high value ('expensive')¹⁸ criminal matters across each of the categories in VLA's Coordinated Briefing Policy,¹⁹ is captured in the sample.²⁰
- b) *Case outcomes*: individual case outcomes should be recorded (at least on a sample basis) and tied to organisational objectives for the existence of VLAC. This will assist in identifying strategic and test cases as well as substantiating the appropriateness of early resolution as a measure of quality and efficiency for VLAC.
- c) *Utilisation of advocates*: although records are maintained of monthly budgets and targets achieved on a per advocate basis, the available Atlas data does not readily reveal the level of an advocate appearing in each case. This data would be useful in determining the types and numbers of cases completed by advocates at different levels and inform the required staff composition and recruitment strategy for VLAC.
- d) *Qualitative contributions*: time recording should capture time spent by VLAC advocates on mentoring, training and development, management tasks and other organisational support provided to enable quantification of this work.

¹⁸ In its 2017 cost effectiveness review of its entire staff, LAQ identified that from a review of 9 categories of expensive cases: the inhouse practice was far more cost effective in 5 of these categories (serious assault, homicide, drugs, robbery/extortion and sexual assault); the in-house practice was as cost effective as the private profession in cases of weapons and explosive offences and unlawful entry / burglary; and in the categories of fraud and theft, the private profession was more cost effective. In relation to LAQ's in-house chambers, it was found to be more cost effective in relation to court work (committals and trials) particularly in higher court jurisdiction work and in circuits – LAQ Briefing Note on cost effective and efficient utilisation of the in-house practice provided to the Review by LAQ stakeholder.

¹⁹ These include (as defined in the Coordinated Briefing Policy): Significant Criminal Cases, Standard Criminal Cases – contested committals, Standard Criminal Cases – jury trials, County Court Pleas, County Court Appeals, Supervision and Detention Orders and Crimes (Mental Impairment) hearings.

²⁰ VLA data reviewed suggests that the peak period in terms of case volume is between August and November.

Part 4 | Structure and Governance

A. Size and Composition

VLAC currently employs 23 advocates practising in the criminal, family and civil law jurisdictions. VLAC also employs a further 7 administrative staff. Advocates are employed on either a full-time or part-time basis and have been recruited from the VLA staff practice or laterally from the private Bar. The advocates have a Victorian public service classification of VLA4, VLA5 or VLA6, with the Chief Counsel at the Executive 3 level.

Based on written information provided by the VLA project team in relation to VLA's Financial Performance Model (**FPM**),²¹ approximately half of the Chief Counsel's time as a resource (and salary) is attributed to activity recorded in the model (including management of VLAC staff) with the remainder attributed to Senior Executive Team responsibilities. Chief Counsel is routinely briefed under the stated billing target in the FPM and generally has a lower court load than other advocates in VLAC.

Similarly, the role of Associate Director does not involve a billing target although the Associate Director may occasionally appear in court cases and recovery is recorded against the usual target for a VLA6 level advocate.

Advocates are otherwise briefed to appear in cases based on their expertise and experience and individual professional development.

Although VLAC has general guidelines for briefing staff advocates, they are not binding as advocates may appear in a number of cross jurisdictional matters, as well as matters which are of a higher complexity than ascribed to their level in the guidelines. For example, many of the current cohort of VLA4 Associate Public Defenders are beginning to run trials in the County Court, as they are considered to have developed the necessary expertise and skills (notwithstanding this is not a core competency for a VLA4 advocate).²²

Overall, the size of VLAC was considered to be appropriate by both internal and external stakeholders. The size of VLAC in terms of resourcing levels is generally comparable to alternative models in Queensland and NSW. The PDO NSW employs a higher number of advocates than VLAC, and LAQ employs a lower number however, the funding for staff salaries is proportionate in terms of the number of advocates and staff salary funding.

²¹ VLA's internal financial modelling seeks to apportion indirect costs across various practice groups within VLA to determine the costs of running various divisions including VLAC.

²² Based on written information provided to the Review by the VLAC project team.

Both the Queensland and NSW models have senior management teams comprising 3 to 4 public defenders. There is also a higher number of senior advocates in the Queensland and NSW models overall.

Management and Leadership Structure: Key Findings

Overall, the management and leadership structure of VLAC is generally considered appropriate.

C. Role of VLA as funder and provider of advocacy services

Internal and external stakeholders considered that VLAC advocates are independent in their decision-making in the conduct of trials.

It was agreed by all stakeholders consulted that like all legal professionals, VLAC advocates are bound by applicable professional and ethical duties to the courts and their clients and that they were capable of observing this duty. Notwithstanding their employment with VLA, advocates consider themselves to be bound by the barristers conduct rules and as officers of the court having the same duties as any advocate, whether at the private Bar or in private practice as a solicitor.

The relationship between VLA as funder and as a provider of advocacy services assists in the achievement of VLA's overarching mandate to provide legally aided services to the neediest in the community in that VLAC is able to direct resources to meet gaps in the legal market for the provision of advocacy services in particular regions, certain matter types and/or emerging areas of law.

Role of VLA as funder and provider of advocacy services: Key Findings

VLAC advocates are bound by the professional and ethical duties of all legal practitioners to the Court and to their clients and are considered to be capable of observing this duty irrespective of employment with VLA.

D. Staff Resourcing: qualifications, experience and diversity

I. Diversity

Since 2014,²³ the majority of the VLAC staff has been female. Both internal and external stakeholders have identified that VLAC provides good development opportunities (including Supreme Court trial experience), particularly for women who may be seeking flexible work arrangements.

VLAC has a mix of part-time and full-time employees. Currently, part-time employees represent 1/3 of the total VLAC staff. Two of the six senior public defenders (VLA6) are part-time, whilst one senior public defender is currently on maternity leave.

In respect of gender diversity, VLAC comprises 14 female and 9 male advocates. Women therefore represent 60.8% of advocates. This compares favourably to the broader profession (approximately 50%) and the private Bar (approximately 30%).

VLA is also committed to diversity in briefing private barristers. In the 2018 financial year, approximately 41% of significant cases co-ordinated by VLAC were briefed to female barristers at the private Bar (exceeding the target of 30% by 2020 set by the National Model Gender Equitable Briefing Policy).²⁴

Since 2014, there has been a general decrease in the overall average age of advocates from 43.5 years in 2014 to 41.5 years in 2019. This may be in part a reflection of the increase in VLA4 advocates (from 3 in 2014 to 6 in 2019) and the current composition of staff advocates being weighted towards the VLA4 and VLA5 levels, nominally the 'public defender' or 'in-house counsel' levels, rather than the 'senior public defender' or 'senior in-house counsel' level. The average age of advocates recruited at the VLA5 and VLA6 levels has also gradually reduced:

²³ Data for 2012 and 2013 was not made available.

²⁴ VLA Annual Report 2017/2018 p 43.

- VLA6 advocates, from 52.50 years in 2014 to 51.13 years in 2016; and
- VLA 5 advocates, from 45.75 years in 2014 to 40 years in 2019.²⁵

II. Experience

VLAC staff experience levels have varied overtime with the noticeable shift in recent years being a decrease in senior advocates and an increase in junior advocates. From 2014 to 2016, the number of VLA6 level advocates increased, whilst from 2016 to date there has been a gradual decrease in the number of VLA6 advocates from 10 in 2016 to 8 in 2019 and an increase in VLA4 level staff from 3 in 2014 to 7 in 2019 (which includes at least one administrative position in 2019).²⁶

VLAC currently has 18 advocates practicing in the criminal jurisdiction, including the Chief Counsel and Associate Director of Chambers. VLAC has 3 advocates practising on a full-time basis in family law, one of whom is a senior in-house counsel at the VLA6 level. There are 2 advocates practicing full-time in the civil jurisdiction, being both at the junior levels of VLA4 and VLA5.

Internal stakeholders expressed the view that VLAC requires more experienced senior criminal law advocates capable of running complex criminal trials in the superior courts and to otherwise assist the VLA staff through early engagement in the conduct of complex cases.²⁷

It was noted that VLAC had experienced some difficulty recruiting senior advocates in the past. The more recent focus of VLAC has been to provide coverage across all service areas of the VLA practice, to develop expertise internally and to rely on the private Bar where relevant advocacy expertise is not available in-house.

Internal stakeholders generally considered that the breath of expertise within VLAC is satisfactory. They also reported that in the criminal jurisdiction there is no matter type in which they would not brief VLAC advocates if available and having appropriate experience, except in cases involving some intersection between administrative law and crime, in which case the private Bar would be briefed.

VLAC staff resourcing would benefit from a more strategic approach to recruitment at particular levels (whether focused internally or externally) to ensure staff composition that is best able to meet VLA's advocacy requirements.

Staff Resourcing: Key Findings

- a. VLAC staff diversity is considered to be appropriate for its size. In terms of gender diversity, VLAC compares favourably to the private Bar.
 - b. VLAC staff resourcing would benefit from a more strategic approach to recruitment at particular levels (whether focused internally or externally) to ensure a staff composition that is best able to meet VLA's advocacy services requirements.
 - c. The development of a staff resourcing and recruitment strategy should be informed by a further cost effectiveness analysis (discussed further in this report).
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²⁵ Based on payroll data provided by VLAC for the 2014 to 2019 financial years.

²⁶ Based on payroll data provided by VLAC.

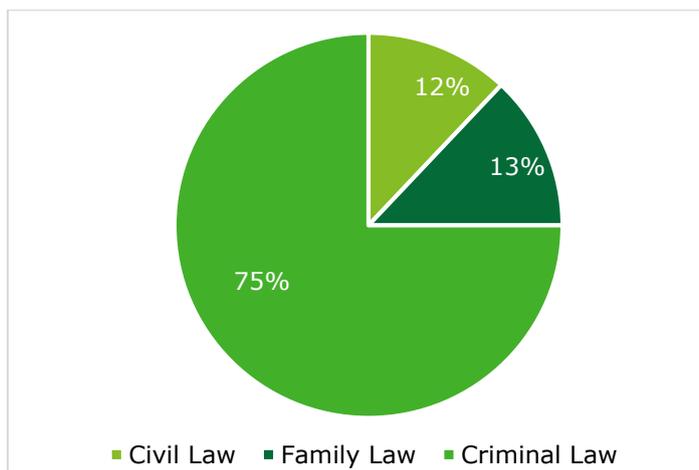
²⁷ Internal stakeholders in the VLA's criminal law program noted that currently, VLAC employs only 3 in-house advocates capable of doing appellate work (notwithstanding the number of appeals matters that are legally aided is not significant).

E. Nature of Work undertaken by VLAC

I. Share of market for different types of advocacy

Based on data in the 2017-2018 VLA Annual Report, VLA manages the largest share of legally aided civil law matters (approximately 79% of all civil law grants of legal aid).²⁸ VLA manages approximately 29% of all criminal law matters granted aid²⁹ and 14% of the family law grants of aid.

Figure 2: VLAC areas of work



The spread of VLAC’s services is illustrated in Figure 2. In terms of all legally aided matters, VLAC’s work constitutes approximately 7.4% of the criminal law market, approximately 22% of the civil law market and approximately 2.6% of the family law market.

Figure 3 below shows the total number of grants of aid briefed to VLAC and to the private Bar.³⁰ Accordingly, VLAC has been briefed in approximate 6.4% of matters with grants of legal aid since the inception of VLAC in 2012.

An analysis of the number of cases briefed to VLAC in each area of the law is presented below in Figures 4, 5 and 6.

In summary, since 2013, the percentage of criminal matters briefed to VLAC has decreased significantly from 20.6% in 2013 to only 3.7% in 2019. This may be in part a consequence of the current composition of advocate levels and experience in VLAC, which has more junior and less senior advocates than in the past.

In contrast, the number of civil cases briefed to VLAC varied in earlier years (up to 73 cases in the 2013 financial year but falling to 34 in the 2014 financial year), then has steadily increased to over 90 cases per year in the 2016 to 2018 financial years. While there was a reduction in the number of cases that VLAC was briefed in 2019, the percentage of total matters briefed increased to 33.2%.

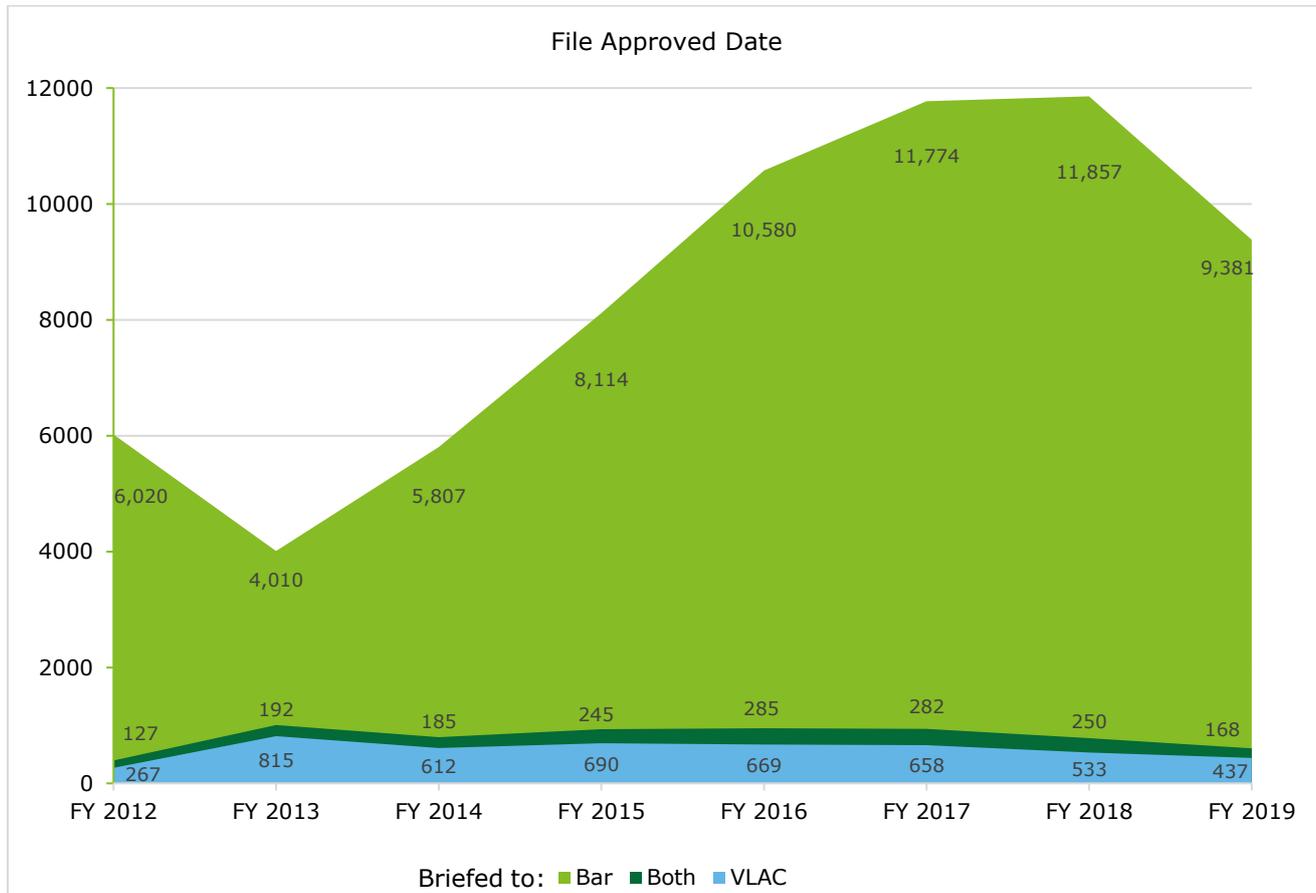
The number of briefs to VLAC in the family law jurisdiction has remained relatively consistent since the 2015 financial year, with a small decrease in the 2018 and 2019 financial years.

²⁸ VLA Annual Report 2017/2018 p 34.

²⁹ VLA Annual Report 2017/2018 p 38.

³⁰ The numbers of grants briefed to VLAC and the private Bar were extracted from the Atlas data. The data also considers cases briefed to both VLAC and the private Bar. We were unable to identify the reasons for these cases being briefed to both VLAC and the Bar. We were also unable to identify the proportion of work done in these cases each VLAC and the Bar.

Figure 3: Total grants of aid briefed to VLAC and the Bar



The decline in cases is evident in criminal law briefs where 717 cases were briefed to VLAC in the 2013 financial year and only 259 criminal cases were briefed to VLAC in the 2019 financial year. This may be a consequence of the current composition of advocate levels and experience in VLAC, which has more junior and less senior advocates than it used to have in the past.

Figure 4 – Number of Criminal Law briefs to VLAC and to the Bar.

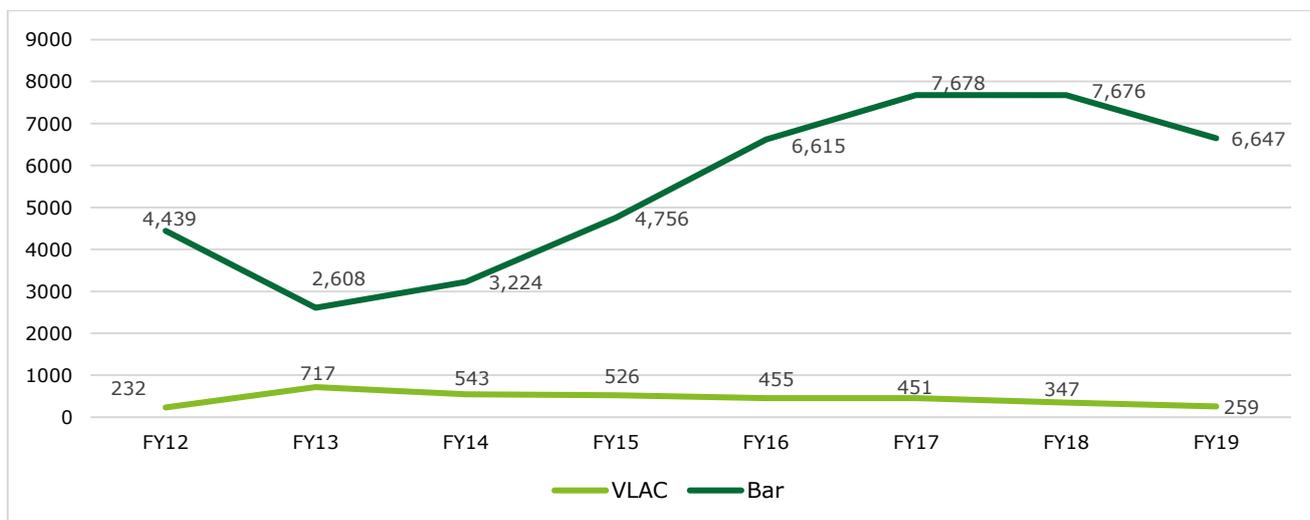
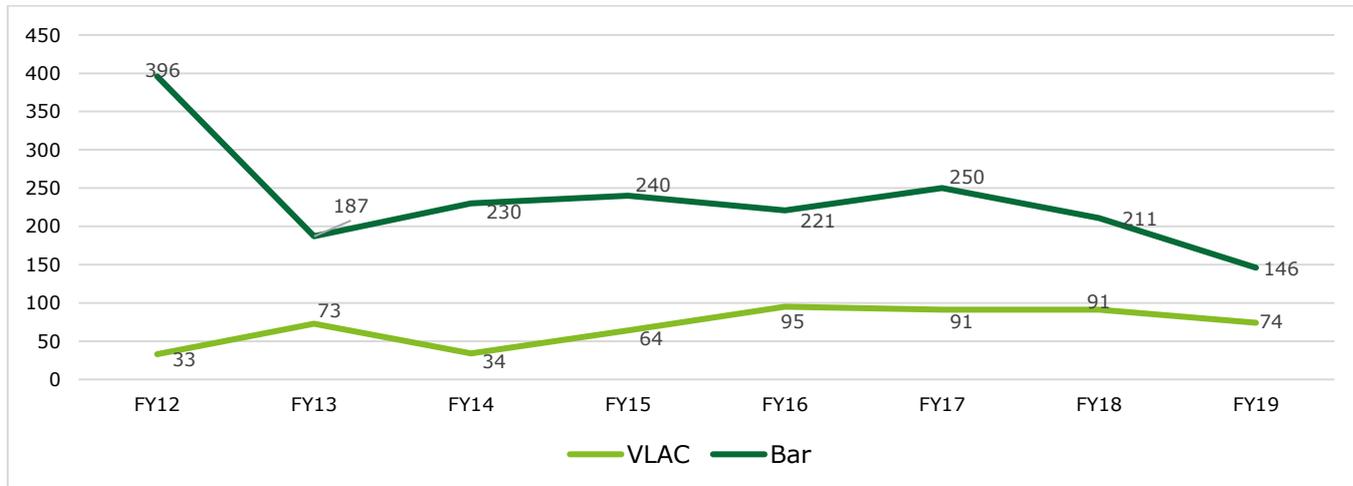


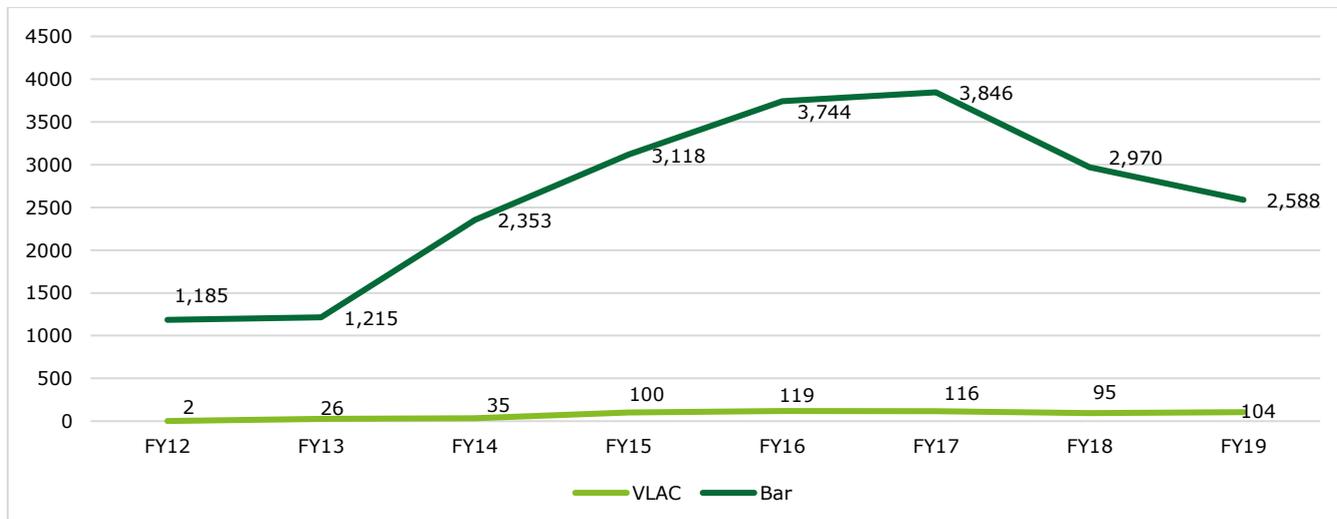
Figure 5 – Number of Civil Law briefs to VLAC and to the Bar.



