



Means Test Review

Consultation paper

August 2016

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

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Contents

Means Test Review	1
Executive summary	1
About Victoria Legal Aid	2
Part A – About the Means Test Review	2
Background	2
Objective of the Means Test Review.....	3
Review process	3
Steering Committee.....	4
How to make a submission	4
Issues outside the scope of the Means Test Review.....	5
How to make a complaint or request reconsideration.....	5
How to get information about eligibility.....	5
Part B – The Means Test	6
Overview of eligibility for services	6
Grants of legal assistance	7
Elements of the means test.....	7
Income test.....	8
Cost of living allowances.....	8
Assets Test.....	10
Financially associated persons	12
Estimated Legal Costs	14
Part C – The Contributions Policy	15
Part D – Exemptions from the means test	17
Part E – Use of discretion	18
Part F – Looking beyond the means test	19
Part G – Better information about financial eligibility	20
Part H – Reviewing and updating the means test	21
Appendix 1 – Summary of Questions	22
Part B – Means Test.....	22
Part C – The Contributions Policy	23
Part D – Exemptions from the means test	23
Part E – Use of discretion	23
Part F – Looking beyond the means test	24
Part G – Better information about financial eligibility	24
Part H – Reviewing and updating the means test.....	24
Appendix 2 – Overview of key elements of the means test	25
Appendix 3 – Cost of living allowances	26
Appendix 4 – Categories of estimated legal costs	27
Appendix 5 – Calculating contributions	27
Calculation of the initial contribution based on income.....	28
Calculation of the initial contribution based on assets	29

Executive summary

There is evidence that many poor and disadvantaged people are missing out on legal assistance – even when they are too poor to pay for their own lawyer. We want to ensure that people who need help have access to grants of legal assistance.

We also want to make sure that people understand when legal help is available. There is evidence that some people do not ask for help because they don't know whether they are eligible for assistance, assume they are not eligible, or think that it will be too expensive to solve their legal problem.

The means test is the tool we use to assess financial eligibility for grants of legal assistance. This is the type of help we provide to people who need a lawyer for ongoing casework – including legal advice, preparation of legal documents and representation in court. We also use the means test to work out whether a person can contribute towards the cost of their legal help.

The Means test review will closely examine our rules for assessing financial eligibility for grants of legal assistance. We want to ensure that these processes are accessible, fair and sustainable.

This consultation paper covers:

- [Part A – About the Means Test Review](#)
- [Part B – The Means Test](#), including the income test, the assets test, cost of living allowances, financially associated persons and the estimated cost of providing legal assistance
- [Part C – The Contributions Policy](#)
- [Part D – Exemptions from the means test](#)
- [Part E – Use of discretion](#)
- [Part F – Looking beyond the means test](#), including consideration of social disadvantage and other circumstances
- [Part G – Better information about financial eligibility](#)
- [Part H – Reviewing and updating the means test](#)

Each section asks some questions to prompt thinking about possible changes that could be made to the means test and contributions policy. A summary of the questions is included at [Appendix 1](#).

Of course there are other reasons why a person may miss out on legal help. For example, publicly funded legal assistance may not be available for their legal issue. However, the focus of this review will be on people who miss out because of their financial circumstances.

We want to know what you think. We will use this feedback to develop options for improving the fairness of the means test. We also want to make more people eligible for legal aid.

This is the first stage of our public consultation process. Submissions to this consultation paper close on **19 September 2016**.

About Victoria Legal Aid

Victoria Legal Aid (VLA) helps people with legal problems involving family separation, child protection, family violence, criminal matters, social security, mental health, discrimination, guardianship and administration, fines, immigration, tenancy and debt.

We provide:

- free legal information through our website, our Legal Help telephone service, community legal education (CLE), publications and other resources
- legal advice and minor assistance through our Legal Help telephone service, duty lawyer service and advice appointments on specific legal issues
- grants of legal assistance to pay for legal representation by a lawyer in private practice, a community legal centre or a VLA staff lawyer.

Most of our clients are people who are socially and economically disadvantaged, people with a disability or mental illness, children, the elderly, people from culturally and linguistically diverse (CALD) backgrounds and those who live in remote areas.

In addition to helping people resolve their legal problems, we work to address the barriers that prevent people from accessing the justice system. We contribute to law reform, influence the efficient running of the justice system, and ensure the actions of government agencies are held to account. We take on important cases and campaigns that aim to improve the law and make it fairer for all Victorians. This is one way we extend the reach of our services and improve outcomes for the community more broadly.