The number of civil cases briefed to VLAC varied in earlier years (up to 73 cases in the 2013 financial year but falling to 34 in the 2014 financial year), then steadily increased to 95-91-91 cases per year in the 2016 to 2018 financial years, followed by a reduction to 74 cases in 2019.

The number of briefs to VLAC in the family law jurisdiction has maintained steady numbers since the 2015 financial year, with a small decrease in the 2018 and 2019 financial years.

Figure 6 – Number of Family Law briefs to VLAC and to the Bar.



Internal stakeholders consistently asserted that VLAC was addressing market deficiencies in work types and regions. However, this is generally not supported by the Atlas data, except in relation to crimes mental impairment and unfitness to be tried matters. Due to its size, particularly in comparison to the VLA staff practice and the Victorian Bar, it would be difficult for VLAC to make any material impact on the market for different types of legally aided advocacy. External stakeholders did not have any real visibility or knowledge of the type of advocacy work VLAC advocates were being briefed in or VLAC’s impact in the market.

Share of market for different types of advocacy: Key Findings

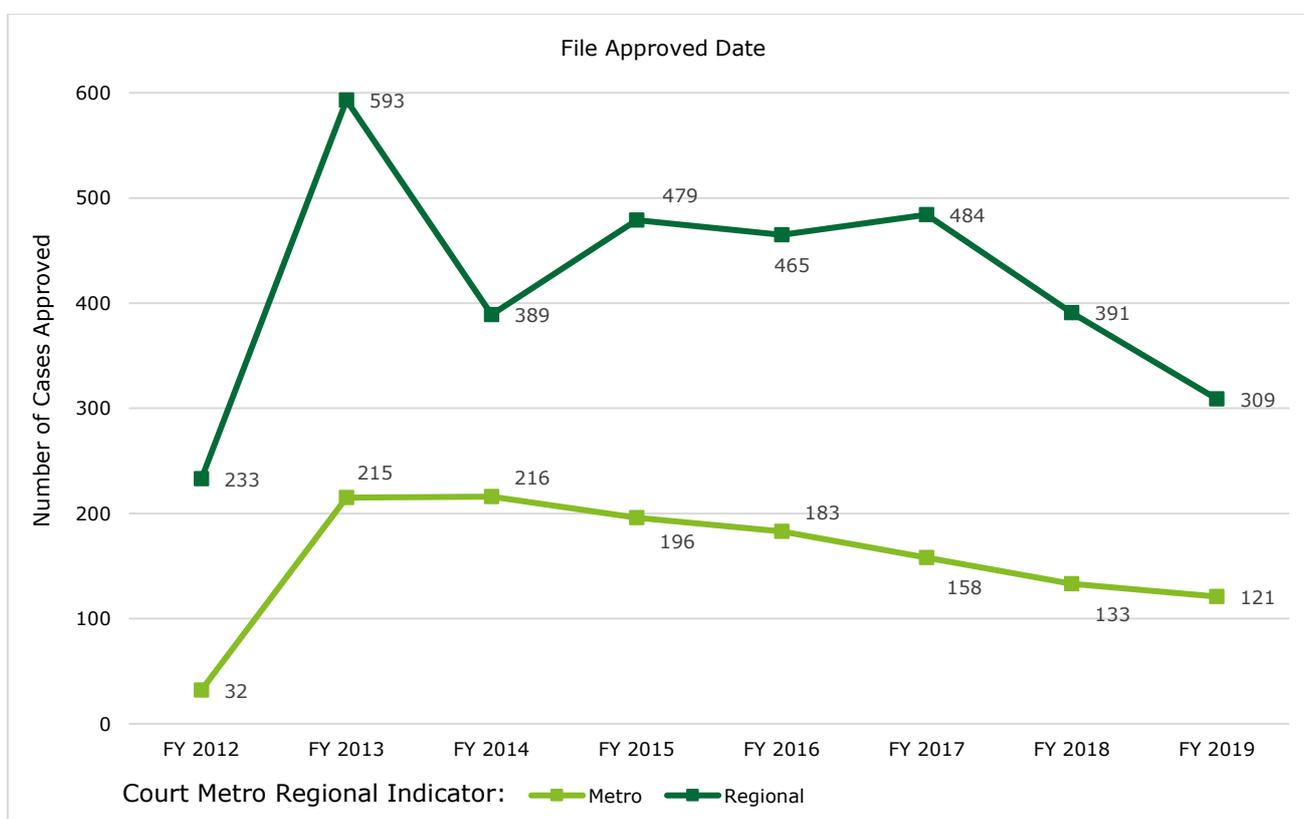
Since its inception in 2012, VLAC has been briefed in approximately 6.4% of matters funded by grants of legal aid.

There has been some variance over the years in the number of cases briefed to VLAC with it being briefed less across each of the criminal, civil and family law areas in recent years. This may be a reflection of the variance in matter types for which funding is granted and the composition of advocates' levels and specialisations over the years.

II. Spread of service provision

Legally aided advocacy services are provided across all metropolitan and regional areas throughout Victoria by VLAC advocates and private barristers. For the 2018 financial year, 19% of all hearings were located in regional courts. Further, 20% of criminal matters, 26% of family law matters and 7% of civil law matters were conducted in regional locations.³¹

Figure 7: Spread of VLAC services by court location over time



Since 2012, VLAC has been briefed in approximately 8% of regional trials across all three programs.

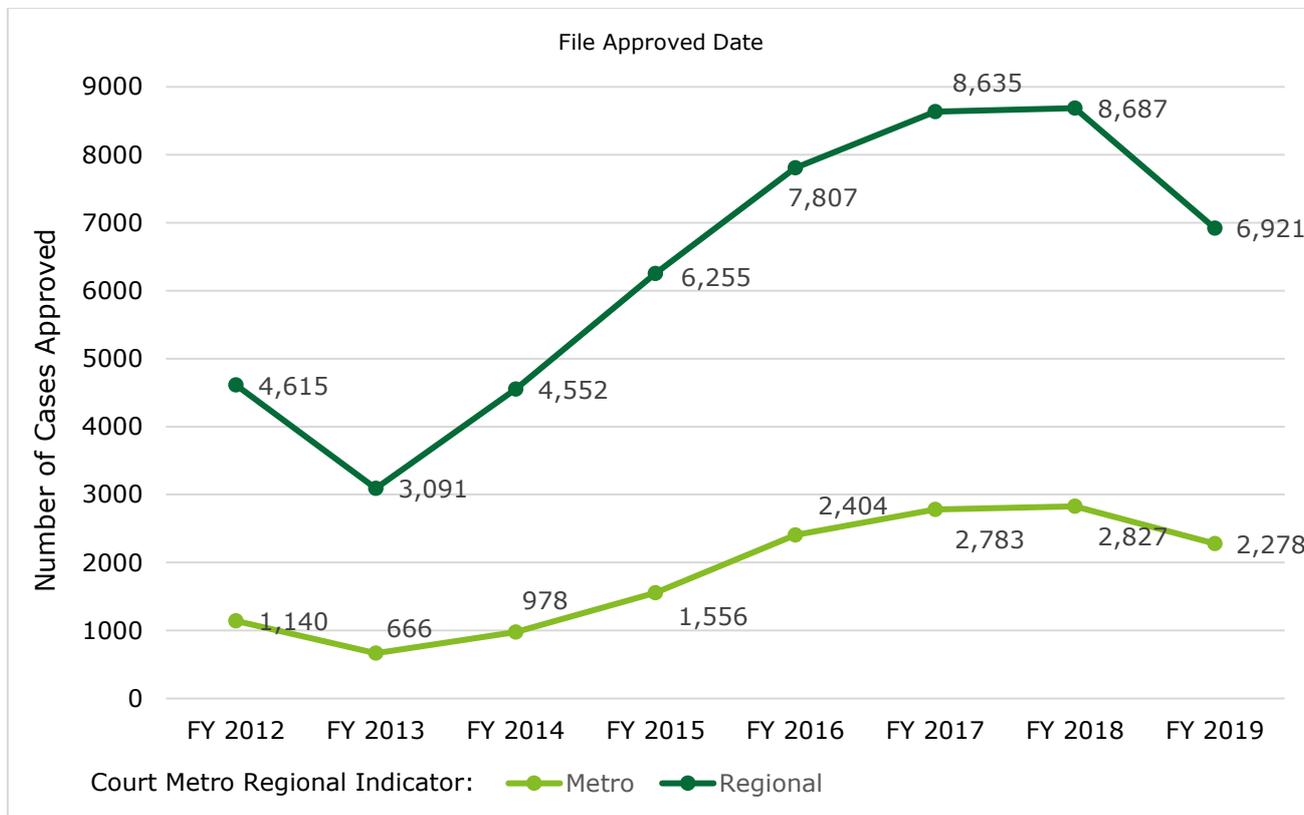
Although internal stakeholders considered that VLAC advocates filled market gaps in the provision of legally aided advocacy services in the regions, the Atlas data does not demonstrate any region in which VLAC advocates were briefed more regularly than private barristers.

Additionally, the Atlas data indicates that there has been a decline in cases conducted by VLAC in the regional courts since the 2013 financial year (from 215 cases in the 2013 year to 121 cases in the 2019 financial year) and an increase in cases briefed to private barristers in the regions (represented above and below in Figures 7 and 8 respectively). VLA stakeholders reported that this reduction in regional cases

³¹ VLA Annual Report 2017/2018 p 43.

relates to changes in listing practices. In 2013, there was a significant backlog of cases in Bendigo and the La Trobe Valley which allowed VLAC to apply a Public Defender to run the entire list of cases. As the backlog decreased, VLAC’s market share returned to the average % ratio of cases in regional areas.

Figure 8: Spread of the Bar services by court location over time



Approximately 71% of VLAC cases are conducted in the metropolitan courts. This constitutes approximately 7% of all legally aided cases which run in the metropolitan courts. The number of cases in which VLAC has been briefed in the metropolitan courts has varied, peaking at 593 cases in the 2013 financial year and steadily decreasing to 309 cases in the 2019 financial year.

The reduction in cases briefed to VLAC may also reflect the changing composition of the VLAC staff and reduced seniority of advocates. The number of cases briefed to the Bar, both in the metropolitan and regional courts does not demonstrate a similar trend. Rather, the number of matters briefed to the Bar has steadily increased over time, except in the 2019 financial year, where there has been an approximate 20% reduction in cases in both the metropolitan and regional courts.³²

VLAC advocates have appeared in cases in most regional areas. VLAC appears to have taken on a more active role in Ballarat, Bendigo, Morwell and Shepparton in terms of number of appearances. VLAC has also taken on a more significant role in terms of percentage of cases in Bairnsdale, Horsham, Warrnambool and Mildura.

³² The reason for this is unknown. However, it may be due to the reduced number of grants being approved over time or the increase in solicitor advocates in particular work types.

Figure 9 below provides details of VLAC and Bar briefs by location since VLAC’s inception.

Figure 9 Bar and VLAC Regional Court appearances by location – 10 most commonly attended locations

Regional Court	Bar		VLAC	
	Number of cases	Percentage	Number of cases	Percentage
Ballarat	3,106	92.6%	250	7.4%
Geelong	2,295	97.6%	56	2.4%
Bendigo	1,850	88.8%	233	11.2%
Morwell	1,681	85.5%	285	14.5%
Shepparton	1,064	92.2%	90	7.8%
Warrnambool	499	84.9%	89	15.1%
Mildura	465	92.6%	37	7.4%
Horsham	308	81.5%	70	18.5%
Wangaratta	295	97.0%	9	3.0%
Bairnsdale	215	81.4%	49	18.6%

Internal stakeholders consistently reported that they felt that VLAC is filling a gap in the market by appearing in the regions where it is difficult to brief quality barristers and ensure continuity of service due to uncertainty of the circuit court lists.

Stakeholders from the private Bar did not agree with this contention and advised that many barristers regularly accept circuit work in regional locations and that there are a number of barristers on the PBL who are suitably qualified to do this work.

Additional benefits cited for briefing VLAC included VLAC advocates’ assistance in the development of trial strategy for complex cases, provision of specialist legal advice and assistance in professional development of the staff practice through mentoring, shadowing and training.

Internal stakeholders reported that VLAC advocates have been temporarily placed at the Latrobe Valley to address a case backlog, which has been very effective. Currently, the Bendigo VLA office has a permanent role for a VLA5 advocate in the office to provide dedicated services in that region.

In the VLA Dandenong office, the main practice areas are summary crime, family law and family violence. VLAC’s advocates practicing in crime and family law often attend the Dandenong office. The preferred practice in Dandenong is to brief VLAC for the court matters but also to have advocates assisting in mentoring the staff lawyers. Private barristers would only be briefed if a VLAC advocate is not available. Mildura and Warrnambool were identified as regions having problems with quality and continuity of counsel.

VLAC’s ability to direct advocates to accept briefs for regional matters is seen as a benefit, if there are challenges accessing appropriately experienced counsel from the private Bar.³³

³³ In practice however, this may not always be the case. For example, internal stakeholder commented that due to the limited number of family law advocates they were rarely available to be briefed, particularly for regional courts. An example was provided where a family law advocate had been briefed in Mildura but was not available for the next circuit hearing date, creating concerns about continuity in representation for the client.

VLAC has also entered into a Service Level Agreement with the suburban and regional offices to provide uniform and equitable access to VLAC services. The Service Level Agreement provides access for the regional offices to an advocate in each practice area several times per year. In order to minimise the financial impact of providing these services, VLAC pairs regional site visits with briefed appearances in the region. Broadly, the Agreement formalises the provision of organisational benefits VLAC such as training, shadowing and reverse shadowing.

All internal and external stakeholders acknowledge the cost efficiency that could be derived through block briefing for regional circuit matters. It was suggested by stakeholders from the judiciary that VLA could work with court co-ordinators to endeavour to facilitate block briefing in criminal matters where this is able to be done appropriately and in consideration of court practice rules.

Spread of service provision: Key Findings and Recommendations

- a) In 2019, approximately 71% of VLAC cases were in metropolitan courts. This constitutes approximately 7% of all legally aided matters run in the metropolitan courts.
- b) Since inception in 2012, on average, approximately 74% of all VLAC cases are in metropolitan courts and approximately 26% in regional courts. VLAC appearances in regional courts peaked in 2014 at 35% of cases and has reduced to between 24% to 29% since 2014.
- c) Stakeholders consider that VLAC's presence in regional Victoria is of value and could be utilised more effectively to address gaps in the market, in particular in regional areas where they exist.
- d) VLAC's advocates presence at regional offices provides additional organisational quality benefits including assisting in the development of trial strategy for complex cases, providing specialist legal advice and assisting in professional development of the staff practice through mentoring, shadowing and training.
- e) There has been a reduction of approximately 20% in cases in which VLAC has been briefed in both the metropolitan and regional courts over recent years. The reason for this is unknown. While VLAC plays a greater role in some regional areas, such as Bendigo and Ballarat where a full-time advocate is located, the significant majority of regional advocacy work continues to be performed by the private Bar.

Recommendations

- a) VLAC consider implementing a more formal strategy to facilitate block briefing in regional circuit work when briefing VLAC and the private Bar, where reasonable and appropriate and take steps to collect data to assess the cost effectiveness of this strategy.
- b) Subject to collection of further data, a comprehensive cost effectiveness analysis should be conducted to identify which regional locations and matter types VLAC can best serve to maximise value for money in the delivery of advocacy services.
- c) Any such assessment should also consider the value of the broader organisational benefits provided by the VLAC's presence and provision of services in regional locations.

III. Representation in jurisdiction and work type

VLAC provides legal services across three programs being criminal law, civil law and family law across various work types within those programs.

a. Civil law program and work types

The civil law program comprises four subprogram areas:

- economic and social rights;
- equality law;
- mental health and disability; and
- migration law.

As the civil practice is very broad, it has not been possible to recruit practitioners (in the staff practice or VLAC) who practice in all areas. The solicitor practice in the civil program is all conducted in-house by the VLA staff practice. The staff practice comprises 60 lawyers. Panel firms are not used in legally aided civil law cases.

Although VLA has the share of the market in all legally aided civil law matters, the VLAC civil law practice is relatively small with only two relatively junior advocates practicing in civil law at the VLA4 and VLA5 classifications. Due to the breadth of practice in the civil program and the small size of the practice, organisationally it is considered that the most impact in the civil law program can be achieved through:

- specialisation in specific areas of civil law and matter types to address market deficiencies, such as economic and social rights and mental health and disability; and
- public interest strategic and test litigation.³⁴

The civil practice has been managed with that focus to endeavour to make the best use of resources in the program.

VLAC advocates are briefed in matters including:

- mental health cases i.e. mental health tribunal matters, Supreme Court work and CMIA matters;
- economic and social rights program in NDIS, infringements and tenancy. (The VLA staff practice services these areas on a daily basis but will brief VLAC when the matters become more complicated or progress to higher courts e.g. ECT work); and
- guardianship and administration.

A benefit cited in briefing VLAC in this area was that VLAC could be easily briefed for urgent applications with advocates having an understanding of the benefits of being able to provide continuity of service (for example, in CMIA reviews).

The share of the market in each subprogram in the civil law program for each of VLAC and the Bar is represented below in Figure 10.³⁵

VLAC is rarely briefed in migration matters and it has been briefed in only 3 cases in equality law since 2012. Matters in the migration law and equality law subprograms are briefed almost exclusively to the private Bar. However, culturally there is a preference to engage VLAC advocates. The civil law staff practice considers that due to the low fees and complexity of the civil law matters, the work is less appealing to the private Bar and it is challenging to identify barristers with relevant experience. The general approach within the staff practice is that where VLAC has expertise, it will be briefed. In addition the civil law advocates are used as a resource regularly by the staff practice for informal advice.

Since 2012, VLAC has been briefed in approximately 22% of legally aided economic and social rights cases and in approximately 46% of the mental health and disability cases. There has been a notable decline in economic and social rights cases briefed to VLAC since 2015 (from 60 cases to nothing in the 2019 financial year) and to the overall number of briefs to the Bar since the 2017 financial year (from 131 cases to 28).