We are funded by the Victorian and Commonwealth Governments to provide these services but we are independent from government. We are required to provide services in the most effective, economic and efficient manner and manage our resources in a way that makes legal aid available at a reasonable cost to the community and on an equitable basis throughout the state.

By providing a range of services – from information and early intervention services to intensive assistance under a grant of legal assistance – VLA aims to provide improved access to justice and legal remedies for people when they need it most.

Part A – About the Means Test Review

Background

Access to publicly funded legal assistance is important for people in financial need. It is an essential element of a fair and accessible justice system.

We are reviewing our assessment of financial eligibility to make sure it reflects the way people live today. We want to make sure the factors we consider reflect the financial circumstances and experience of people who need legal help, so that disadvantaged people who need access to legal help do not miss out. We also want to increase understanding of our means test.

Since the means test was first implemented, the way people live, work and spend money has changed. For example:

- employment patterns have changed and more people are working in casual, temporary and contract jobs

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- income inequality has grown
 - patterns of expenditure within households have changed
 - households are more likely to have large amounts of debt, including personal debt
 - housing costs have increased
 - the cost of raising a family has increased.

This means that our current test for financial eligibility may no longer build an accurate picture of whether a person can afford to pay for a lawyer.

In 2014/15, 888 people who made an application for a grant of legal assistance missed out because of their financial circumstances. This number does not include people who did not apply because they didn't think they would be eligible or were told by someone they would not be eligible and did not proceed with their application.

In March 2016, modest changes were made to the means test to better reflect the current cost of living in advance of the full review. We want to do more to ensure that people who most need legal help are eligible for grants of legal assistance.

Objective of the Means Test Review

The purpose of the Means Test Review is to expand access to justice by making more people eligible for grants of legal assistance. We aim to develop an approach to the assessment of financial eligibility that is simple to understand, flexible, efficient to administer, financially sustainable and fair.

Review process

This consultation paper asks a number of questions about the means test and contributions policy so we can improve the current approach. You can answer some or all of the questions or simply share your ideas without answering any particular questions.

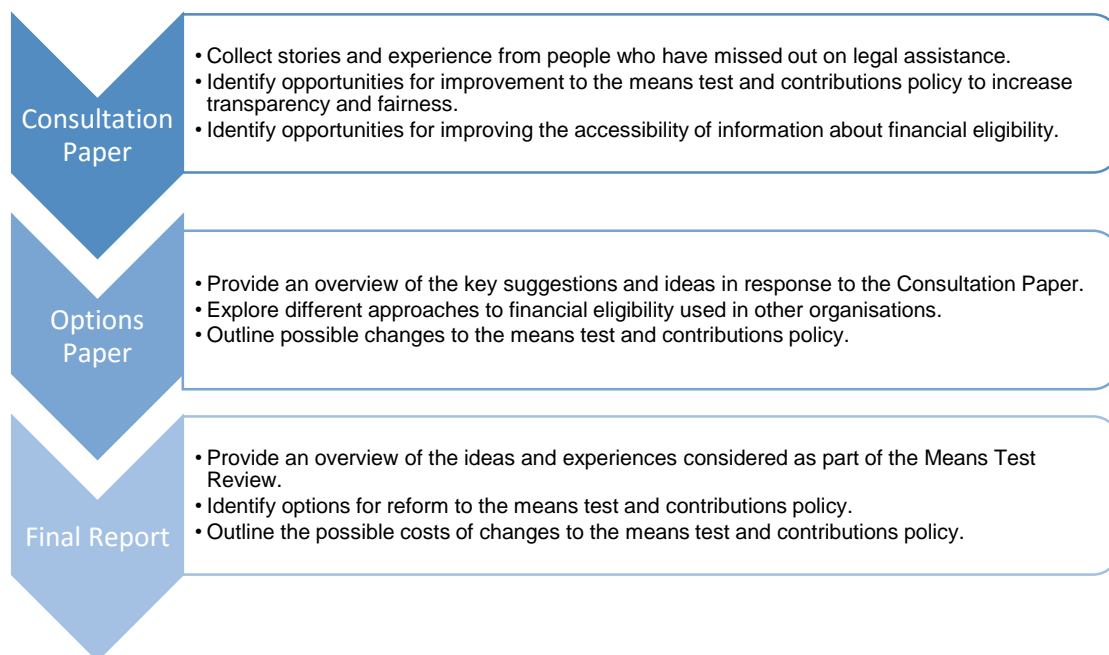
You can also tell us your story if you have missed out on a grant of legal assistance because of your financial circumstances.

The responses to this consultation paper will be used to develop options for changes to the means test and contributions policy. An Options paper will be released for further comments and feedback from people who need our services, lawyers and community organisations.

We will also be meeting with groups and individuals who want to share their ideas and experience of the means test. If you would like to meet with us to share your ideas and experience, please register your interest at www.yoursay.vla.vic.gov.au.

Once we receive feedback and ideas from people who need our services, our external partners and other organisations, we will make recommendations for reform to the VLA Board of Directors (the VLA Board) which is responsible for setting the means test and contributions policy.

If the VLA Board decides to make changes to the means test and contributions policy, we plan to implement these changes in 2018.



Any change to financial eligibility measures and the contributions policy will have financial implications – particularly if the effect of the changes is to increase the number of people in the community that meet the criteria for financial eligibility. The scale of the changes may depend on whether additional funding is available.

Once we have developed options for reform we will be looking closely at what these changes are likely to cost. It may not be possible to implement changes that will expand access to legal assistance if additional funding is not available. VLA will continue to discuss funding arrangements with the Victorian and Commonwealth Governments throughout the review process.

Steering Committee

The Means Test Review is being supported by a Project Steering Committee that includes representatives from VLA, the Law Institute of Victoria, the Federation of Community Legal Centres, the Victorian Council of Social Services, the Victorian Department of Justice and Regulation and the Commonwealth Attorney-General's Department.

The Steering Committee provides advice and recommendations to the VLA Board. The VLA Board will be assisted by the Steering Committee but does not have to follow the advice or implement the recommendations of the Steering Committee.

How to make a submission

There is no specific format for submissions. You can answer some or all of the questions or just share your story.

Submissions are generally public documents and we will publish all submissions on our website. Please tell us if you would like your submission to be anonymous or confidential.

We also have a survey available to make it easier for you to contribute your experience and ideas. This is available on our [review website](#).

Issues outside the scope of the Means Test Review

The Means Test Review is considering financial eligibility which is assessed by the means test. It will also consider the circumstances where a person may be required to contribute to the cost of legal assistance.

We will be looking at opportunities to improve the means test and contributions policy for **future** applications for grants of legal assistance. We want the experiences of our clients and external partners to inform any future changes. There are some issues that are out of scope for the review and will not be considered.

The Means Test Review will not consider what types of legal issues are covered by grants of legal assistance (guidelines) or examine how we assess whether a particular legal matter has merit (the strength of a person's legal case). Court-ordered representation in criminal law and family violence matters is also out of scope for the Means Test Review.

The use and operation of the ATLAS grants management system is also out of scope for the Means Test Review. However, any changes to the means test will require this system to be updated to reflect the changes.

How to make a complaint or request reconsideration

We are keen to hear stories about your experiences seeking legal assistance, but this review is not the right place to make a complaint or request reconsideration about a decision made by VLA about applications for grants of legal assistance.

We have existing processes for making a complaint or requesting reconsideration of a decision of VLA.

If you want to make a **complaint** about VLA, please call our Complaints and Statutory Compliance team on (03) 9280 3789, Monday to Friday from 8.45 am to 5.15 pm.

If you want to make a complaint in writing, you can email complaints@vla.vic.gov.au or send a letter to:

Complaints and Statutory Compliance
Victoria Legal Aid
GPO Box 4380
MELBOURNE VIC 3001

If you want to request **reconsideration** of a decision made by VLA, please speak to your lawyer or contact Legal Practice (Assignments) on (03) 9269 0600.

Requests for reconsideration must be made within 14 days of a decision by VLA.

How to get information about eligibility

If you want **information** about your eligibility for a grant of legal assistance or you need help with a legal issue, please contact Legal Help on 1300 792 387.