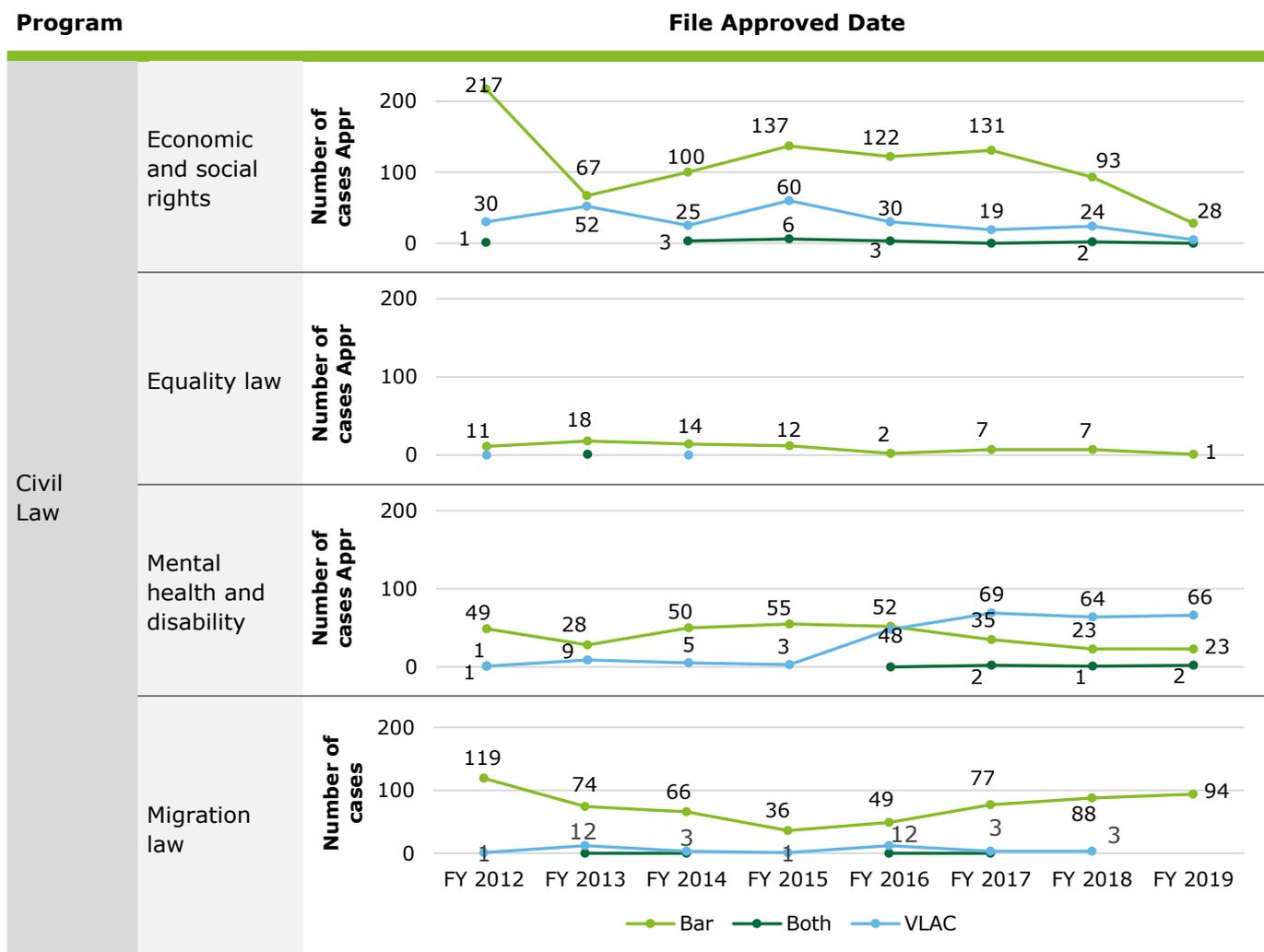
Since the 2016 financial year, the number of mental health and disability cases briefed to VLAC has exceeded the number of cases briefed to the Bar in that work type. This may be an area or where VLAC has captured a significant proportion of the market in which VLAC may be filling a market gap in the civil jurisdiction.

VLAC has been briefed in approximately 81% of total cases in the crimes mental impairment and unfitness to be tried subprogram. Internal stakeholders consider that VLAC advocates have specialist expertise in this area of practice and are skilled managing these matters. This appears to be the only matter type in which VLAC holds such a significant market share.

³⁴ The practice conducted an ETC case in the Supreme Court to seek clarity around how those rules are applied.

³⁵ Reference to 'Both' is an anomaly in the Atlas data which indicates a matter has been briefed to both VLAC and the private Bar. We have disregarded this metric due to the small numbers.

Figure 10: Share of the Civil Law market over time



Other subprograms in which VLAC has a notable share of the market in civil law matters based on the Atlas data include:

- approximately 60% in National Disability Insurance Scheme;
- approximately 42% in matters following death; and
- approximately 40% in social security.

In addition to advocacy, VLAC civil law advocates assist in training and in identifying intersections between different areas of law (e.g. this is significant in relation to the NDIS practice, as these issues arise in other jurisdictions such as criminal matters where NDIS support is relevant to bail conditions for availability).

Civil law programs and work types: Key Findings

The number of mental health and disability cases briefed to VLAC has since 2016 exceeded the number of cases briefed to the Bar, suggesting that VLAC may be addressing a market gap in this area of practice.

b. Family law jurisdiction and work types

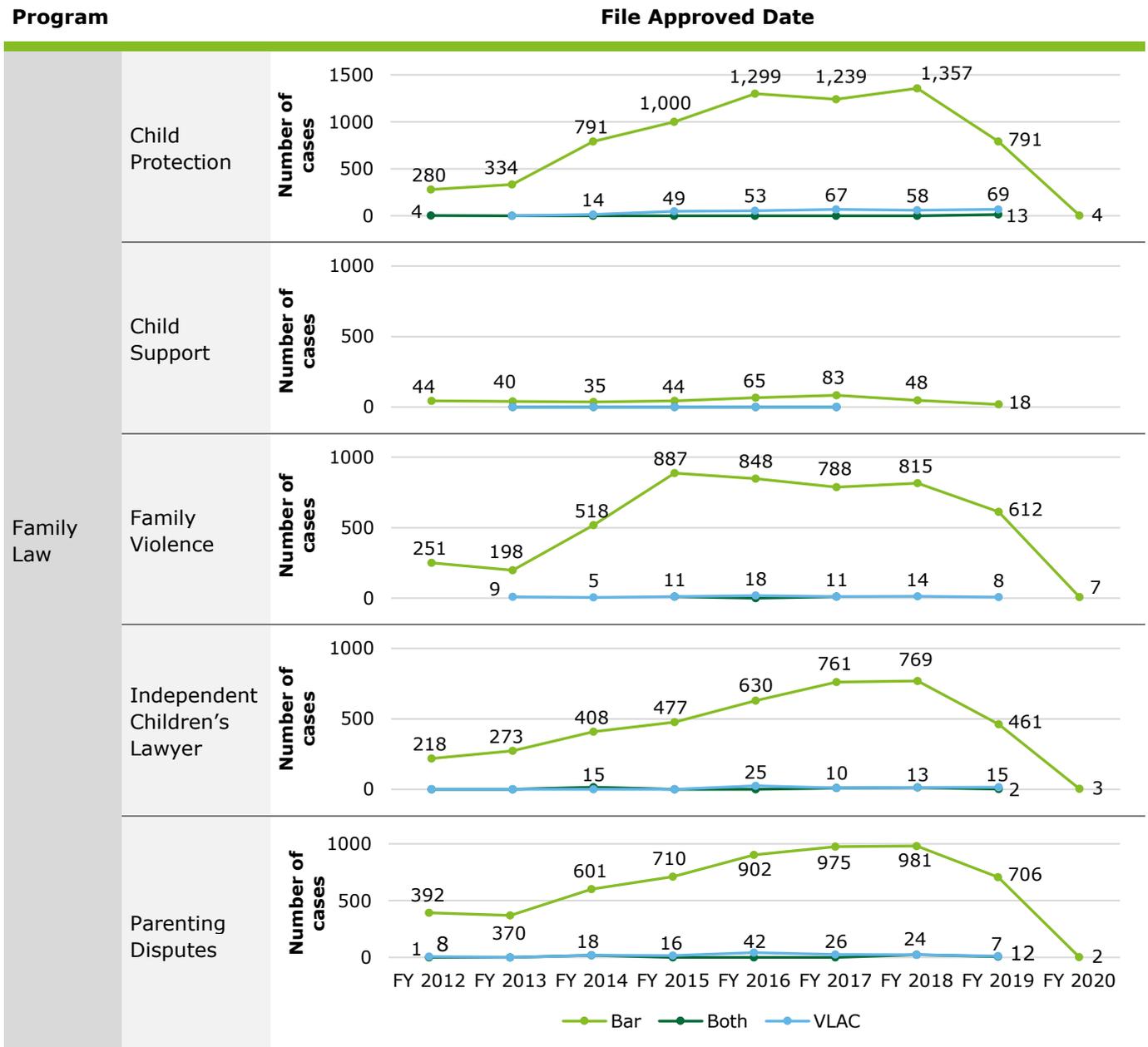
Approximately 13% of VLAC matters are in the family law jurisdiction, constituting approximately 2.6% of the total number of family law matters funded by VLA.

In the family law jurisdiction, the work types include:

- child protection;
- child support;
- family violence;
- independent children’s lawyer; and
- parenting disputes.

The number of family law matters briefed to each of VLAC and the private Bar is summarised in the below table.

Figure 11: Share of the Family Law market over time



VLAC's most significant practice in the family law jurisdiction is in child protection. VLA staff will prioritise VLAC for this work because of their expertise. However, only approximately 8% of all child protection cases were briefed to VLAC in 2019. Notably, in the 2019 financial year, there was a decline in the number of total cases briefed to counsel in this work type, falling from approximately 1,415 cases in the 2018 financial year to 873 in the 2019 financial year. This is consistent with the reduction in the number of family law matters briefed to counsel from the 2018 to the 2019 financial years across all work types.

The application of VLAC resources to child protection matters was reported to be providing a valuable resource to service this work in the context where child protection is funded wholly by grants of aid and where the number of barristers practising in Children's Court matters at the private Bar is relatively small (as compared to other practice areas, such as the criminal Bar).

Child protection cases are mostly heard in Melbourne, although there are some cases in the regions. VLA does not experience any difficulty in briefing the Bar in relation to ICL or family law matters in Melbourne, although it was reported that it is sometimes difficult to brief private barristers in the regions.

Internal stakeholders identified the family violence work type as another gap in the market that the private profession is not consistently available to service. The Atlas data however does not support this contention. Since 2012, the private Bar has been briefed in close to 5,000 family violence matters, whereas VLAC has been briefed in only 76. In all other family law work types, the private Bar is briefed in the vast majority of matters. This is due to both the limited number of VLAC advocates practising in family law (3), and their expertise being focused in particular work types, such as Children's Court matters relating to child protection.

Child protection matters in the Children's Court (Family Division) has been an area of focus based on VLA's assessment that there is increasing market difficulty briefing quality private barristers and retaining continuity of representation where private barristers are briefed, because the Children's Court often vacates these matters.³⁶

Internal stakeholders also advised that VLAC advocates assist in public interest cases like judicial review and Supreme Court appeals.

Some external stakeholders questioned the value proposition of funding 3 family advocates unless it could be established that they are in fact meeting a market gap, building specialisation in niche areas of practice, providing cost benefits through early briefing, strategic advice and early case resolution or otherwise, providing qualitative benefits by contributing to the development of family law advocacy skills within VLA (through training, shadowing and mentoring).

Family law jurisdiction and work types: Key Findings

- a) VLAC's most significant practice in the family law jurisdiction is in child protection matters.
 - b) Although the impact that VLAC is making in family law advocacy is numerically insignificant in respect of overall market impact, internal stakeholders consider that the family law advocates are a valuable in-house resource for the provision of strategic advice and assistance in professional development.
 - c) Internal stakeholders identified the family violence work type as another gap in the market that the private profession is not consistently available to service. However, the Atlas data does not support this contention with a significant volume of family violence work continuing to be briefed to the private Bar.
 - d) VLAC may consider prioritising family law advocacy services to regional areas where VLA has experienced difficulty in briefing the private Bar.
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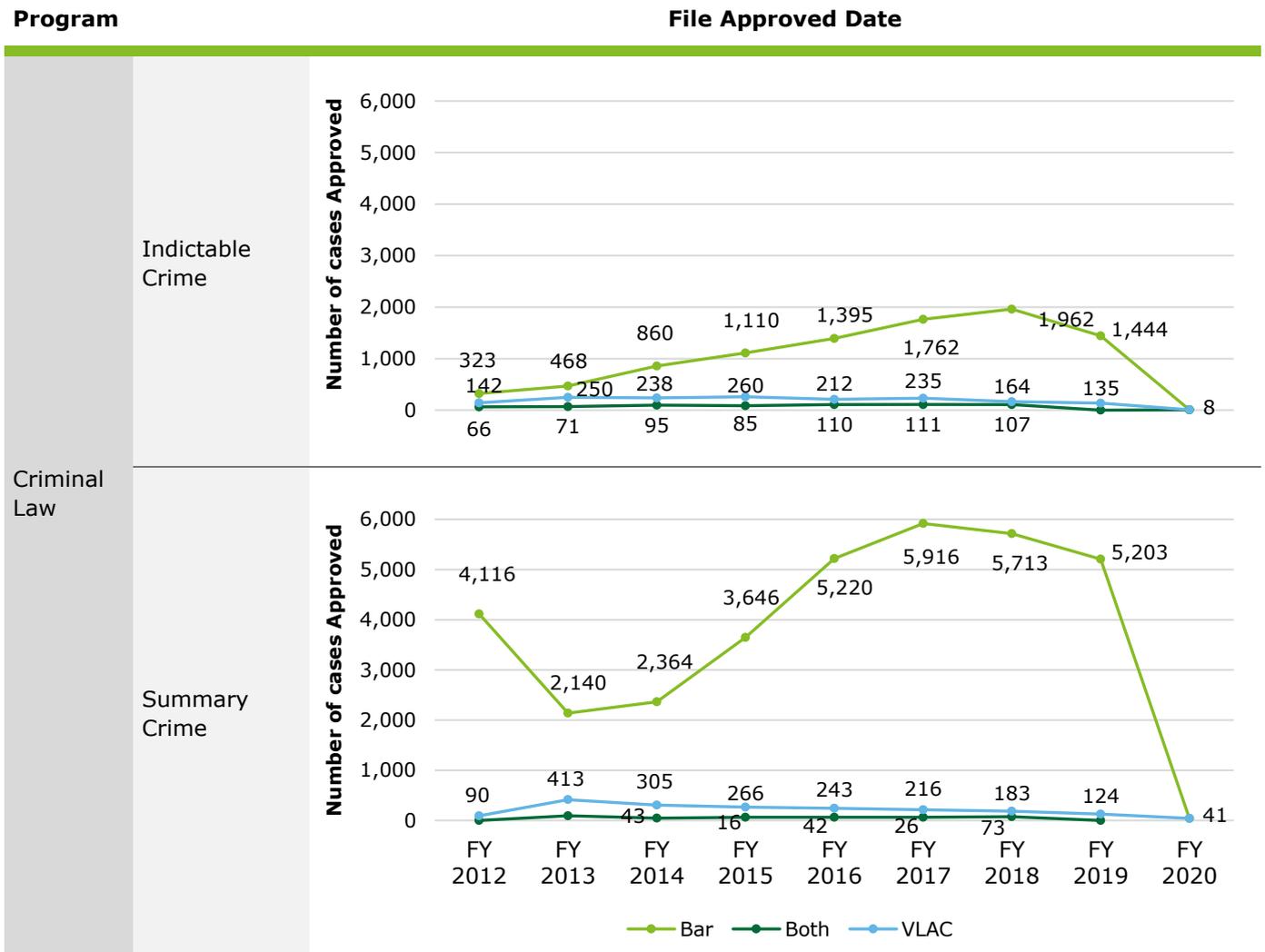
³⁶ This is not supported by the Atlas data which demonstrates that VLAC is briefed in child protection Children's Court matters in 4.2% of cases in that work type over time, suggesting there are many appropriately experienced private barristers

c. Criminal jurisdiction and work types

Criminal law is VLA’s largest practice area and comprises the largest proportion of VLAC’s advocacy work. VLAC is briefed in both indictable and summary crime cases (in broadly comparable numbers of cases over time as represented in Figure 12). Approximately 75% of VLAC work is in the criminal jurisdiction.

VLA’s overall criminal program is consistently growing and VLA has started delivering duty lawyer services at night. The duty lawyer summary crime practice is predominantly in-house, although VLA has commenced briefing this work externally to meet the growing demand. VLA funds approximately 80% of all indictable crime matters and trials constitute a significant part of VLA’s expenditure.³⁷

Figure 12: Share of the Criminal Law market over time



The number of cases (indictable and summary) briefed to VLAC has consistently decreased since the 2012 financial year. Although there was a decrease in the number of indictable crime matters briefed to the private Bar in the 2019 financial year, the number of criminal cases briefed to the private Bar has continued to increase over time.

³⁷ VLA’s website: <https://www.legalaid.vic.gov.au/about-us/news/evaluating-our-delivering-high-quality-criminal-trials-project>.

Given the size of VLAC in comparison to the staff practice and to the Bar, VLAC generally provides a relatively small proportion of advocacy services in almost all work types. However, in relation to the restricted data set *closed or concluded VLA criminal cases*, VLAC has been briefed by VLA staff in a significant proportion (above 50%) of indictable crime work types including: homicide, fraud, misappropriation and deception; sexual offences (Cth); matters arising out of criminal act; and drug and related offences.³⁸

Figure 13: Closed or concluded VLA indictable criminal cases referred to VLAC and to the Bar 2012 to 2019 – 10 most common case types.

Indictable Crime	Bar		VLAC	
	Number of cases	Percentage	Number of cases	Percentage
Assault	89	35.00%	127	50.00%
Breach offences – other courts	100	53.20%	79	42.00%
Burglary and related offences	161	43.90%	148	40.30%
Drug and related offences	78	29.40%	156	58.90%
Homicide	19	17.30%	73	66.40%
Offences against person	39	37.50%	47	45.20%
Robbery	231	43.00%	219	40.80%
Sexual offences	90	35.20%	114	44.50%
Sexual offences – Commonwealth	12	26.70%	29	64.40%
Sexual offences – State	140	31.30%	238	53.10%

Figures 13 and 14 do not include indictable or summary crime cases that have been briefed to 'Both' the Bar and VLAC. Cases briefed to 'Both' represent the remaining percentage of cases briefed.

As demonstrated in Figure 14 below, the proportion of summary crime cases briefed to VLAC is significantly smaller in comparison to the Bar.

The table below in Figure 15 details the share of criminal law briefs over time year on year between 2012 and 2019 for selected matter types. The matter types selected correspond with the cases selected for the data sample provided for the cost effectiveness analysis conducted in the Review.

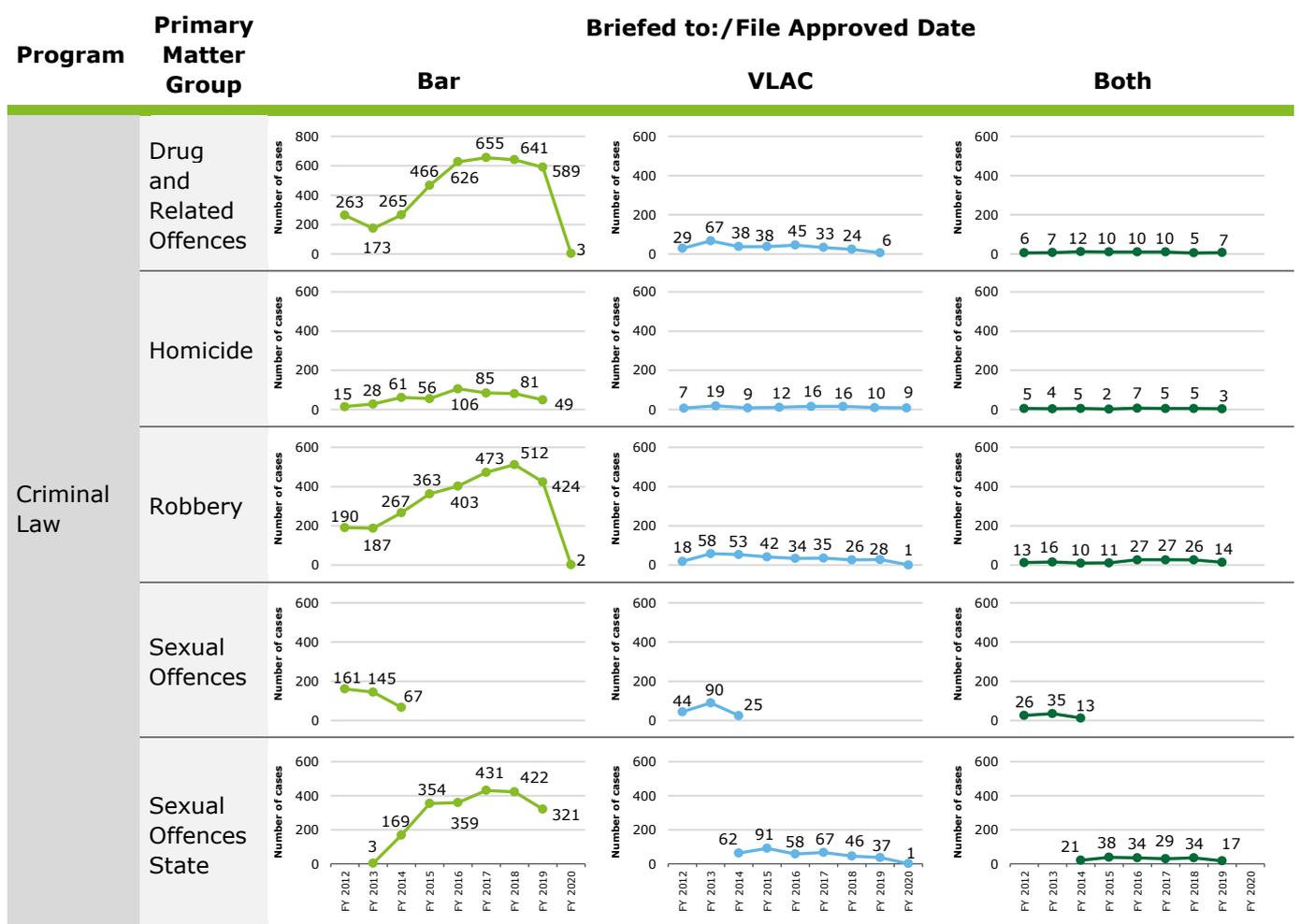
Based on the unrestricted data set of all matters briefed by the private profession and the VLA staff practice, the number of cases briefed to VLAC in each of these work types has gradually reduced over time. This may be due to the changing expertise and experience of the public defenders on staff at VLAC from time to time, noting that VLAC has increased the number of more junior advocates in recent years.