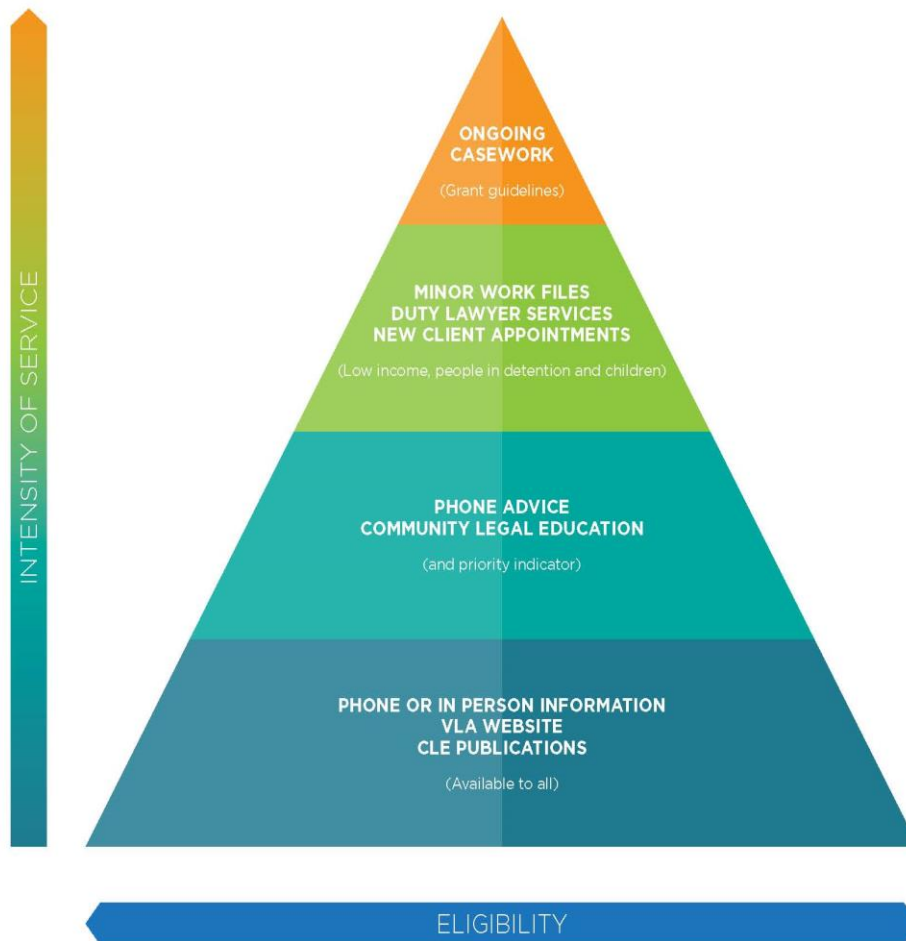
Part B – The Means Test

Overview of eligibility for services

Not everyone is eligible for a grant of legal assistance. More people need legal assistance than the amount of legal assistance we can provide. This is because VLA and other legal assistance services have limited funding and cannot help everyone who needs help. VLA uses different eligibility filters to ensure that the assistance available is targeted to those most in need of legal help with the funds available.

Stricter eligibility filters are applied to more resource intensive services. Grants of legal assistance are the most costly and intensive service provided by VLA.

The relationship between eligibility and the type of legal help



Some services are available to everyone. For example, everyone can access legal information from our website, publications or through our Legal Help telephone service. As services become more intensive we start applying additional eligibility filters. For example, we generally only provide duty lawyer services to people who are considered to be a priority to receive our service – such as people on a low income, children and people in detention. For grants of legal assistance, a person is required to meet our means test, grant guidelines and the matter must have merit.

Grants of legal assistance

Financial eligibility, measured by the means test, is the first hurdle for a grant of legal assistance ('ongoing casework'). A grant of legal assistance can enable a lawyer to provide more intensive assistance including the preparation of legal documents and providing ongoing representation in legal proceedings.

Most grants of legal assistance are provided for criminal and family law issues.¹ However, grants of legal assistance are also available for some civil law issues.

When deciding whether a person is eligible for a grant of legal assistance, VLA is required to consider whether a person can meet the full cost of legal services from a private lawyer.² VLA does this by applying a means test which is made up of an 'income test' and an 'assets test'. The means test allows us to assess a person's financial circumstances, including income, available cash, debts, and living costs.³

In addition to considering a person's financial circumstances, VLA also considers whether a grant of legal assistance is available for the particular legal issue under our guidelines and whether the matter has merit. Sometimes a person will be required to pay for some of the cost of legal assistance. This is called a contribution.

Information about the means test and contributions policy is included on the [VLA Website](#) and in the [VLA Handbook for Lawyers](#). Most people apply for a grant of legal assistance with help from their lawyer.