³⁸ Note where all cases are considered (not just closed or concluded cases briefed by VLA), the total number of cases briefed to VLAC is significantly less than the number of cases briefed to the private Bar in all criminal law subprograms.

Figure 14: Closed or concluded VLA summary criminal cases referred to VLAC and to the Bar 2012 to 2019 – 10 most common case types.

Summary Crime	Bar		VLAC	
	Number of cases	Percentage	Number of cases	Percentage
Assault	2,912	88.40%	289	8.80%
Breach offences – other courts	3,154	88.30%	364	10.20%
Burglary and related offences	1,901	90.60%	152	7.20%
Drug and related offences	1,103	90.50%	102	8.40%
Offences against person	1349	90.40%	113	7.60%
Property damage	570	88.90%	53	8.30%
Robbery	583	91.10%	41	6.40%
Sexual offences – Commonwealth	4	50.00%	4	50.00%
Sexual offences – State	395	82.60%	60	12.60%
Theft and related offences	1,891	90.80%	151	7.20%

Figure 15: Share of the Criminal Law market over time by offence



The number of homicide matters briefed to VLAC has decreased since its highest number of 19 cases in the 2013 financial year to 9 cases in the 2019 financial year. The number of homicide cases briefed to the Bar has also decreased from 106 cases in the 2016 financial year to 49 in the 2019 financial year. While the overall number of homicide matters briefed to VLAC is significantly less than the 66.8% of homicide matters briefed by the VLA staff practice, VLAC has continued to be briefed overall in a proportionally higher number of homicide cases than the private Bar in terms of the size of VLAC compared to the size of the private Bar and the PBL.

There has also been a decrease in the number of sexual offences/sexual offences state cases briefed to VLAC over time since 2015, with the matters briefed to the Bar noticeably reducing in the 2019 financial year only. However, notwithstanding the decrease in the number of cases, VLAC appears to be briefed in approximately 19% of all sexual offences matters which is a high proportion in terms of its size as compared to the private Bar.

Although the number of criminal cases approved for legal aid has increased over time, there has been a reduction in approved grants in criminal matters from the 2018 to the 2019 financial year approximately 14%. The reduction in indictable crime matters briefed to VLAC (such as homicide and sexual offences) over time has decreased since the 2013 financial year reflecting a reduction in market share in indictable matters.

Internal stakeholders in the criminal law program consider that VLAC is filling a gap in the market in relation to particular "high needs" areas and emerging areas of practice. In particular matter types, internal stakeholders consider VLAC has developed specialist expertise, including mental impairment homicide and serious sex offender detention and supervision orders. However, stakeholders consulted from the Victorian Bar contended that there is also a sufficient number of appropriately skilled and experience barristers to represent clients in all matter types across all of VLA's programs.

Representation in jurisdiction and work type: Key Findings and Recommendations

- a) VLAC's civil law practice is relatively small with only two junior advocates. Due to the breadth of practice in the civil program and the small size of the practice, the most impact in the program can be achieved through public interest strategy and test litigation and specialisation in specific areas of civil law to address market deficiencies.
 - b) VLAC's most significant practice in the family law jurisdiction is in child protection matters. Although the impact that VLAC is making in family law advocacy is numerically insignificant in respect of overall market impact, internal stakeholders consider that family law advocates are a valuable in-house resource for the provision of strategic advice and assistance in professional development.
 - c) The number of criminal law cases briefed to VLAC has gradually reduced over time, (this may be due to the changing expertise and experience of the public defenders). However, VLAC is briefed in a significant proportion of all VLA indictable crime matters both when briefed by the staff practice and overall in proportion to the size of VLAC in comparison to the size of the private Bar. The criminal practice remains VLA's largest practice area and comprises the largest proportion of VLAC's advocacy work.
 - d) In developing an appropriate future model, VLA should identify which work types VLAC can deliver most cost effectively to maximise the value in its delivery of advocacy services. The results of this analysis should also inform the allocation of current resources and any future recruitment strategy.
 - e) An appropriate future model for advocacy services in the indictable crime jurisdiction may also equally apply a strategic lens to the types of cases which should be briefed to VLAC based on considerations as to where VLAC's engagement delivers broader organisational value, including:
 - cases in specialist work types where VLAC has or is able to develop specialist expertise (such as mental impairment or SSODSO);
 - cases where there is a public interest in VLAC conducting the trial for example, strategic/test cases to assess efficacy of new laws; and
 - cases that provide appropriate opportunities for staff development.
-

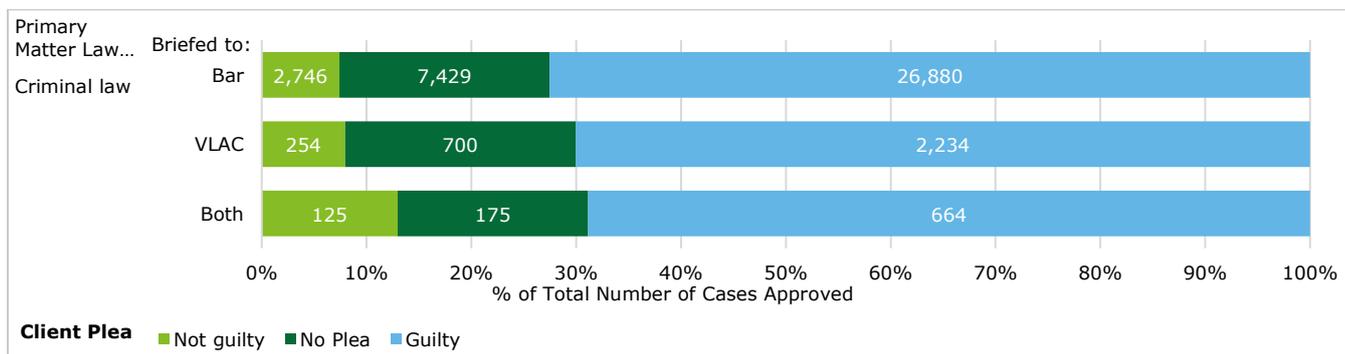
Part 5 | Performance of VLAC

A. Quality of Services

I. VLAC advocacy work

The Atlas data suggests that the outcomes of pleas for criminal cases briefed to VLAC and the Bar have been proportionally similar over the time³⁹ (represented below):

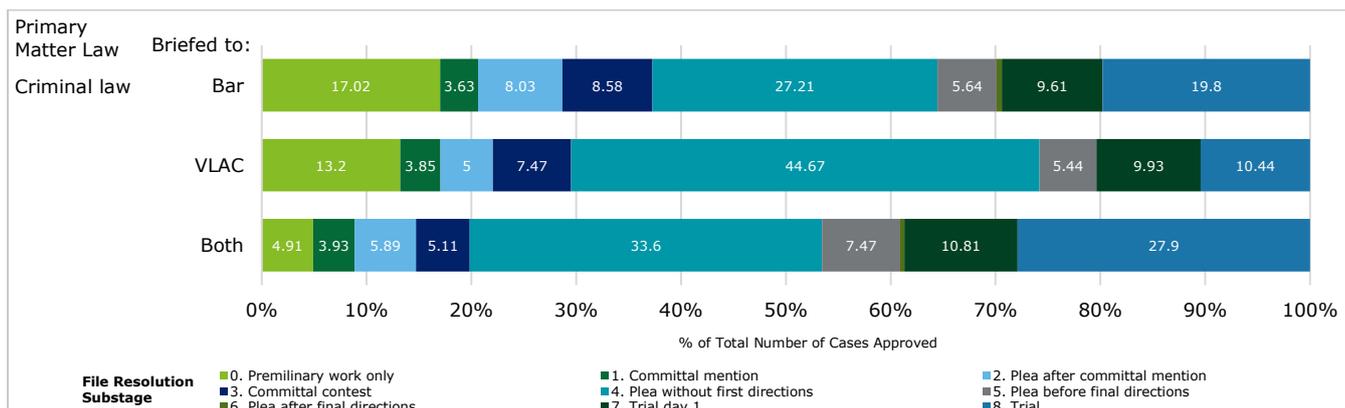
Figure 16: VLAC outcomes for clients compared to the Bar – Pleas



Additionally, the outcomes for stage of matter resolution are similar for VLAC and the Bar across each stage of a trial except in relation to:

- pleas without a direction hearing, where 45% of VLAC cases and 27% of Bar cases resolve; and
- trials, where 20% of cases briefed to the Bar conclude and 10% of cases briefed to VLAC conclude⁴⁰ (represented below).

Figure 17: VLAC outcomes for clients compared to the Bar – Stage of Resolution



The general view of VLA/VLAC is that VLAC advocacy facilitates earlier resolution of cases. There was a general consensus that early resolution is facilitated through early briefing enabling an assessment of the matter at an earlier stage and early trial preparation. Consistency in briefing the same counsel/barrister throughout the matter was agreed to be beneficial.

³⁹ Approximately 70% guilty pleas, 20% no plea and 7.5% guilty plea.

⁴⁰ Percentages are approximations.

The Bar and LIV cautioned that early resolution should not be considered as a reliable measure of quality, as there is significant variability across cases (in facts, issues and complexity) and the basis for resolution and the appropriateness of the outcome for the client is unable to be assessed. Whether there is any selection bias in cases briefed to VLAC would also impact the reliability of early resolution as an indicator of the quality of advocacy services.

Based on estimated length of trials in all criminal matter types, cases briefed to the Bar have longer estimated trial days (particularly in relation to theft and related offences, Commonwealth offences, sexual offences and drug and related offences).⁴¹ This suggests that on average, the more complex cases are briefed to the Bar.

Currently, VLA does not collect any data that records the appropriateness of outcomes for clients or the number of VLAC cases which have been subject to appeals based on error. Similarly, private barristers are not required to record or collect this data.⁴²

II. Quality of VLAC advocacy compared to private practitioners

Advocates maintain professional CPD requirements and no notable unresolved complaints have been reported in respect of the quality of VLAC advocates.

The quality of advocates within VLAC was commended by internal stakeholders. External stakeholders could not attest to the quality of VLAC advocacy, as they generally have no visibility of whether a VLAC advocate is appearing in court.

Internal stakeholders expressed a preference to brief VLAC advocates in all areas based on quality of services, except where expertise or experience is limited. Some external stakeholders noted that there is variability in the expertise of the VLAC advocates due to changes in staff advocates and variabilities as practice levels with VLAC currently considered to be made juniors.

Some external stakeholders expressed the view that VLAC may be small as compared to the private Bar. However, it could be more strategic in respect of areas of specialisation and maintaining the requisite experience and skills levels through training and recruitment rather than just pursuing an organic growth approach.

III. Recruitment and retention of appropriately qualified advocates

Some internal stakeholders expressed concerns about the current composition of staff advocates being more junior than in previous years and noted that the breadth and level of expertise and experience in VLAC will necessarily depend on the composition of VLAC at any point in time.

It is recommended that VLAC undertake a review of its current recruitment practices and consider a more targeted approach to meet organisational needs in terms of expertise, experience and skills.

Retention rates in VLAC are relatively stable and it was reported that the existence of VLAC has improved retention by reason of VLAC providing an opportunity to develop advocacy skills and do high level advocacy work. The senior public defender level in particular has very high staff retention rates.

IV. VLAC quality assurance processes with reference to other models

Internal stakeholders reported that VLAC does not have a specific quality assurance process in place, although it is considered that high standards are maintained through careful management and oversight by senior staff.

⁴¹ The estimated number of trial days is a variable from barristers' invoices. Where two barristers appear in the same case, their number of days are not aggregated, rather the greater estimated number of days is reflected in the data assuming they appear at trial concurrently.

⁴² The Victorian Bar's ICC renewal process includes a review process in respect of any adverse findings by appeal courts concerning a barrister's professional advocacy skills.

In submissions to the Access to Justice Review, VLA stated that it has been building its quality framework including the Victoria Legal Aid's Panels Project, the High-Quality Criminal Trials Project, compliance functions, the introduction of quality audits and regular feedback through client surveys and monitoring of complaints.

VLAC advocates are involved in the post-implementation review being undertaken by consultants, Protiviti, to evaluate steps introduced as part of the Delivering High Quality Criminal Trials Project conducted in 2013.

Further, complaints in respect of VLAC advocates are monitored (discussed above). However, it is unclear whether VLAC has implemented a practice of regular client feedback through internal client surveys and external client surveys where appropriate.

Given the overall positive feedback from the internal staff about advocate quality of service and the nominal reported complaints against VLAC advocates, the overall professionalism and quality of advocates does not appear to be an issue. However, the Review considers that VLAC would benefit from implementing formal quality assurance processes and independent internal client feedback surveys and external surveys where appropriate.

Quality of services: Key Findings and Recommendations

- a) Feedback from the internal staff about advocates' quality of service is overwhelmingly positive. External stakeholders did not comment specifically on the quality of VLAC advocates. No negative comments were made and it was noted that VLAC provides a good opportunity for junior barristers to develop and have increased opportunity to do high level advocacy work.
 - b) VLAC would benefit from implementing more formal quality assurance processes and client feedback surveys.
-

B. Availability of Services

I. To the private profession

Briefs from private solicitors constitute approximately 4% of all matters briefed to VLAC. It is unclear whether this is due to a lack of awareness of the availability of services by VLAC or due to private solicitors having established relationships with preferred private barristers or both. Due to the small size of VLAC, it is unlikely that it could accept a greater number of briefs from the private profession.

Based on consultations with internal stakeholders, we understand that when advocates appear in circuit courts in the regions, VLA will often notify the local private solicitors who do legally aided work that a VLAC advocate will be available. However, it is up to the solicitors who they brief in any given matters. Internal stakeholders consider that recently there has been less take up than in the past.⁴³

II. To the VLA staff practice

VLAC is predominantly briefed by the staff practice pursuant to the principles contained in the Co-ordinated Briefing Policy. The size of VLAC in comparison to the staff practice means that VLAC advocates are often unavailable to be briefed by the VLA staff practice. This was confirmed by many of the internal stakeholders consulted by the Review.⁴⁴

⁴³ Based on consultation with internal stakeholder, VLA Bendigo Office, Managing Lawyer.

⁴⁴ VLA provided data to the Review which suggests close to 1000 briefs were declined by VLAC in the 2018/2019 year and just under 600 cases in the previous year.

Availability of services: Key Findings

- a) The number of briefs from private solicitors is currently immaterial and given the limited size of VLAC it is not likely this will substantially increase in the future.
- b) Due to the limited size of the VLAC practice, VLAC advocates are often unavailable to be briefed by the VLA staff.
- c) It is considered that there is a sufficient number of barristers at the private Bar that can be briefed when VLAC advocates are not available or do not have the requisite skills or experience for a particular matter. There may however be an opportunity to assist private solicitors in some regional areas.

C. Cost Effectiveness

I. VLAC cost effectiveness analysis

a. Approach and data considerations

Cost effectiveness analysis measures the incremental cost per extra unit of outcome and enables a comparison of effectiveness between options, in this instance the cost of providing services through VLAC compared to the cost of private practitioners providing similar services.

In order to make such comparisons the relationship between costs (e.g. time charged for briefing) and outputs (e.g. representing a homicide defendant) needs to be established for both VLAC and private barristers.

Using grants of aid payment data (i.e. Atlas data), the costs associated with the services provided by a private barrister can be estimated, noting the limitations of this data in the following section. Barristers invoice against the grant of aid when they perform legal aid work, subject to the payment structure outlined in the VLA Handbook for lawyers (**Handbook**). This allows association of the total invoices received from a barrister for services on a case, such as a homicide, to the grant of aid for the case.

In contrast, there is a shortage of useful cost information relating to the provision of services through VLAC, due to VLAC advocates being salaried employees of VLA. While VLAC advocates do invoice against grants of aid, this is done notionally. The true cost of their services is effectively a proportion of their salary associated with a case. Further, using notional costs (grants of aid data) to estimate the cost of VLAC services is subject to an additional limitation detailed in the following section.

Cost estimation of the services provided by VLAC advocates could be estimated by taking the time performing legal work in calculation with annual salaries. However, it is not VLA practice for VLAC advocates to keep timesheets. Additionally, due to the nature of legal matters, often extending over large periods of time, it is also not possible to accurately estimate the costs associated with total VLAC legal aid work completed in a year as a proportion of total annual salaries.

Given these challenges, the data used to analyse the costs of providing services through VLAC as compared with the private Bar, were as follows.

b. VLAC costs

A sample of recent VLAC cases was provided in indictable criminal matters. These cases were all resolved at trial and contained a mix of matter types consistent with the cases in respect of which both VLAC advocates and private barristers are briefed.

For each case the associated notional cost per case billed to undertake the trial was given (first day appearance fee plus subsequent days fee as set out in the Handbook), as well as the dedicated preparation time (days) per case. Estimates of time were inferred from advocates' calendars, where time had been allocated to work on a specific case.

A cost was estimated for each case provided by apportioning the direct and indirect costs of VLAC based on the estimated length of time spent preparing for the case (preparation time) which was then added to the notional billed cost (actual cost to deliver the trial).

Figure 18: Sample data composition

Homicide	Robbery	Sexual Offences	Drug Related Offences
N=6	N=6	N=7	N=5

Figure 19: The salaries of VLAC staff were sourced from the VLA Enterprise Agreement 2016-2020. A daily wage was calculated for each advocate level and as an average based on the employee composition as at July 2019.

Employee Level	Daily salary (as at April 2019)
VLA4	\$ 382.65
VLA5	\$ 483.15
VLA6	\$ 581.79
Average	\$ 482.53

Figure 20: Annual indirect and direct costs were recorded in financial data provided by VLA. These costs were applied on a daily basis per employee. As at July 2019, VLAC consisted of 30 employees. Yearly indirect and non-salary direct costs were apportioned over all employees on a per day basis to be applied based on the estimated length of time spent on each case.

VLAC indirect costs (per employee per day)	VLAC non-salary direct costs (per employee per day)
\$87.82	\$20.65

c. Bar costs

Grants of aid payments made to private barristers as recorded in the Atlas data system were deemed inappropriate to use as a means of comparison with the VLAC sample cases, due to the inability to accurately compose a comparable sample. This is because the costs attributed directly to the preparation and delivery of the trial itself could not be accurately distilled from the numerous other costs associated with each case.

For this reason, in consultation with the VLA, it was determined that the notional billed cost (actual cost to deliver the trial) associated with each of the VLAC sample cases is equivalent to the amount that would be paid to the Bar if a private barrister had undertaken the case. This is because, whether undertaken by VLAC or a private barrister, the 'actual costs' are determined by the payment structure outlined in the Handbook. In some cases, the Bar and VLAC may apply for an additional payment where the preparation associated with a trial is deemed to be particularly high. For the purposes of this analysis, where this has been granted to the Bar, this is included as "Additional preparation allowed". To avoid double counting with time recorded preparation time, this notionally billed additional preparation was excluded from VLAC costs.

d. Summary of approach

For the sample of cases provided:

- VLAC costs have been calculated as: Notional billed cost (first day appearance fee plus subsequent days fee as per the Handbook) + Preparation days (VLAC direct and indirect costs per day); and
- Bar costs have been calculated as: Billed cost (first day appearance fee plus subsequent days fee as per the Handbook) + Additional preparation allowed.