Elements of the means test

There are a number of elements to the means test. Each of these is designed to build a picture of a person's financial circumstances and assess whether they are able to afford a lawyer. A summary of the process of assessing financial eligibility is included in [Appendix 2](#).

¹ In 2014–15, VLA provided 34,681 grants of legal assistance to 26,805 unique clients who accessed one or more grants of legal assistance during the year. The majority of grants were in criminal law matters (20,126) with over half of these being provided for summary crime matters. Grants of assistance for family, youth and children's law matters totalled 13,226 with the majority of these grants being for child protection matters (6,704). The balance of the grants of legal assistance were provided for civil matters (1,329). The majority of these matters were undertaken by VLA staff lawyers (1,047).

² *Legal Aid Act* 1978, Section 24(1)(a).

³ *Legal Aid Act* 1978, Section 24(3). The Means Test may also include the assessment of the income and assets of people who are financially associated with the applicant. A 'financially associated person' is a person who usually provides an applicant with financial support or could reasonably be expected to financially assist the applicant. It may include a partner, parent, sibling or child. This is discussed later in [Part B](#).

Income test

The means test includes an assessment of a person's income to determine what financial resources they have available. The **income test** considers 'assessable income' rather than a person's total income.⁴

A person's assessable income includes pensions, benefits, allowances (excluding Family Tax Benefit) earnings from employment, income from self-employment, interest on investments, maintenance or child support and a range of other potential income streams.⁵ It may also include the income of any financially associated persons.

If a person receives the maximum rate of Centrelink, they automatically meet the income test because we know how much income they receive. However, eligibility for legal assistance is not restricted to people who receive Centrelink payments. People who earn an income from their employment may also be eligible without paying a contribution if their net income is under \$360 per week after cost of living allowances.

The income levels were last updated in March 2016.⁶

Holly's case study demonstrates the operation of the income test.

Case study – Holly

Holly needs help with a legal problem relating to custody arrangements for her two-year-old son. Holly receives the maximum rate of Centrelink. She rents a two-bedroom apartment in outer metropolitan Melbourne which she shares with her son. He attends childcare one day a week to allow Holly to complete her studies. She doesn't have a job or any other source of income, doesn't receive any financial support from her ex-partner and does not own a car. She puts some money in a bank account each fortnight as an emergency fund. The balance of her account is around \$700.

Holly would be eligible for a grant of legal assistance with no contribution.

Cost of living allowances

A person's income is only part of the equation. The means test recognises that people have everyday living expenses that impact on the amount of money they might have available to pay for a private lawyer. Allowances are made for housing costs, child care costs and dependants.⁷ These are called '[allowable deductions](#)'.⁸

⁴ This involves the calculation of an applicant's discretionary income by subtracting (or making 'allowance') for certain deductions from their gross (or total) income.

⁵ See the [VLA Handbook for Lawyers](#).

⁶ From 1 March 2016, VLA extended the existing means test to better reflect the current cost of living. This will make more people eligible for legal assistance in the short term, ahead of the Means Test Review. The current thresholds are set out in [Appendix 3](#).

⁷ A 'dependant' is any person who relies on the person for financial support. This may include a spouse, partner or child of the person applying for a grant of legal assistance.

⁸ As set out in [Appendix 3](#), allowable deductions for expenses and cost of living deductions are based on National Means Test benchmarks which were agreed by all Australian Legal Aid Commissions. One of the aims of the [National Means Test](#) was to have a consistent approach to eligibility for legal aid across Australia. A consistent

The deductions are a mixture of standard deductions (e.g. \$130 for the first dependent and \$125 for each further dependant) and capped actual amounts (e.g. a maximum of \$400 for housing). A capped amount means that even if a person, for example, pays more than \$400 per week for housing, VLA will only be able to deduct \$400 for housing costs under the means test.

Deductions are subtracted from a person's total income. Once these amounts have been taken into account, a person will be financially eligible for a grant of legal assistance without having to pay a contribution if their income is less than \$360 per week and they satisfy the assets test. For more information, see [Assets test](#).

Above \$360 per week, a person may receive a grant of legal assistance with a condition that they have to make a contribution towards the cost of legal assistance. [The Contributions Policy is discussed in Part C](#).