The accuracy of a cost comparison using the sample data is limited by the sample size, the degree to which the inferred time estimates capture the actual time spent on trial preparation by VLAC advocates and finally, the degree to which the small sample of recent cases is representative of common case work between VLAC and the Bar.

e. Findings

The results of a comparative analysis using the approach outlined above demonstrates that, for each of the four matter types resolved at trial that were included in the sample, the cost of cases briefed to the Bar are less than the cost of cases briefed to the VLAC. Principally the cost of briefing VLAC is higher due to the additional costs incurred during the preparation for trial conducted by VLAC, calculated based on salaries and other direct costs.

By contrast the cost for a private barrister where the costs incurred only relate to the standard preparation fee included in the first day of trial fee and the subsequent trial day fees on the grant of aid, as well as any additional preparation allowed for more complex cases. Whilst additional work may have gone into preparing for the trial, this is incurred by the private barrister rather than VLA. In reality, this means that the true cost of delivering the trial is not being captured for cases being briefed to the private Bar. However, this transfer of cost to the private Bar makes this option more cost-effective for the VLA.

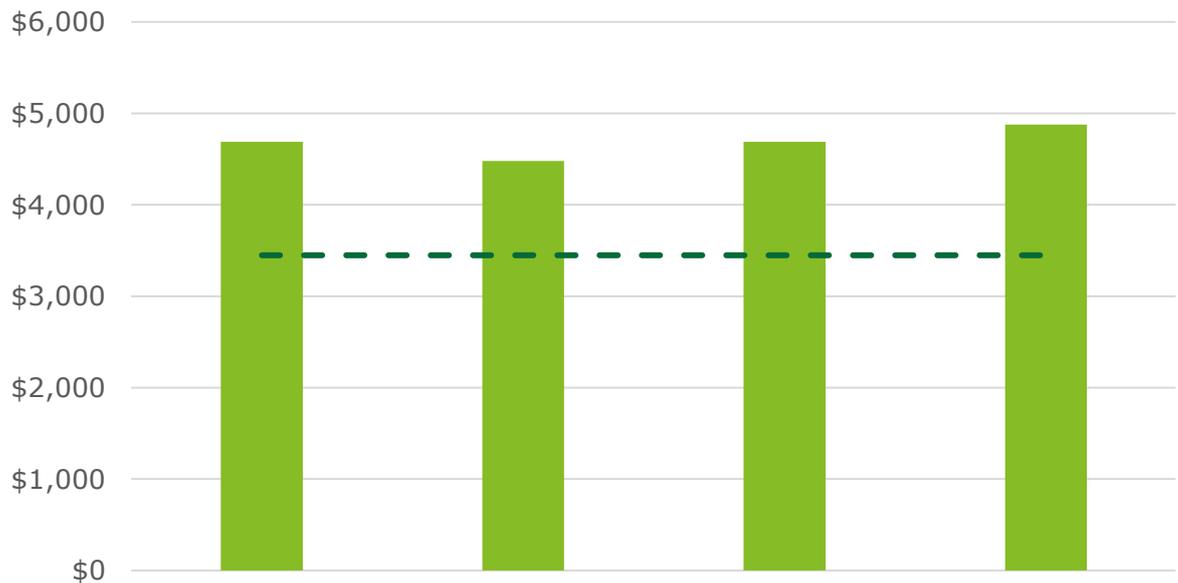
The charts below show the average cost of delivering cases resolved at trial for each VLAC staff level (and using an average advocate salary), compared to the average cost for cases briefed to the Bar for each matter type.

Figure 21: Homicide cases resolved at trial



It is more likely that more experienced advocates would be briefed in homicide cases at \$17,020 as compared to the cost of briefing the Bar at \$13,551. The sample data suggests that it is approximately 25% less expensive to brief the private Bar in homicide matters.

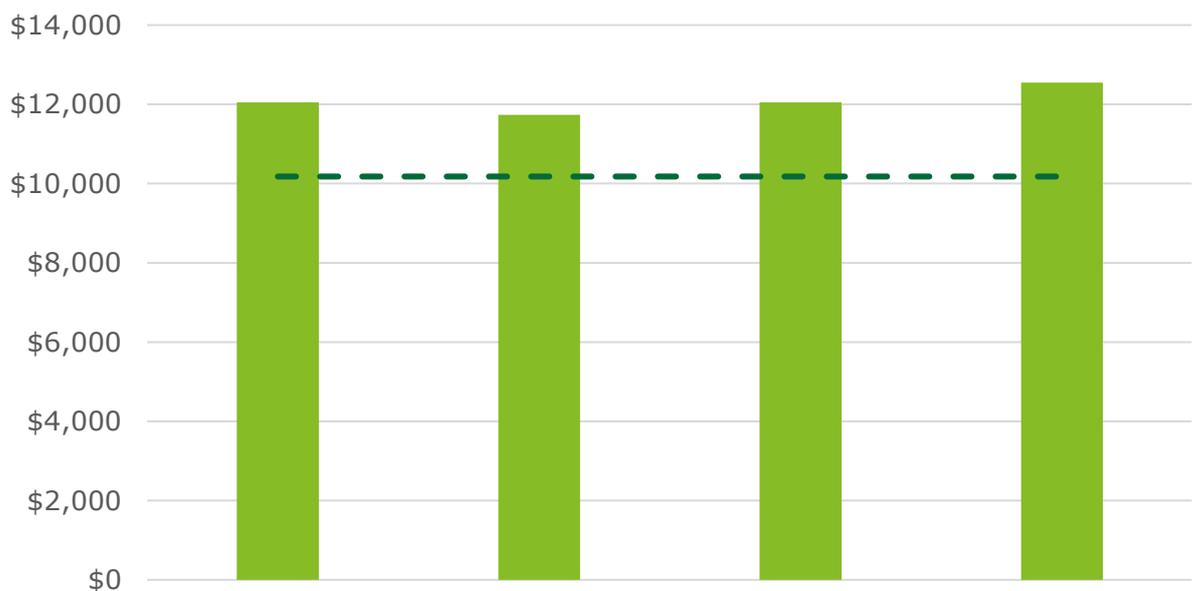
Figure 22: Robbery cases resolved at trial



	Average	VLA4	VLA5	VLA6
VLAC	\$4,689	\$4,479	\$4,690	\$4,897
The Bar	\$3,448	\$3,448	\$3,448	\$3448

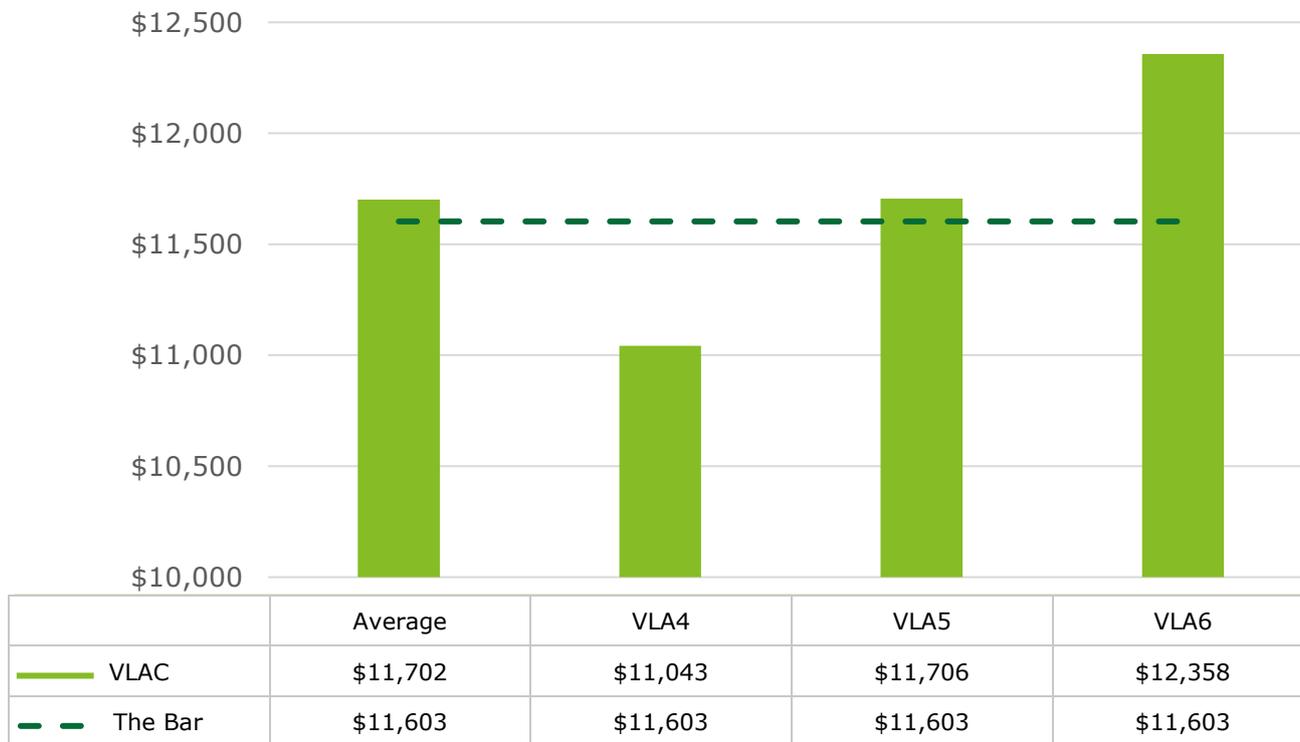
The sample data suggests that it is less expensive to brief the Bar in robbery cases resolved at trial. The cost differential is less than 10% between briefing a VLA4, VLA5 or VLA6 for this type of matter. Atlas data does not reveal which level of advocate appears in types of cases.

Figure 23: Sexual offences resolved at trial



	Average	VLA4	VLA5	VLA6
VLAC	\$12,050	\$11,734	\$12,052	\$12,547
The Bar	\$10,179	\$10,179	\$10,179	\$10,179

Figure 24: Drug and related offences resolved at trial



Cost differential varies from 0.8% more expensive on average to 6.5% more if a VLA6 advocate is briefed. Assuming the average is in appropriate measures, VLAC may be as cost effective to brief as the Bar.

While the above results show the private Bar to be cost effective, there are a number of considerations and limitations which impact the interpretation of the findings. These include:

- to attain a statistically appropriate estimate of costs, a larger sample for each matter type would be necessary. A larger sample would also provide a greater level of comparability between VLAC and the Bar;
- there may be a level of inaccuracy contained in the sample data. It cannot be guaranteed that the estimations of time spent on each case inferred from VLAC advocates’ diaries, are a true reflection of the actual time spent on each case;
- the approach used has assumed comparable cases being briefed to both the VLAC and the Bar. However, in reality this may not be the case. Under the VLAC cost model, a VLAC advocate working on a case for a day will generally incur the same cost regardless of the specific service being provided, being their daily wage (noting the existence of VLA flex arrangements). In comparison, private barristers are paid for different service/appearance items which vary in cost. What this means is that if VLAC advocates are consistently appearing in cases that are resolved at the first day of trial, then there will be a natural cost discrepancy to cases briefed to the private Bar; and
- the sample cases do not reflect ‘real’ cases that have been briefed to the Bar. Rather, they are a cost estimate based on using the Handbook, based on the trial characteristics. Being able to distil trial related costs using a matched sample from the grants data in Atlas would enable a more accurate analysis of actual cases being briefed to VLAC and the private Bar.

f. Comparison with alternative models in other jurisdictions

When assessing the efficiency of the services provided by VLAC, one valuable consideration is to compare the service delivery model to that of similar models in other jurisdictions. Queensland has in-house public barristers who represent legal aid clients. However, NSW has The Public Defenders’ Office, which is an organisation independent of Legal Aid NSW.

High level data for these models was provided for the purposes of comparison with VLAC. By comparing the overall funding, the size of the practice and the overall budget, it can be determined whether VLAC offers an equivalent service to that of other states. This data is presented in the table below.

Figure 25: Comparable models – Overall funding, size of practice and budget

	VLAC	LAQ Chambers	NSW Public Defenders
Matters	29% of all criminal law grants of aid	25% of all criminal law grants of aid	1014 matters (all criminal)
Number of advocates	22	16	29
Funding	\$4,119,000 (\$3.33 million for staff salaries)	\$3,159,000 for staff salaries	\$11,065,000 (85% related to employee expenses)

This information shows that, particularly when compared with the Queensland in-house chambers model, VLAC undertakes a similar proportion of cases for a comparable cost and staffing profile.

Additionally, the nature of the work undertaken is similar across each of the practices. A significant majority of the work undertaken by the three models is criminal work (100% for NSW being the Public Defenders' Office, 99% for LAQ and 75% for VLAC). The VLAC undertakes more civil and family law work than LAQ's in-house chambers.

One major difference is the complexity of matters undertaken by in-house advocates at VLAC in comparison to the NSW and Queensland practices. As previously outlined, in recent years there has been a decline in the more serious indictable offences cases briefed to the VLAC. These more serious and complex cases are more often briefed to the private Bar. Accordingly, the analysis outlined above indicates that this is a more cost-effective decision.

However, the NSW Public Defenders 2017-18 Annual Report states that "Public Defenders are often briefed in lengthy and complex trials to help contain the cost of such matters." The Service Level Agreements in NSW which are used to set the framework for the work undertaken by Public Defenders state that priority should be given to more serious, lengthy and complex matters. This is on the assumption that by focusing on high cost matters, the services provided by Public Defenders will be more efficient. This does however, mean that they do not undertake as many matters per year, as they are not available to work on other cases.⁴⁵ These findings are based on assumptions only and would need to be validated through a cost effectiveness analysis.

A review has been undertaken to compare the cost effectiveness of the Queensland in-house chambers model with outsourcing grants of aid matters to the private Bar. The results of the review found that the cost effectiveness depends on the matter type. For example, for pleas of guilty and summary trials undertaken in the Magistrates' Court, using the private practice was deemed to be more cost effective, whereas for more 'expensive' and complex cases such as serious assault, homicide, drugs, robbery and sexual assault, the in-house practice was found to be significantly more cost effective.⁴⁶

Whilst this difference between the Queensland and VLAC findings should be explored further, it may be explained by differences in the approaches used to undertake the cost effectiveness analysis. The Queensland analysis compared the average hourly rate of in-house advocates to private barristers, the Review's analysis considers the cost of the grant of aid for a sample of cases and the time spent on the case by the VLAC advocates.

⁴⁵ The Public Defenders, Annual Review 2017-2018.

⁴⁶ Legal Aid Queensland (2018) Cost effective and efficient utilisation of the in-house practice.

g. Utilisation analysis

Analysis of staff utilisation targets was undertaken for the 12 month period ending in May 2019. The proportion of advocates who were under, meeting and exceeding their utilisation target was grouped by staff level and averaged across the year. The results are presented in the table below.

Figure 26: Staff utilisation average %

Staff level	Average % under utilisation target in any given month	Average % meeting target in any given month	Average % above utilisation target in any given month
VLA4	35%	19%	46%
VLA5	50%	15%	35%
VLA6	53%	9%	38%

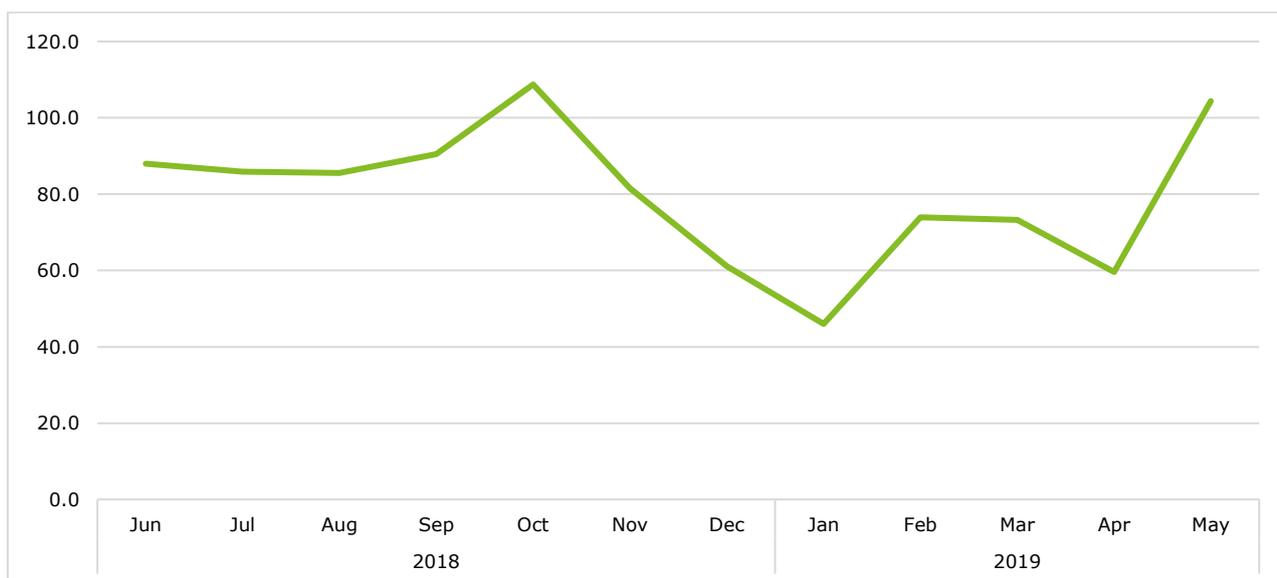
This analysis shows that VLA4 advocates are meeting their utilisation target more frequently than any other staff level. VLA5 and VLA6 advocates were under-utilised at least 50% of the time across the twelve month period. Across all staff levels, for the twelve-month period, the average utilisation rate was 79.8%. This indicates that those staff members who were above target, are typically significantly so. This was tested by showing the average utilisation rate for those exceeding their target according to staff level. The table below shows that for each staff level, when utilisation was exceeded, it was above 100% on average.

Figure 27: Staff utilisation above target

Staff level	VLA4	VLA5	VLA6
Average utilisation when target is exceeded	35%	19%	46%

Overall, utilisation levels varied across the year. This is shown in the chart below.

Figure 28: Staff utilisation levels – 12 months to May 2019



There may be various factors contributing to utilisation rates in respect of VLA6 advocates and VLAC advocates more generally. In respect of VLA6 advocates, mentoring and supervision of junior staff may impact utilisation. Additionally, where matters are resolved early or fail to proceed, utilisation may be affected. In respect of VLAC advocates more generally, the current method of assessing utilisation via “notional billing” may also not present an accurate assessment as to utilisation.

h. Key Recommendations – Cost Effectiveness Analysis

Noting the limitations of the cost effectiveness analysis as outlined in the approach overview, implementing the following improvements to data collection would enable the VLAC to undertake a more robust cost effectiveness analysis in the future:

- Consistent time sheet recording of time spent performing legal work for each case. This would more accurately capture the actual time spent per case by advocate level and therefore allow a calculation of cost estimation per case, by taking the time performing the work in calculation with the annual salaries.
- Alternatively, VLA could consider implementing a periodic time recording program. This could be achieved through regular time recording projects conducted over a reasonable period (e.g. 3 to 6 months) across a viable sample size and at appropriate intervals (e.g. every 2 years). This would enable cost effectiveness to be measured over time and would be capable of being analysed to consider variations in staff salary and associated costs.
- More consistent and accurate recording of legal services notionally against a grant of aid in order to better estimate the true cost of the services being notionally billed by the VLAC advocates as compared with those being billed by the private Bar. This would also enable a more accurate comparison of the nature of work being undertaken by the VLAC advocates compared with the private Bar and therefore, the complexity of cases could be taken into account when assessing cost effectiveness.

II. Competitive neutrality

VLA's Coordinated Briefing Policy was revised in May 2019 following a review in December 2017. Broadly, the policy applies to VLA staff lawyers in relation to briefing in-house advocates and private barristers in indictable crime matters. Under the revised policy, VLA solicitors may choose from a list of private barristers when two or fewer suitably skilled and experienced in-house public defenders are available to be briefed in Significant Criminal Cases, Standard Criminal Cases – contested committals and Standard Criminal Cases – jury trials.⁴⁷ However, certain assumptions will apply in relation to Significant Criminal Cases, which will ordinarily be conducted by a public defender rather than being briefed to the private Bar.

Where aid has been granted for two counsel in a Significant Criminal Case, one of the counsel should be an in-house advocate. Notably, if three or more public defenders are available, approval to brief a private barrister from the PBL can only be given by the Significant Criminal Case Committee (in the case of a Significant Criminal Case) or the Associate Director Chambers or Chief Counsel (in the case of a standard contested committal or standard jury trial).

Broadly, in all other matters, an in-house solicitor may brief a private barrister only where a good reason is provided (such as continuity of representation) and a public defender is not available or there is only one public defender available and they are not suitably qualified. Where at least one public defender is available then a private barrister may only be briefed with the approval of the Briefing Manager or Associate Director Chambers. For proceedings in the Court of Appeal, decisions about allocation of Counsel are made by the Program Manager Appeals and Strategic Litigation, in consultation with the Executive Director Criminal Law.⁴⁸

The amendments made to the policy are intended to ensure that in serious indictable crime matters, the most appropriate counsel is briefed. Notably, the policy does not separately deal with briefing principles relating to counsel appearing in the circuit courts.

⁴⁷ All terms are defined in VLA Coordinated Briefing Policy (May 2019) p 4.

⁴⁸ VLA Coordinated Briefing Policy (May 2019) ps 9-10.

External stakeholders at the Victorian Bar expressed concern that the briefing policy reduces the pool of eligible advocates significantly. Although the policy has been amended, arguably the amendments do not go far enough and are not clear enough. In particular, it is unclear why the assumption that VLAC will be briefed will apply in relation to Significant Criminal Cases, which will ordinarily be conducted by a public defender rather than being briefed to the private Bar. Arguably, in these types of more serious matters, solicitors and defendants should have greater choice in the selection of the advocate to appear to ensure the most appropriately skilled and experienced advocate available is briefed.

While the Coordinated Briefing Policy prioritises briefing VLAC, who is ultimately briefed in any given matter will depend on the availability of required expertise within VLAC. Given the small size of VLAC, it was consistently acknowledged by internal and external stakeholders that the briefing policy did not threaten the survival of the private Bar although comments were made by external stakeholders about VLAC retaining more Supreme Court matters and high-profile matters. This would be a matter for concern for the private Bar if the number of these high-profile higher court cases briefed to the VLAC was of such a size as to deny the Bar of the professional development opportunities provided by such cases.

One barrister noted that he and his colleagues in chambers are not briefed in indictable matters by VLA although the private firms do brief them in legally aided cases, including homicide. He also suggested that junior barristers would get a lot of low-level work from VLA that VLAC would not do.

Another view expressed was that the size of VLAC would not have any tangible impact and that a bigger issue may be the increasing number of solicitors doing more advocacy and only using the Bar for overflow work.

We note the view expressed in the Access to Justice Review report that:

"For government as a purchaser of legal assistance services (from both in-house and external providers), to maximise effectiveness and efficiency, Victoria Legal Aid needs to be able to assess the relative value of those providers for the benefits of competition to be fully realised. As a public provider, Victoria Legal Aid must also have a sufficient market share to influence the price and quality of the private market, to ensure that there is internal expertise to inform policy and purchasing decisions, and to assess the quality of services purchased. The public provider also needs to have capacity to respond to market failure of various kinds. There is evidence of market failure in Victoria in some regional areas, and in areas of the law like mental health and child protection."⁴⁹

Cost analysis: Key Findings and Recommendations

- a) Our comparative analysis of sample cases suggests that it is more cost effective to brief the Bar in some indictable crime matters including Homicide, Sexual Offences and Robbery. While the results show the private Bar to be cost effective, there are a number of considerations and limitations which impact the interpretation of the findings.
 - b) A comparison with alternative models in other jurisdictions shows that one major difference is the complexity of matters undertaken by in-house barristers at VLAC in comparison to the NSW and Queensland practices. Briefing the private Bar is more serious and complex cases may be more cost-effective.
 - c) The Review recommends that improvements to data collection, such as consistent time sheet recording, are made so as to enable VLAC to undertake a more robust cost effectiveness analysis in the future.
 - d) Alternatively, if a daily time recording process is unlikely to be adopted by VLAC, VLA could consider implementing a periodic time recording program conducted over a reasonable period of time and across a viable sample size to enable a more robust cost effectiveness analysis to be undertaken.
 - e) Ideally, any periodic time recording analysis conducted would assess VLAC's performance in respect of the cost of advocacy services across all matter types to inform the strategic allocation of its resources to case types where VLAC can deliver services most cost effectively.
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⁴⁹ Access to Justice Review report p 400.

D. Organisational and System-wide Benefits

Both internal and some external stakeholders agreed that cost-effectiveness in the provision of advocacy services must be considered in light of the qualitative benefits provided by VLAC. The benefits identified by VLA for consideration follow.

I. Diversity and equitable briefing by VLAC

VLAC comprises predominantly female advocates and satisfies various diversity criteria.

II. Contributions to policy and law reform

VLA as an organisation contributes significantly to policy and law reform, internal stakeholders advised that VLAC advocates are often involved in and contribute to this work. VLAC is also able to provide valuable insight to assist in identifying trends in advocacy and the impact of legislative changes or reforms.

Recently, VLAC has contributed to the following:⁵⁰

- *Tendency and Coincidence Evidence Review, Department of Justice Working Group participation and feedback*: A working group convened by the Department to consider options for reform to tendency and coincidence evidence laws in criminal matters (arising from Recommendations 44 – 51 of the Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse). VLA was invited to participate and a VLAC advocate was nominated to sit on the working group. The work has involved background preparation and meeting attendances. This involvement is continuing and VLA considers that the contribution of the VLAC advocate has been highly valuable.
- *Committals Review, VLRC Consultation Paper Submission*: VLA is preparing a submission to the VLRC consultation paper (released in July 2019) relating to the review of the committal system in Victoria. Three VLAC advocates have been appointed to the VLA Reference Group which contributes advice and practical experiences to the development of VLA's policy response and identifies any client or case examples to inform the policy response. Due to the technical nature of the committals review and the direct impact on criminal procedure, VLA considers that the contribution of VLAC advocates' experience and expertise in the preparation of the VLA's submission is invaluable.
- *Crimes (Mental Impairment and Unfitness to be Tried) Act (CMIA)*: Chief Counsel was a lead member of the CMIA Working Group that developed the VLA Response to the VLRC Review of the CMIA.
- *Royal Commission Mental Health into Victoria's Mental Health System*: Chief Counsel is a member of the Steering Committee and contributes to the governance and policy leadership of the project. The Associate Director of VLAC was also involved in finalising the policy submission. The VLAC's civil law advocate is a member of the Project Working Group and was involved in settling the policy position to inform the VLA response to the Royal Commission.
- *Criminal Connections*: The Criminal Law Program delivers training days 2 to 3 times per year. VLAC advocates frequently present on substantive legal issues.
- *Family Law Council Families with Complex Needs Inquiry*: VLAC family law advocates provided various experiences, which informed VLA's submission to the Council.
- *Victorian Ombudsman's investigation into the imprisonment of a woman found unfit to stand trial*: VLAC civil law advocate's systemic experience was used for VLA's submission to the Ombudsman.

The Review acknowledges that VLAC advocates are able to provide unique insights on behalf of VLA and its client base to inform legislative and policy reform and do contribute positively to VLA and policy and legislative reform more generally.

⁵⁰ This information was provided in writing by VLA for the Review.

III. Professional development and career pathways for VLA staff and non-staff advocates

The Review acknowledges that VLAC provides opportunities for solicitors in the VLA staff practice to pursue the development of advocacy skills. For example, one civil advocate role is a 12 month rotating position designed to enable the development of advocacy skills in this practice area in the staff practice. Additionally, VLAC advocates are recruited from the staff practice from time to time.

VLAC is also considered by the profession as offering significant developmental opportunities for solicitor advocates and private barristers who leave the Bar to join VLAC at certain stages in their careers.

IV. Training, mentoring and practitioner collaboration

VLAC advocates deliver various training programs both internally and externally throughout the year. For internal staff, VLAC advocates are involved in providing the following:⁵¹

- *Advocacy Training Programs*: VLA's professional legal education (**PLE**) team delivers the Legal Practice Essentials training program comprising 20 foundational topics identified as essential for VLA lawyers to provide a quality service to priority clients. Some modules are streamed for different practice areas, in particular the advocacy skills training programs. Each program comprises a series of lectures and workshops, with some intersection between practice areas including court ethics and etiquette and preparation and analysis. The criminal law program is held twice a year and the civil and family programs are held annually. The programs are delivered by VLAC advocates.
- *Specialisation*: VLA offers specialisation accreditation programs with broad eligibility criteria to include all lawyers practicing in the jurisdiction. This has resulted in OPP participation in VLA's crime specialisation study support program and participation of the Department of Health and Human Services (i.e. Child Protection Legal Officers) in VLA's Children's Law specialisation study program. This approach facilitates collaboration and sharing of knowledge, experience and resources. Study programs provide: lectures and workshops; facilitated study groups, past study notes and practice exams; and information and guidance from VLA's professional support lawyers. The crime specialisation study support program will next be delivered in 2020 exclusively by VLAC advocates due to budget constraints.
- *Practice Area Forums*: Each year the PLE team support delivery of practice area forums. These include: Criminal Connections (2 per annum); Family law forum (2 per annum); Civil law forum; ICL training; Youth Crime forum; and Duty lawyer essentials forum. VLAC advocates regularly participate in delivering sessions, which VLA considers to be at a very high standard.
- *Trial Counsel Development Program*: VLAC coordinates and facilitates the Program, which is a highly regarded development program for junior advocates at the Victorian Bar. "The Program is designed to deliver unique training opportunities to selected Junior Barristers by partnering them with senior trial advocates from VLAC in criminal trials each year. This program is part of a range of initiatives developed through [VLAC's] work with the Victorian Bar, the Office of Public Prosecutions, the Commonwealth Director of Public Prosecutions, the Magistrates', County and Supreme courts, the private profession and the Department of Justice to tackle the causes and symptoms of delays to justice".⁵²

VLAC advocates are also involved in formal and informal mentoring of VLA staff lawyers and other development programs such as reverse shadowing (some of which are set out in the Regional Service Level Agreement).

⁵¹ This information was provided in writing by the Office of the Chief Counsel for the Review.

⁵² <https://www.legalaid.vic.gov.au/information-for-lawyers/doing-legal-aid-work/trial-counsel-development-program>

VLAC advocates are also involved in providing interagency training including:

- cross examination workshops with Victorian Institute of Forensic Medicine (**VIFM**) and Forensicare, involving moot court workshops to provide training to VLA staff and VIFM and Forensicare registrars. VLAC has a standing commitment to both Forensicare and VIFM to deliver training at six month intervals on an ongoing basis; and
- VLAC works with the VIFM and Forensicare to facilitate the delivery of expert lectures to VLA on topics related to forensic medicine and forensic psychiatry.⁵³

V. Contributions to managing conflicts of interest

VLAC advocates provide expert advice to the VLA staff practice and are generally considered to be a valuable reference point for resolving complex conflicts of interest and ethical questions. Additionally, when advocates become aware of conflicts, they will raise them with instructors and if required, support instructors in making decisions to appropriately address these issues.

VI. System-wide time savings or productivity increases attributable to VLAC

VLA considers that VLAC contributes to system-wide savings and productivity increases through early preparation of cases and early resolution of matters. The Review has been unable to validate VLAC's contribution to early resolution in terms of a contribution to system wide-savings.

VII. Compensating for market-deficiencies

Whether VLAC is in fact compensating for market deficiencies in either regional cases or particular work types is difficult to assess as the available data demonstrates that VLAC is a significant provider of advocacy services in criminal law only. Further, as noted by external stakeholders, given the size of the private Bar in comparison to the limited size of VLAC, there should be sufficient numbers of private barristers able and prepared to do circuit work, (noting that the OPP commented that it regularly briefs the Bar for regional circuit work). These anecdotal assessments are difficult to verify.

The fact that VLA as employer is able to direct advocates to appear in particular types of cases and/or certain locations to meet (real or perceived) deficiencies in the market is an advantage. While anecdotal feedback from internal stakeholders was that VLAC advocates were being directed and applied to some areas where there was considered to be market deficiencies, the Atlas data examined did not appear to support these views.

VLA should consider how it can better utilise VLAC advocates in a flexible and agile manner to improve organisational efficiency and meet market demand in areas of high demand or where specialisation would be advantageous. An example was provided to the Review of a recent situation where 3 or 4 staff members of a small regional office had taken parental leave and a VLAC advocate worked at the office for a number of weeks, providing day to day assistance to the office as well as travelling to satellite courts to conduct matters and court appearances in a number of summary and indictable crime cases. This is a level of service that would not necessarily be practical or more affordable if it had to be sourced from the private Bar.

VIII. Cooperation and innovation with courts

VLAC (generally through Chief Counsel) participates in court users group meetings to provide feedback about the court experiences of lawyers and their clients. VLAC conducts the Trial Counsel Development Program in association with the Victorian Bar.

IX. Market intelligence and representation in jurisdictional forums

As an organisation, VLA is considered a repository of extensive market knowledge in the delivery of legally aided services. Relying on VLA's organisational infrastructure, VLAC is in a unique position to identify trends in legally aided advocacy.

⁵³ This information was provided in writing by VLA/VLAC.

VLAC advocates are involved in various jurisdictional forums through professional associations and committees. These include the Victorian Bar Criminal Bar Association, Diversity and Equality Committee of the Victorian Bar, the Law Institute's Children Committee, Youth Issues Committee and Children's Law Advisory Committee, Child Witness Service Advisory Board, County Court working group that addresses procedural and practical issues in mental impairment and unfitness cases, Liberty Victoria (Victorian Council for Civil Liberties).⁵⁴

Organisational and system-wide benefits: Key findings and Recommendations

- a) Whilst the participation of Chief Counsel and other in-house advocates in VLA's involvement in policy and law reform is noted, the Review considers that VLA's contribution is largely an organisational contribution based on the whole of VLA's organisational intelligence and experience. Certainly, VLAC advocates do make a valuable contribution when involved and are able to provide unique insights based on their advocacy skills and experience.
- b) The Report acknowledges the importance of strategic advocacy as an opportunity to provide system-wide reforms to laws and court procedures and that VLAC is uniquely placed to test relevant policy and law reform to provide feedback to government about real impacts of reforms across its three programs. It is considered that this is a distinct benefit of VLAC and a viable means of producing system-wide efficiencies and benefits for groups in the community and eventual savings to the legal aid fund in terms of individual client case work.

In this regard, the Review reiterates the conclusion of the Access to Justice Review that "[i]t is important for [VLA] to use its resources wisely and consider where it can add value in addition to the other sources of advice to government on a given topic."⁵⁵

- c) The Review acknowledges that VLAC advocates are able to provide unique insights on behalf of VLA and its client base to inform legislative and policy reform. Any quantitative assessment should also take into account that VLAC comprises a small number of advocates and that the investment required in this type of non-advocacy work diverts time and finite resources away from individual case work for VLA clients.

The Review does not consider that VLAC's involvement in non-advocacy work is contrary to the fundamental basis of VLAC as an in-house model providing specialised advocacy services. Rather, appropriateness and efficiency should be equal drivers for and inform the level of involvement by VLAC advocates in VLA's participation in legislative and policy reform work.

- d) The amount of time and dollar value of the advocates' time spent on policy and law reform (and other non-advocacy work) should be assessed as part of a comprehensive cost effectiveness analysis of VLAC based on time records maintained by advocates whether as part of day to day time sheet keeping records or periodic time recording projects.
- e) VLAC's advocates are heavily involved in training and mentoring programs which are of value and assistance to professional development in the organisation and contribute to improving the quality of the services at VLA.
- f) An assessment as to whether VLAC compensates for market deficiencies has not been able to be made due to the lack of quantitative data and relevant data in the Atlas system in respect of types and complexity of matters. It is noted that internal stakeholders agreed that VLAC advocates assist in filling market gaps in regions or work types.
- g) Both a qualitative and quantitative assessment should be made as to whether VLAC advocates are the most appropriate contributors to the relevant policy and legislative reform activity.

⁵⁴ Based on information provided in writing by VLAC to the Review.

⁵⁵ Access to Justice Review report (2016) p 419

Part 6 | Future Model for VLAC

A. Staff Resourcing and Governance

I. Staff composition review

It is recommended that VLA take steps to enable it to conduct a comprehensive cost effectiveness review of VLAC to inform the development of an appropriate future model for VLAC. This may include:

- a comprehensive cost effectiveness analysis based on time records of advocates to ascertain a per unit cost and determine in what work types VLAC advocates are more cost effective, as cost effective or less cost effective than the private Bar;
- a regular review and assessment of utilisation rates;
- record keeping as to the numbers of circuit court trial matters in which VLAC advocates appear due to private barristers not being available to be briefed and the number of cases where private barristers have been briefed on circuit but can no longer appear, requiring the case to be reassigned to VLAC;
- record keeping as to the number of cases in work types where advocates are briefed because relevant expertise are not available at the Bar; and
- record keeping as to the number and type of matters/cases in which VLAC advocates are briefed because a strategic decision has been made that the case should be conducted by VLAC as a government provider of advocacy services.

This will assist in determining an appropriate composition of staff levels based on cost as well as considerations including empirical evidence of market failure and evidence of VLAC's strategic impact in the market for legally aided advocacy services.

The findings can be used to underpin a strategic decision relating to briefing for work types as between the Bar and VLAC and within VLAC based on advocate levels and experience. Any such strategic decision should also take into consideration those work types where VLAC is making, or could make, an impact in advocacy services.⁵⁶

This will require VLA to collate and retain additional data as follows:

- time recording by advocates implemented as part of day to day practice or alternatively, periodic time recording projects conducted over a meaningful time period in respect of a statistically significant sample of cases across all work types and advocate levels;
- a record of types and length of trials in which VLAC and the private Bar are respectively briefed;
- a record of all other work advocates participate in, including management responsibilities, policy and law reform and contributions to training and development;
- a record of cases where private barristers do not have the expertise to be briefed or were not available to be briefed or cancelled a brief, in order to identify what percentage of VLAC's work is in fact to address market failure; and
- the number and type of matters conducted by VLAC advocates to support VLAC's strategic direction as a government provider of advocacy services (such as strategic/test cases), cases undertaken to keep costs down and other appropriate metrics.

⁵⁶ This strategic decision-making has been successfully achieved by the civil law practice in relation to work types including mental impairment.

Based on this analysis and assessment of VLAC’s resourcing requirements, VLAC should review its recruitment strategy and recruit to fill staffing requirements at identified levels. In reviewing its recruitment strategy (following a further cost effectiveness analysis) VLA may consider implementing the following measures:

- ensuring a minimum FTE capability at each advocate level;
- ensuring advocates are directed to develop capabilities to meet organisational needs e.g. to service identified gaps in the market and towards matter types where VLAC advocates’ performance is equally or more cost effective in delivery of services as the private Bar; and
- reviewing and addressing utilisation target performance on a regular basis.

II. Appropriate reporting mechanisms for VLAC

The Access to Justice Report noted there was a need for more transparent information about legal aid services to foster better engagement with the legal sector.⁵⁷ Currently, VLA reports quarterly to the Department of Justice in accordance with the Budget Paper No 3 measures but does not separately report in relation to VLAC. The quarterly reports set out VLA’s financial and service delivery performance for each quarter and projections for the rest of the year. The reports provide an outline of the services VLA provides to the community, the public funds received from the Victorian and federal governments and VLA’s financial performance.⁵⁸ The reports are published on VLA’s website.

Appropriate reporting mechanisms for VLAC:

The quarterly reporting model is simple and could capture expenditure and associated metrics in relation to VLAC. It is recommended that VLA include information relating to VLAC in its quarterly and annual reports for public access.

B. Quality Standards and Professional Development

I. Capturing data about quality of VLAC’s advocacy services

VLA introduced various quality measures as part of the Delivering High Quality Criminal Trials project in 2013 (and in 2019, VLA has appointed consultants Proviti to review the measures). The measures include a framework for managing major criminal trials, the use of instructing lawyers at trial and other quality assurance tools such as procedural checklists and a brief analysis and case strategy document.

In addition, VLA maintains a complaints register⁵⁹ and has undertaken client satisfaction surveys.

In order to enhance VLAC’s existing quality assurance processes, it is recommended that VLAC commence recording and capturing data that aligns to quality measures considered appropriate for a publicly funded advocacy services provider. These measures may include:

- capturing data about case outcomes: at least for a sample of cases in each work type in each program. This may include brief case descriptions, terms of resolution and basis for resolution (if not at trial). Focused on impact of services based on VLA’s organisational objectives in combination with other measures, this type of data will assist in demonstrating the basis and appropriateness of early resolution of cases by VLAC, making early resolution a viable and more reliable metric for assessing VLAC’s cost efficiency and effectiveness. As stated by the Access to Justice Review, outcome reporting, where outputs are linked to business outcomes or objectives, would also be useful for decision-making in relation to strategic litigation;⁶⁰

⁵⁷ Access to Justice Review report (2016) p 409.

⁵⁸ VLA’s website: <https://www.legalaid.vic.gov.au/about-us/our-organisation/public-accountability/quarterly-reports>

⁵⁹ One external stakeholder suggested that clients in the legal aid market may not be best qualified to assess quality of legal services and may not feel entitled to make complaints.