Other Legal Aid Commissions in Australia share a broadly similar approach to the assessment of income, with the exception of Legal Aid Tasmania and Legal Aid Queensland who use a simplified process. For example, Legal Aid Queensland takes into account gross income and applies a formula based on certain factors (household composition, work status and number of children/dependents) to work out the income threshold (with and without contribution). The simplified income test does not separately consider cost of living deductions.

Lin's case study demonstrates the operation of deductions.

Case study – Lin

Lin works as a manager in a retail store and earns \$1050 per week after tax. Lin requires assistance with a discrimination issue. Lin lives with his two children in inner Melbourne and pays \$400 per week in rent. Lin's oldest child is at school but his younger child attends long day care three days a week. Lin's out of pocket childcare costs are \$162 per week. Lin owns a car worth \$6000. Lin has no savings.

Lin would be financially eligible for a grant of legal assistance with no contribution.

Key Issues

Issues with the income test include:

- people who are living in poverty may miss out on legal assistance because the level of assessable income before a contribution is required is very low
- people who work in casual, contractual or seasonal work have irregular incomes which may change over the year. They may have a temporary period of elevated income but no job security
- people may not be able to tell if they are eligible based on their own financial circumstances because the income test is complex and is difficult to understand
- people have everyday living expenses where no allowance or deduction is available. These include transport, education, food, telephone and internet expenses

approach is also preferred by the National Partnership Agreement on Legal Assistance Services which sets out the funding arrangements between the Commonwealth and Legal Aid Commissions, including VLA.

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- people may have other expenses that can impact whether they can afford the cost of private legal representation. For example, a person may be making repayments on a credit card or personal loan, may have regular medical expenses associated with disability or another medical condition, or have other debts or infringements to pay
 - people with multiple children do not get any additional allowance for child care expenses
 - people are spending more money raising families and the dependant allowance may not reflect the true cost of raising children
 - people may be paying more child support, including any child support debt that may be due, than the allowance for child support payments
 - people may not have all the financial information and [documentation required](#) to support their application for a grant of assistance.

Questions

B1: Do you have any examples of circumstances where you think the income test has been unfair or could be improved?

B2: How can we make the assessment of income fairer to make sure people who need legal assistance are eligible for help?

B3: How can we make it easier for people to understand if they are eligible for a grant of assistance based on their income?

B4: What changes do you think there should be to the financial information required to support an application for a grant of legal assistance?

B5: Should there be any additional allowances for household costs? If so, what should they be?

B6: Should there be any additional allowances for other types of expenses? If so, what should they be?

B7: Are there any other issues with the income test?

Assets Test

A person applying for a grant of legal assistance must satisfy both the income and the assets test. The assets test completes the picture of a person's financial circumstances and assists VLA to understand what resources may be available to the person to meet their legal costs.

Assets include real estate, investments, shares, options, unpreserved superannuation and a range of other property and interests.⁹ It may also include the assets of a 'financially associated person'.

Just because a person has some assets it does not mean that they will miss out on a grant of legal assistance. The means test includes some 'allowable assets'. For example, a person may have up to \$500,000 equity in their family home and up to \$20,000 equity in a car and still be eligible for a grant of legal assistance. Allowance is also made for household furniture and personal belongings,

⁹ 'Assets' are any tangible or intangible property or interest which has economic value to the person applying for a grant of legal assistance or to any financially associated person. See [VLA Handbook for Lawyers](#).

clothing, tools of trade and equity in a farm or business that is the main source of income of the person.¹⁰

If the person applying for a grant of legal assistance has no financially associated person or dependant and the value of the person's assessable assets is \$1095 or less:¹¹

- VLA may make a grant of legal assistance
- VLA will not require the person to make an initial contribution from their assets towards the cost of the grant of legal assistance.

If that person's assessable assets exceed \$1095, VLA will calculate the amount of any initial contribution by the person towards the cost of a grant of assistance.¹² If the amount of this contribution is more than the estimated total legal costs, VLA may refuse to make a grant of legal assistance.

An initial contribution based on assets is usually payable in a lump sum. However, if a person can show that this would cause undue hardship, VLA may allow the person to pay by instalments or extend the time for the lump sum payment to be made.

All Legal Aid Commissions in Australia use a combination of an income and assets test to assess financial eligibility. While different asset thresholds apply, the categories for allowable or excluded assets are largely the same.

Jerry's case study illustrates the operation of the assets test and contributions.