⁶⁰ Access to Justice Review report (2016) p 374.

- collating client satisfaction ratings through regular surveys conducted annually and selected from the cases in respect of which outcomes data has been collated and retained: This will enable objective confirmation of ratings based on the appropriateness of case outcomes determined by independent third-party assessment. Currently, VLA monitors quality through client surveys and receiving complaints. However, client feedback may not be an accurate measure of quality as the client will be subjective and may not appreciate what is an appropriate legal outcome;
- satisfaction feedback should be sought from the VLA staff practice, private solicitors who brief VLAC and other public legal service providers that work with VLAC (e.g. community legal centres and ALS). This may be undertaken annually and conducted by VLA based on a questionnaire compiled in consultation with the organisations from whom feedback is sought, to ensure the questionnaire captures metrics that are important to those external stakeholders;
- enhanced continuing professional education and development through accreditation and training from external organisations, such as the Victorian Bar or The Australian Advocacy Institute, specialising in advocate skills development. The Review acknowledges that VLAC is strongly committed to training and staff development and conducts various training programs for VLAC advocates, the VLA staff practice and external agencies, all of which are highly regarded. However, the Review considers that greater training opportunities in collaboration with the private practice and external accreditation will be beneficial and may foster a more collegiate relationship with the private profession and enhance VLAC's external reputation, potentially attracting a broader base of barristers for its external recruitment; and
- other performance measures as determined appropriate by VLA to assess and strengthen quality assurance standards and processes for VLAC, which as suggested by the Access to Justice Review, may include the 360-degree feedback mechanism used by the Judicial College of Victoria and peer review of advocacy skills in court based on appropriate metrics (based on models used by VLA for in-house staff).⁶¹

II. Assess quality and utilisation of advocates

A cost effectiveness analysis may be enhanced by an analysis of the quality of advocates at an individual level. This may also be achieved by the time recording project by assessing utilisation of advocates against appropriate benchmarks.

The types of work being undertaken by advocates at each level and location of services provided (whether in the regions or metropolitan courts) will also assist in determining the cost efficiency of advocates at each level for decision-making in relation to briefing for circuits. This will require VLA to collate data about the location of the trial and the type of work based on advocate levels. This information is not currently available from the Atlas data.

C. Scope of Work that should be undertaken by VLAC

I. Comprehensive time recording project is undertaken by VLAC advocates

In order to determine the type of work that should be undertaken by VLAC, a comprehensive cost effectiveness analysis is required. The Review recommends that a cost effectiveness project is undertaken by VLAC based on actual time recording by in-house advocates to ascertain a per unit cost. Time records will assist in identifying the amount of time spent by in-house advocates in undertaking particular work types. The salary and a proportionate allocation of overheads would then be applied against the hours spent to provide a true cost of the work performed by in-house advocates on a per unit basis.

⁶¹ Access to Justice Review report (2016) p 423.

VLAC's Financial Performance Model is an important tool in determining the costs of in-house services (including the cost of VLAC) as it captures salary costs and a proportionate allocation of overheads. The appropriateness of the proportionate allocation of overheads to the VLAC advocates in the current Model should be reviewed and reassessed for the purposes of any cost effectiveness analysis that would be undertaken based on actual time records. Further, the Model should be reviewed regularly (at least every 2 years) as the costs of in-house advocates would change due to salary, rent and supplies and services cost increases. Significantly, these costs may increase by a percentage which is higher than the increase in grants of aid for the corresponding services provided by the advocates.

A time recording project would enable cost efficiency to be determined based on actual time spent on tasks. This could be achieved through whole of VLAC staff time recording conducted for a meaningful period (suggest a minimum of 3 months) every two years or a sample test conducted annually for a test period of say, 2 months involving a sample of advocates at different levels in different programs across different work types. This rotating time recording project may be preferable as it would provide an annual review or test of the cost effectiveness findings, without burdening all VLAC staff or impacting the cultural practices of the organisation. Whatever form of the recording project is adopted, the test period and scope should be broad enough to cover each practice area and most significant matter types such that it produces a statistically viable market sample and, the findings must be reviewed regularly.

A time recording project was conducted in VLAC during the period November to December 2015 to ascertain the actual time spent to prepare and conduct a matter. This project involved a sample of 51 briefs representative of the 'normal' work of VLAC (representing 14% of the total matters briefed to VLAC during the test period). Advocates completed a time record for each matter from the initial preparation phase to finalising the matter post-appearance. The time records were analysed with reference to the brief fee to calculate the 'hourly rate' to determine the 'true' fee for the work involved in conducting the matter. Average hourly rates were assessed by jurisdiction, by appearance type and by advocate level. However, a comparative cost assessment with the cost of briefing private barristers for those matters was not completed.

The recommendations made included:

- the results of the project should be used to inform decision-making regarding the need for further data collection activities;
- further data is collected where advocates record all time over a set period; and
- a summary of these findings⁶² is reported to the VLAC staffing group.

No further time recording data has been collected by VLAC.

The cost effectiveness analysis based on a time recording project would enable VLAC to determine the following:

- those matters where it is more cost effective to brief VLAC rather than private barristers. As approximately 80% of indictable crime work in Victoria is legally aided, VLA may consider employing a briefing policy in-house and across the service level arrangements with panel firms to consider potential briefing models in accordance with the cost efficiency framework developed following a robust cost effectiveness analysis;
- whether it is more cost effective to brief VLAC advocates or private barristers in the regions and the cost efficiencies of block briefing for circuits. This will involve an analysis of the types of cases being undertaken (by VLAC and the private Bar) in each of the regions and what level of skill and experience is required for that type of work. This will require VLA to retain appropriate data that identifies the level of advocates and level of experience of private barristers briefed to appear in the circuit courts. This will also inform the cost effectiveness of a potential block briefing strategy; and
- utilisation rates and whether advocates are spending sufficient hours on work that is notionally billable. Whether VLAC can then set targets for daily billable hours must be considered in the context

⁶² Internal VLAC memorandum regarding Time Recording Project dated 20 January 2016.

of the culture of the organisation, but to the extent advocates' utilisation rates are failing to meet monthly (notional) billable budgets, there would be a requirement to justify their efficiency. Utilisation budgets/targets should be based on industry practice. We note that LAQ sets a daily notional billing target of 5.5 hours per day. Currently, VLAC advocates are set monthly notional billing targets.

The above determinations would assist VLAC in setting its strategic direction for the most appropriate work to be undertaken in-house. The strategic direction for appropriate work may include the following:

- work that is as or more cost effectively briefed to VLAC rather than to the private barristers;
- work conducted in specialist jurisdictions where VLAC has greater expertise and/or where there is a public interest in VLAC conducting the work in-house;
- work that enables VLAC to maintain a presence in the market so that costs can be controlled and to meet priority needs in the community;
- work that should be undertaken to provide staff development and variety in work opportunities to staff; and
- work where there is market failure in advocacy in matter type or location.

The cost effectiveness analysis would also enable VLAC, in setting its strategic direction, to prioritise matters where VLAC can make a greater impact, whether through greater specialisation, agility in being briefed by the VLA in-house staff or strategic litigation.

Finally, the Review notes that the costs of any model must be considered in the broader context of quality and outcomes. That is, whatever the strategic direction adopted by VLAC following a cost effectiveness analysis, it must be assured that VLAC advocates have the best skills and expertise to provide the relevant services and achieve the best outcomes for clients.

Data and performance measures that may be used to monitor effectiveness and efficiency into the future include:

- time recording project is undertaken within VLAC to facilitate a cost of unit analysis. Whether or not the advocates should be given a productive time target per day should be considered;
- cost efficiency should also take into account other issues of effectiveness and efficiency provided by VLAC including:
 - early resolution of cases based on data records of cases and outcomes; and
 - contribution to overall efficiency of the justice system, including the operation of the courts and the visibility of focused services in regional areas, including block briefing for circuit work; and
- independent review of VLA's Coordinated Briefing Policy to ensure that cost efficiency is regularly considered in the development of the policy.

II. Review scope of the non-advocacy work performed by VLAC

Although internal stakeholders consider that the intrinsic value of VLAC is founded in broader organisational and system-wide benefits provided by VLAC, the appropriateness of this non-advocacy work should be assessed and the value of alternative purchasing arrangements should be considered.

This may include:

- assessing whether in each case VLAC advocates would be making a distinctive contribution or offering a unique perspective to VLA's policy and law reform activities when they are being required to participate in policy and legislative development submissions and forums on behalf of VLA⁶³; and

⁶³ The Access to Justice Review recommended that VLA consider introducing a 'distinctive contribution' criterion for its policy and law reform work (at p 420 of the report). This criterion should also be applied in determining the appropriateness of VLAC's contribution to VLA's policy and law reform work.

- assessing whether other VLA staff or external service providers are able to make a more cost-effective substantive contribution than the VLAC advocates would be making in each instance.

The minimum daily utilisation rates of advocates in the performance of advocacy work should be measured against benchmarks in private practice or in comparable models, such as LAQ's in-house chambers where utilisation rates are set at 5.5 (notionally) billable hours per day. Where the non-advocacy work of advocates is impacting minimum utilisation rates, then VLA should seek to measure the cost efficiency of the non-advocacy work undertaken by VLAC and whether these types of contributions would be better made by other centres of excellence within the organisation or third parties. The right balance of VLAC's value in providing non-advocacy work can only be measured based on a cost effectiveness analysis founded on time recording and whether those benefits can be accessed more cost effectively through alternative service arrangements.

Annexure 1

Summary | Comparable models

A. Queensland in-house model

Information relating to LAQ's in-house chambers model is based on our interview with former Deputy CEO Paul Davey (who led the cost effectiveness analysis of LAQ's in-house chambers model in 2010 and the review in 2017), desktop research and further information provided in writing by LAQ.

LAQ is a statutory authority that provides a mixed model for the provision of legal services to the Queensland community. LAQ is funded by the Queensland Government to undertake state law matters in the areas of criminal law and civil law. Other sources of funding for state law matters include solicitor trust fund interest, client contributions and interest on invested LAQ funds. In relation to Commonwealth law matters, such as matters in the family law area, LAQ is funded by the Australian Government.

LAQ considers that the current size and composition of its in-house advocacy model is appropriate for its needs. It was noted that LAQ has a very strong relationship with private practitioners and, as is the case in Victoria, the majority of criminal work in the State is legally aided and many private practitioners could not maintain a criminal practice without doing legally aided work.

LAQ currently employs 19 in-house advocates. Although in-house advocates of LAQ are not public servants, LAQ has adopted the public service classifications and salary levels. The LAQ in-house chambers staff composition is as follows:

- 3 SES positions (Public Defender and Deputy Public Defender);
- 7 Senior Officer Counsel;
- 4 PO6 Public Defenders;
- 5 PO5 Public Defenders;
- Chambers Clerk at AO6 level; and
- Administrative Officer at AO3 level.

Currently, LAQ's in-house chambers comprises 10 male and 7 female advocates (with two vacant positions at the time of our consultation).

We are advised that staff retention rates for LAQ's in-house chambers are high:

- SES level: excess of 15 years;
- SO staff: 5 have been with LAQ for more than 15 years whilst 1 has been there for 2 years;
- PO6 staff: recruited 2 years ago;
- PO5 staff: greater than 10 years; and
- Admin staff: greater than 15 years.

The Queensland in-house model has a larger management team than VLAC, comprising the Public Defender and Deputy Public Defenders.

All LAQ in-house advocates have a practising certificate from the Bar Association of Queensland and are bound by its rules. A majority of the in-house advocates hold employed member Class B memberships which entitles them to practice provided there is a grant of legal aid. Given the nature of the Queensland criminal law market and the high dependency of the private criminal Bar on legal aid work, concerns about the independence of in-house advocates, which have been raised in the past in Victoria, have not been raised in Queensland.

The minimum years of experience for the in-house advocates is 5 years and the current average years of experience of the in-house advocates is 13 years. Almost all work completed by in-house counsel is in criminal law. All permanent recruitment at LAQ (including at the PO5 or PO6 levels) follows the Directives issued by the Queensland Public Service Commission. Internal staff have to compete with external applicants for permanent roles. Recently, three advocates were recruited from the Office of the Director of Public Prosecutions. However, advocates may also be recruited from the private Bar. A mandatory requirement of in-house counsel positions is advocacy experience and admission or eligibility for immediate admission as a legal practitioner in Queensland, and eligibility for a current practising certificate as a barrister and entry in the High Court Registrar of Practitioners.

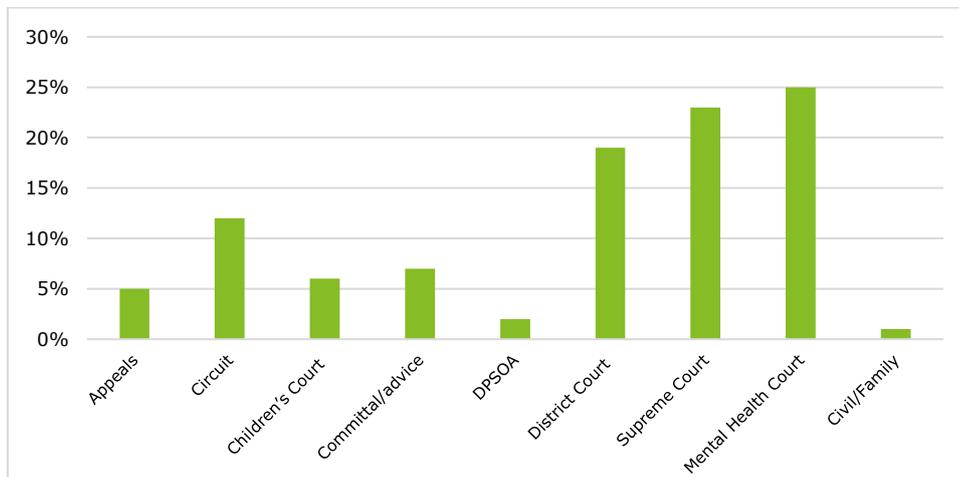
LAQ has a structure for its in-house model that reflects the requirements of LAQ. That is, to provide a quality and cost efficient service and build a centre of excellence in LAQ’s program areas. LAQ’s strategy to build a centre of excellence in the legal practice requires training and the commitment of senior staff and management to mentor and guide junior advocates. In the 2018/2019 year, in-house counsel provided development opportunities to 6 recently admitted barristers from the staff practice to act in the PO5 positions for 6 to 12 months. In those roles, the advocates are able to gain experience through appearances at the Children’s Court and District Court (including circuits). The success of this development program will see it continuing in the future. The PO5 level advocates role is considered a training opportunity available to encourage the in-house staff in their career development.

The LAQ in-house public defenders undertake the following work types:

PO5 level counsel	PO6 level counsel	SO level counsel	SES level counsel
<ul style="list-style-type: none"> Children’s Court sentence Children’s Court trial District Court sentences District Court breach District Court trials (not complex, sensitive and difficult) Circuit District Court sentences & trials S222 Appeal – appeals to the District Court against sentence and conviction Uncontested proceedings before the Mental Health Court Committal hearings in the Magistrates Court Preliminary proceedings for respondents to applications by the Attorney-General under the Dangerous Prisoners (Sexual Offenders) Act 2003 Approved family law and civil litigation in various jurisdictions. 	<ul style="list-style-type: none"> All of PO5 Complex, sensitive or difficult trials and sentence hearings in the District and Children’s Court Sentence hearings and trials in the Supreme Court (not complex e.g. murder and manslaughter) Circuit Supreme Court sentences Uncontested and contested proceedings before the Mental Health Court Proceedings for respondents to applications by the Attorney-General under the Dangerous Prisoners (Sexual Offenders) Act 2003 Less complex sentence appeals in the Court of Appeal 	<ul style="list-style-type: none"> All of PO6 Advise on and argue appeals against conviction and sentence in the Court of Appeal Appear in complex, sensitive or difficult trials and sentences in the Supreme and District Court Circuit Supreme Court sentences and trials Appeal in all matters before the Mental Health Court; Appear for respondents to applications by the Attorney-General under the Dangerous Prisoners (Sexual Offenders) Act 2003 in complex committal hearings in the Magistrates Court; and in approved family law and civil litigation in various jurisdictions Mentor junior Counsel on District Court Circuits 	<ul style="list-style-type: none"> All of SO Appeals to the High Court Act as lead Counsel in complex trials in both Supreme and District Court, contested hearings in the Mental Health Court, applications under the Dangerous Prisoners (Sexual Offenders) Act 2003 and in other extraordinary matters in jurisdictions as assigned

Advocates almost exclusively undertake criminal work as summarised below for the period July 2018 – April 2019.

Figure 29: LAQ court matters as a percentage



Broadly, LAQ’s in-house counsel undertake complex trials and sentences in the Supreme, District and Magistrates Courts and also appear at all Mental Health Court sittings and for respondents to applications brought under the *Dangerous Prisoners (Sexual Offenders) Act 2003* in the Supreme Court, civil jurisdiction. In the 2018-2019 year, senior counsel advised on the merit of applications for grants of aid for appeals against conviction and sentence and appeared in appeals against conviction and sentence in the Queensland Supreme Court and Court of Appeal.

The in-house counsel practice also provides broader organisational benefits by contributing to LAQ’s continuing professional development programs, assisting in training programs for expert witnesses in the area of mental health and providing temporary opportunities in chambers for LAQ’s staff solicitors to develop their advocacy skills. During the 2019 year, the in-house counsel practice also contributed to the Bar Association of Queensland’s Indigenous students mentoring program.⁶⁴

LAQ’s in-house advocates are briefed in some civil law cases but predominantly only if the matter is associated with crime e.g. dangerous prisoners. Any social security work is completed by a duty lawyer and not briefed to the in-house advocates. In-house advocates do not practice in the family jurisdiction and all family matters are briefed to private barristers. Further, approximately 98% of appeals are briefed in-house.

In-house counsel in LAQ are all based in the Brisbane office except for three advocates namely, SO Counsel position is permanently based in the Townsville LAQ office and two advocates are based at the Southport LAQ office. In-house advocates appear in the Supreme Court and District Courts throughout Queensland and are either briefed by the in-house criminal practice, private legal firms or on circuit. The allocation of counsel (private barristers and in-house counsel) to regional Supreme Court and District Court Circuits throughout Queensland is managed by the Chambers Clerk. A barrister is allocated to a regional circuit to appear for all legally aided clients (by regional LAQ offices and private legal firms). There are approximately 140 weeks of circuits throughout the year.

Based on our interview with LAQ stakeholder, it is estimated that 49% of all cases (i.e. briefed to in-house advocates or externally) are heard in the Brisbane courts with 51% of cases being heard in the regional courts. Of the cases in the regions, 91% are briefed to private barristers and only 9% are briefed to in-house counsel (this includes LAQ circuit work).

⁶⁴ LAQ Annual Report 2018-2019 p 41.

Due to the market in Queensland for legal aid matters and based on a comprehensive cost effectiveness analysis undertaken in 2010 and 2017, LAQ has implemented block briefing counsel (either in-house staff advocates or private barristers) to appear in the regions for several years. As the majority of criminal matters in Queensland are legally aided and the in-house advocates predominately practice in criminal law, through its briefing policy, LAQ has been able to successfully implement a policy of block briefing in the regions. These measures have been supported by recommendations made in February 2018, following the 2017 cost effectiveness analysis.

In terms of professional development, the in-house advocates undertake an annual In-house Counsel Conference which provides training in mandatory topics including ethics, advocacy and practice management. Additionally, there is a mandatory annual 3 hour session on Resilience and Wellness training and advocates are encouraged to undertake and present CLE sessions.

The LAQ internal stakeholder consulted by the Review stated that although LAQ does not collate data relating to the quality of service of in-house advocates, the general view is that the majority of cases conducted by in-house advocates would resolve before trial and there have not been any complaints against advocates. Additionally, all lawyers' files are audited twice per year by senior lawyers in the division for quality assurance and training purposes. The LAQ stakeholder considers that LAQ is seen as a centre of excellence by the judiciary and the salaries offered attract highly skilled advocates. It is considered that the level of training and continuing professional development, specialisation and work experience provided by LAQ cannot be matched by the private profession. The LAQ stakeholder stated that they receive consistent feedback from regional magistrates about the marked difference between LAQ lawyers compared to private lawyers with the consensus being that the LAQ lawyers are specialised and well trained. The in-house advocacy practice is one part of the equation of the delivery of these high-quality legal services.⁶⁵

Quality assurance processes for internal counsel include annual performance reviews as well as feedback from preferred suppliers, the judiciary, the in-house solicitors in the criminal practice and ATSILS. Quality assurance processes for private barristers is predominantly based on the feedback provided by preferred suppliers, the judiciary and the in-house solicitors in the criminal practice. However, in relation to the Complex Criminal Case Barrister Panel Policy, barristers are required to make a submission for accreditation to be included on the expensive case panel.

In the 2018-2019 financial year, in-house counsel were briefed in 1,120 cases. Approximately 85% of those matters were briefs from the LAQ in-house criminal law staff practice and 15% were briefs from preferred suppliers.⁶⁶ Although this demonstrates greater awareness in the Queensland legal market that in-house advocates are available to be briefed, the greater percentage of briefs accepted from the private solicitors may be a function of the Queensland criminal law market which is predominantly legal aid cases or the state geography being so large with various regions.

LAQ imposes time recording on staff including advocates and sets a daily notional billing target of 5.5 hours. This has formed the basis of the cost effectiveness analysis of its in-house chambers model. The time records assist in identifying the amount of time spent by in-house advocates in undertaking particular work types. The salary and a proportionate allocation of overheads provides a true cost of the work performed by in-house advocates at an hourly rate or on a per unit basis. Based on stakeholder consultations, we understand that broadly, LAQ undertook this general approach and that LAQ's cost effectiveness analysis will provide benchmarking for Legal Aid NSW and Legal Aid WA.

⁶⁵ Information provided by LAQ stakeholder during consultation.

⁶⁶ Data provided by LAQ.

In 2010 a review was undertaken into the cost effectiveness of the in-house practice of LAQ. The cost effectiveness modelling concluded that some services provided by the in-house team were cost effective and others were not and decisions were made to appropriately focus LAQ's resources based on those results. KPMG was engaged in 2017 to undertake a high-level review of LAQ's costing methodology. The following outcomes were identified:

- the in-house chambers is the most cost effective division in LAQ, as it always exceeds its income targets and derives notional income above the calculated salary cost of undertaking the work;
- in-house counsel are more cost effective than private barristers in Magistrates' Court committals and in the District Court, Supreme Court, Mental Health Court, Court of Appeal and sometimes in the High Court;
- in-house counsel are cheaper than private barristers (and overheads) when they appear in the regional circuits; and
- utilisation of in-house counsel to undertake case work, including expensive cases and circuit work, would be financially viable.⁶⁷

Another relevant factor in the cost efficiency of the LAQ model is that the Queensland government will increase fees for legal aid matters by 2.5% pa where the standard enterprise increase for LAQ staff is by 2-2.5% per annum. Fees appear to be keeping pace with the annual increase in the cost of salaries.

LAQ has two policy documents relating to briefing Counsel. They are:

- In-house Lawyers Briefing Counsel Policy; and
- Circuit Court Briefing Policy.

LAQ's In-house Lawyers Briefing Counsel Policy (**Policy**) sets out general briefing guidelines and provides specific procedures for briefing counsel in expensive or extraordinary cases. The policy was updated in 2019 with the objective of developing Aboriginal and Torres Strait Islander barristers through mentoring, access to junior briefs, training and access to circuit opportunities. Broadly, the general briefing guidelines provide the following requirements to:

- consider the Law Council of Australia's Equitable Briefing Policy which aims to promote diversity, equality and respect to improve the retention of women barristers within the profession;
- genuinely consider briefing Aboriginal and Torres Strait Islander barristers whenever possible; and
- consider briefing LAQ's in-house advocates to ensure cost effectiveness.⁶⁸

In particular, where in-house advocates are located in or proximate to a region, they must always be briefed in all matters (subject to their availability). The availability of in-house counsel must be determined in accordance with the guidelines in the policy and private barristers are only briefed if in-house advocates are not available. Private solicitors may brief any private barrister but are encouraged to brief female barristers, Aboriginal and Torres Strait Islander barristers where possible and barristers at the local Bar in the region.

However, in relation to matters listed in a circuit court, in-house and private solicitors must brief the counsel (whether a private barrister or an in-house advocate) allocated to the circuit in accordance with the Circuit Court Briefing Policy. This policy applies to all matters heard on circuit court sittings in Queensland and applies to all LAQ in-house solicitors in the criminal law practice, preferred suppliers undertaking criminal law matters in circuit court areas and LAQ's Counsel Chambers. LAQ's Public Defender retains the sole authority to brief counsel for circuit sittings and the circuit court barrister is allocated by the LAQ Chambers Clerk. The requirements of the policy are:

- preference must be given to briefing in-house counsel for all circuits;

⁶⁷ Briefing Note provided by LAQ stakeholder

⁶⁸ LAQ Annual Report 2018-2019 p 44.

- except in exceptional circumstances, only one counsel will be briefed for all legal aid matters listed for the circuit sittings. Two counsel may be allocated to a specific circuit for efficiency purposes or professional development opportunities;
- in pursuance of the Law Council of Australia Equitable Briefing Policy, all reasonable endeavours will be made by LAQ to identify and genuinely consider engaging available female counsel;
- in-house Counsel Chambers is responsible for administering circuits throughout Queensland;
- Senior Chambers Officer will make the necessary enquiries for the briefing of counsel for circuit sittings in consultation with the Principal Lawyer of the relevant regional office;

In determining the counsel to brief for a specific circuit sitting, the Senior Chambers Officer will have regard to the following factors to ensure adherence to the statutory obligation to deliver legal assistance in the most effective, economic, commercial and efficient way:

- The nature of the circuit in question. This would involve analysis of the matters listed and all relevant specific client factors and needs and the seniority of prosecuting counsel, to inform a view about the level of experience and ability required by the circuit counsel to ensure, as far as possible, that the highest quality services are delivered;
- Whether there would be benefits in briefing any private counsel previously briefed to represent any client in the list (e.g. the prior brief at committal stage). This may extend to counsel who have been involved in other stages of proceedings, such as pre-trial recording of evidence of a child complainant;
- Whether there would be benefits in briefing counsel already engaged to privately represent a client in the list;
- Whether there are benefits in briefing counsel based at the Local Bar;
- Whether there are benefits in briefing counsel who may have appeared on prior circuits in the region, having regard also to the benefits of promoting the full use of the independent Bar and optimising opportunities for the development of counsel willing to undertake legally aided work; and
- Any other factors that will ensure adherence to the statutory obligation to deliver legal assistance in the most effective, economic, commercial and efficient way.⁶⁹

LAQ also has a Complex Case Barrister Panel Policy which relates to briefing in relation to complex criminal case matters in respect of which an expensive case grant of legal assistance has been, or is likely to be, sought or issued. Under this policy, in-house lawyers and preferred suppliers must brief barristers on the panel for complex criminal cases except in exceptional cases and with the approval of the Chief Executive Officer.

The LAQ stakeholder we interviewed expressed the conclusion that approximately 80% of legally aided work is briefed out, although there is an effort to retain the expensive matters in-house, even if the private lawyer has seen the client first. The condition of the service level contract with the private solicitor firms is that they are to brief matters to in-house counsel first.

B. The Public Defenders' Office NSW model

The Public Defenders' Office in NSW is independent of Legal Aid NSW. Public defenders are appointed as independent statutory officers by the Governor of NSW under the *Public Defenders Act 1995 (Act)* for a period of seven years (with a 12 month probationary period) to represent socially and economically disadvantaged defendants charged with serious criminal offences who have been granted legal aid either by Legal Aid NSW, The Aboriginal Legal Service NSW/ACT or other community legal centres.

⁶⁹ From LAQ Circuit Court Briefing Policy at <http://www.legalaid.qld.gov.au/About-us/Policies-and-procedures/Circuit-court-briefing-policy>.

The Senior Public Defender, Mark Ierace SC, is responsible for the functions of the PDO NSW and for conducting a Supreme Court trial and appellate practice. Three Deputy Senior Public Defenders assist the Senior Public Defender including in the conduct of the trial and appellate practices. The Senior and Deputy Senior Public Defenders form the management team and also work on high level policy and law reform matters. The Public Defenders appear in criminal trials and perform other functions referred to by Senior Public Defenders.

There are 29 Public Defender positions. Four of these positions were created through additional funding to address a District Court backlog. Two Public Defender positions are fully funded by Legal Aid NSW.⁷⁰

The PDO NSW currently comprises 4 female and 20 male public defenders. The Senior Public Defender is a female. There are 5 silks, two of whom are women.

Public Defenders may appear in District Courts and Supreme Courts throughout NSW. Public Defenders are based at Dubbo, Wollongong, Lismore and Newcastle to accept briefs from these areas. Briefs are generally referred to the Public Defenders from the Legal Aid NSW (**LANSW**), Aboriginal Legal Services (**ALS**), private solicitors and community legal centres. Public Defenders can only appear for clients who have been granted legal aid.⁷¹ The types of matters in which Public Defenders are generally briefed include:

- Supreme court trials;
- Long and/or complex District Court trials;
- Circuit work at nominated regional centres;
- Appellate work in the High Court, Court of Criminal Appeal and Court of Appeal; and
- Committal hearings involving serious criminal charges.⁷²

The ratio of matters in Sydney compared with regional and non-metropolitan courts was 52:48, noting that all court of criminal appeal matters were heard in Sydney.⁷³

Formal arrangements for access to services are contained in service level agreements negotiated annually with between The Public Defenders Office NSW and each of the LANSW and ALS. In the service level agreement with LANSW, it is acknowledged that in all legally aided matters, it is a condition of the grant of aid that in the first instance a public defender should be briefed if available.

The Service Level Agreement with LANSW and the Department of Justice for the 2020 year provides that in legally aided matters, it is a condition of the grant of aid that a Public Defender is briefed in the first instance if available. The work that will be briefed is as follows:

- Supreme Court trials;
- Long, complex or high-profile matters in the District Court, Supreme Court or Court of Criminal Appeal;
- Circuit work;
- Appellate work;
- Provision of services at nominated regional and metropolitan locations including the allocation of one Public Defender to Port Macquarie/Taree District Courts and one Public Defender to Tamworth/Armidale District Courts; and
- Long or complex committal proceedings, inquests or other matters where both parties agree that representation by a Public Defender is appropriate.

⁷⁰ The Public Defenders Annual Review 2017-2018 ps 2-3

⁷¹Public Defenders Office NSW website:
https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_aboutus/public_defenders_history.aspx

⁷² The Public Defenders Annual Review 2017-2018 p 6

⁷³ The Public Defenders Annual Review 2017-2019 p 7

Annexure 2

Summary | Stakeholder consultations

A. Introduction

As part of the Review we interviewed both internal and external stakeholders who were identified and selected in consultation with the VLA project team.

Stakeholders were selected from within the VLA staff practice to provide insight into the working relationship between the staff practice and VLAC, the nature of the advocacy work undertaken by VLAC and the additional benefits provided by VLAC to the broader VLA organisation and throughout the legal justice system. We also interviewed VLAC Chief Counsel, Tim Marsh in relation to the criminal law practice of VLAC as well as management and strategic issues.

Broadly, external stakeholders were selected on the basis that they would be able to share views on VLAC from the perspective of the profession (including the Law Institute of Victoria, the Legal Services Board, the Victorian Bar), the Family Court and the Country Court Criminal Division (through the judiciary) and the Department of Justice. We also interviewed the former Deputy CEO of LAQ immediately before his retirement, in order to facilitate the comparison with the alternative in-house chambers model in Queensland.

The stakeholder consultations were fundamental in collating the information required to address the qualitative considerations raised in the Terms of Reference for the Review.

B. Principal views expressed by Stakeholders

In interviews conducted with the stakeholders, the Review sought to address each aspect of the Terms of Reference. The questions asked to the internal and external stakeholders addressed the principal objectives of the Terms of Reference in evaluating the structure and governance of VLAC, the performance and quality of service provided by VLAC and the organisational or system-wide benefits provided by VLAC.

Broadly, the questions addressed the following matters:

- the extent of the stakeholder's knowledge of VLAC, including its management structure and staff composition;
- whether the stakeholder had a view on or was able to make any assessment of the quality of the advocacy services provided by the VLAC advocates, including the level of skill and experience of the advocates;
- whether the stakeholder had a view about the independence of VLAC advocates in decision-making in the conduct of trials, given that they are employed by VLA;
- whether the stakeholder had any awareness or knowledge of VLAC's share of the market in advocacy in the relevant jurisdiction (of criminal law, family law or civil law) and whether the stakeholder considered that VLAC advocates are filling deficiencies in the market for legally aided advocacy services in relation to work types or the availability of experienced counsel in regional Victoria;
- whether the stakeholder considered that VLAC provides any other broader organisational or system-wide benefits; and
- whether the stakeholder had a view on the VLAC model and whether the current model maximises value for money in advocacy services.

Overall, the Review's consultations with the stakeholders were positive. However, it was apparent that the external stakeholders' awareness of VLAC, its operations, structure and governance was limited.

Internal stakeholders were consistently positive and expressed enthusiasm for improvements that could help deliver the best advocacy services to the community by VLAC within the limited funding envelope for legally aided matters. Largely, these related to ensuring the right composition of advocates (in terms of experience) and measures that could improve continuity of representation for clients.

Both internal and external stakeholders generally considered that the effectiveness of the VLAC model required consideration of qualitative matters as well as costs, otherwise VLAC would fail any cost effectiveness measure.

Internal, and some external, stakeholders considered that the organisational or system-wide benefits provided by VLAC constitute a valuable contribution to VLA. Early resolution of trials, compensating for market deficiencies, system-wide contributions to policy and law reform and the delivery of professional development and training for the VLA staff practice were all cited as being value adding contributions.

I. External stakeholders' views

Generally, the views expressed by external stakeholders were very 'high level' as their knowledge of the VLAC structure and its advocates was limited.

External stakeholders from the profession queried the cost efficiency of the in-house model and whether VLAC is in fact filling gaps in the market. Broadly, many of the concerns raised by the LIV and the Victorian Bar in submissions made to the Access to Justice Review were again raised in similar terms including:

- a cost effectiveness analysis had not been undertaken in relation to VLAC and that our Review, to the extent it could deliver a reliable cost effectiveness analysis, was overdue.
- VLA is deriving the benefits for the additional unfunded work completed by private barristers in the conduct of legally aided cases. It was considered that this necessarily makes the payment of salaries to VLAC advocates a cost inefficiency, particularly in instances where:
 - advocates are being paid a salary even when they are not preparing for a case;
 - advocates are spending time preparing for cases in circumstances where the preparation time would not be funded by VLA if the same work had been done by a private barrister. That is, it was asserted that private barristers do a lot of unfunded preparatory work on legal aid matters; and
 - more than one VLAC advocate or VLA staff lawyer may be working on a case where the legal aid fund would not support funding for two barristers or an instructing solicitor and barrister if the case had been briefed to the private Bar;
- the pool of advocates in VLAC is minuscule compared to the number of barristers at the Victorian Bar. Therefore, VLA's Coordinated Briefing Policy does not ensure that the most appropriate counsel is necessarily briefed to appear in a case and that this potentially undermines the principle of choice of representation for clients (we note that the Coordinated Briefing Policy has recently been updated, as previously discussed in this report); and
- the argument that VLAC is filling market gaps in the regions or based on work types is anecdotal as there are sufficient numbers of private barristers who are willing to travel to any region to obtain relevant court experience and hundreds of private barristers with skills, expertise and experience covering all areas of VLA's programs and work types.

Comments were made by both internal and external stakeholders that the number of senior public defender level advocates currently employed in VLAC who have the requisite expertise to undertake the more serious criminal trials in superior courts had reduced over time.

Unlike the Access to Justice Review, concerns were not expressed by the courts or other external stakeholders about the quality of the advocacy by VLAC advocates. Generally, external stakeholders did not comment on the quality of the advocates' skills, although stakeholders from the private Bar expressed positive comments about the skills of certain advocates with whom they had worked when those advocates were at the Victorian Bar.

While noting that VLAC advocates did not appear in many cases due to VLAC's limited resources, VLAC was considered by the OPP to be more likely to achieve early resolution in cases as VLAC advocates have the same drivers to achieve appropriate early resolution as the OPP, unlike the private barristers who may not be incentivised to do so under the funding model. The Solicitor for Public Prosecutions made clear that he was not insinuating that private barristers unnecessarily prolong cases noting that other factors, such as early briefing and continued involvement in a matter, impact an advocate's or private barrister's ability to influence and/or advise on resolution of a matter. He agreed that VLAC may be better able to contribute to efficiency through early resolution because VLAC advocates are engaged earlier and are able to prepare earlier than private barristers.

The Solicitor for Public Prosecutions also provided the following insights about the OPP model, which are useful considerations for an appropriate VLAC model:

- the OPP relies on the private Bar to scale up and private barristers are doing most of the cases of the OPP;
- the OPP size and composition is considered appropriate. Prosecutors are recruited so their skills and experience are compatible with other prosecutors in the Office, and in relation to Crown Prosecutors, the OPP seeks people on a growth or development trajectory (to Silk or the judiciary);
- although the OPP does not enforce time recording, a record of work performed is maintained and in-house prosecutors generally spend between 40-45% of their time in court and 60% of their time is spent undertaking chambers work (e.g. core work, such as preparing indictments); and
- the OPP has a successful practice of block briefing in which a barrister (and instructing solicitor) are briefed to undertake the entire list for a whole month of circuit court work in the regions.

Also, it should be noted that the stakeholder consulted at the County Court expressly declined to comment on the quality of VLAC advocates. Although it was noted that VLA does not run the circuit list in the same way that the OPP does, it was considered that VLA is in a position to take advantage of the benefits of block briefing, given that a significant proportion of the criminal law (indictable crime) market is legally aided.

The stakeholder from the Department of Justice was not able to comment on many of the questions asked by the Review on the basis that the Department considers that the functions and operations of VLAC are a matter for VLA to determine. The Department was not in a position to assess the quality of advocacy provided by VLAC but welcomes any measures to improve advocacy services across the legal aid sector.

None of the stakeholders interviewed by the Review expressed any concern about competitive neutrality, given the small size of VLAC. However, stakeholders from the private Bar commented that it would be concerning if VLAC retained a disproportionate number of the high-profile cases in the superior courts at the expense of enabling the development of skills in those types of cases at the private Bar. Although there has not been an assessment of whether this concern can be proved, anecdotally this was an issue raised within the private profession. The Solicitor for Public Prosecutions noted that the VLA funding model has more of an impact on briefing practices than any other measure, and that private solicitor firms have increasingly been undertaking more advocacy work in legally aided matters and increasingly using the Victorian Bar for overflow.

The Solicitor for Public Prosecutions expressed the view that VLA, as an organisation is more cooperative and receptive in adopting system-wide innovations (e.g. electronic briefing) than private barristers who are independent practitioners.

II. Internal stakeholders' views

During the Review's interviews with internal stakeholders, the principal matters highlighted were the additional organisational and system-wide benefits provided by VLAC. These include:

- VLAC is considered to be a "centre of excellence" within the organisation in relation to providing legal and strategic advice in complex cases, advice in relation to complex ethical matters and conflicts, and as a touch point for ad hoc queries where it would be difficult to contact a private barrister because the advice sought would not be funded;
- VLAC advocates are considered to provide continuing professional development for the VLA staff practice through training, mentoring and reverse shadowing in court for the development of advocacy skills for more junior advocates and in the staff practice;
- VLAC advocates contribution to VLA's involvement in policy and law reform activities through participation in forums, committees and submissions; and
- VLAC advocates are uniquely placed within the organisation to identify trends in litigation in legally aided matters, develop expertise in emerging areas of law to address market gaps and identify cases for strategic and test litigation to inform VLA's operations and for the benefit of the broader community.

There was also consistent feedback that VLAC is addressing market failure in respect of certain types of matters and in regional matters. Stakeholders consider that VLAC is addressing market failure in the following work types:

- in the civil law program: mental health, disability, economic and social rights;
- in the family law program: Children's Court, child protection; and
- in the criminal law program: homicide (mental impairment) and serious sex offender detention and supervision orders.

Internal stakeholders also noted that the size of the civil law and family law advocacy practices are very small in terms of resourcing. It was reported that strategic decisions had been made to focus specialisation in particular work types in the civil law practice. Some concern was expressed about the availability of family law advocates with quality experience and skills in areas other than ICL. Concerns were also expressed about the lack of senior experienced advocates in the criminal practice.

In relation to VLAC addressing market failure in the regions, there was substantial discussion about the unreliability of the circuit court listings, making it challenging to brief private barristers because of the lack of certainty as to timing for the matters to be heard in the circuit list. Internal stakeholders also stated that there is limited or no availability of appropriately skilled and experienced private barristers available to be briefed in the regions, particularly the more remote regional courts.

In relation to whether the model maximises value for money, internal stakeholders consistently asserted that cost efficiency can be demonstrated through measures beyond staff costs of the VLAC advocates including:

- the early resolution of trials;
- by inhouse advocates being easily and readily accessible to provide strategic and technical advice in relation to complex matters;
- VLAC advocates consistently assist the staff practice with the timely and appropriate resolution of cases;
- through professional development, training and serving as a centre of excellence; and
- VLAC contributes to the development of a more highly skilled and efficient staff practice.

Stakeholder views are discussed further throughout the report.

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