Case study – Jerry

Jerry lives in regional Victoria and receives the disability support pension. He lives in a home inherited from his parents that is worth \$450,000 and has no mortgage. Jerry does not have a car but has a mobility scooter that is valued at \$4500. Jerry has a bank account with a balance of \$4000 that is used to pay for home maintenance.

Jerry is seeking assistance to challenge a decision of Centrelink in relation to his disability support pension payment. He requires assistance for his hearing at the Administrative Appeals Tribunal.

The assets test does not deal directly with mobility scooters and other disability aids and Jerry's lawyer requests that VLA exercise discretion and exclude the value of Jerry's mobility scooter from the calculation of his assets. However, the amount of savings that Jerry has in the bank means that even if discretion were exercised to exclude Jerry's mobility scooter, Jerry is still required to make an initial lump sum contribution towards the cost of legal assistance.

Key Issues

Issues with the assets test include:

- people with very few assets may not be eligible for a grant of legal assistance or will have to make a contribution towards the cost of assistance due to the different way assets are dealt

¹⁰ See [VLA Handbook for Lawyers](#).

¹¹ If a person has a financially associated person or a dependant, a higher asset threshold of \$2,190 applies.

¹² The amount of the initial contribution is calculated in accordance with the tables set out in the [VLA Handbook for Lawyers](#). The calculation of contributions is outlined in [Appendix 5](#).

with under the assets test. For example, the means test may be more generous towards home-owning households over rental households

- people who have a small amount of savings but no other assets or safety net may miss out on legal assistance. For example, a person may have modest savings for their monthly rent, a deposit on a home, or anticipated medical, funeral or other expenses. Anything above \$1095 (for a single person) will impact their eligibility for legal assistance
- people have different circumstances and financial arrangements and it is difficult to build a picture of a person's overall financial circumstances when considering each asset category separately.

Some of these issues are illustrated by in Aldo and Leila's case study.

Case study – comparison of Aldo and Leila

Aldo owns his own home worth \$500,000 in Bendigo, has a car and some superannuation. He is on a full pension and does not have any savings. Aldo qualifies for assistance under the current means test for his summary criminal case about property damage.

Leila rents an apartment for \$400 a week in Melbourne, and has no assets except \$5000 cash in the bank. She would not be eligible for help for the same kind of criminal matter, or would be eligible but required to make a contribution from her savings towards the cost of legal assistance.

So, while Aldo could be described as 'less disadvantaged' than Leila, he would be more likely to be financially eligible for a grant of legal assistance.

This is because there is no separate allowable limit for savings in the bank so the total value of a person's savings will be included in the limit for 'allowable assets'.

Questions

B8: Do you have any examples of circumstances where you think the assets test has been unfair or could be improved?

B9: How can we increase fairness in the assessment of assets?

B10: Should VLA consider a person's whole assets pool or should the separate asset categories be maintained?

B11: What assets should be excluded under the assets test?

B12: Should the assets test treat homeowners and non-homeowners differently? Why or why not?

B13: Are there any other issues with the assessment of assets for applicants for legal assistance?

Financially associated persons

The means test considers the financial circumstances of the applicant for assistance as well as any 'financially associated persons'. This is any person who provides, or could 'reasonably be expected' to provide assistance to the person applying for legal assistance.¹³ This might include a parent,

¹³ A financially associated person may also be a corporation, association or trust. See [VLA Handbook for Lawyers](#).

partner, child or sibling. The test used by VLA is broader than the test applied by other agencies, such as Centrelink, that usually only consider the resources of a partner or de facto relationship.

This is to ensure that the resources of a household or a relationship are considered as part of the assessment of whether a person can afford to pay for a private lawyer. It also supports the idea that publicly funded legal assistance is a safety net for people in need that should only be available where a person does not have access to other resources.

If an applicant has someone considered to be a financially associated person, then that person's income and assets will be included in the assessment of the application for legal assistance. This may affect the applicant's financial eligibility for services or the conditions of a grant of legal assistance. A contribution may be required from the income or assets of the financially associated person.

Norma's case study illustrates how the means test operates where there is a financially associated person.

Case study – Norman

Norman lost his job and experienced a period of depression in the following months. His relationship with his girlfriend deteriorated and she asked him to leave their shared apartment. By this stage Norman was receiving a Newstart Allowance but struggled to find a rental property within his budget. His parents offered him the use of the bungalow in the backyard of the family home in Melbourne. The power and water was all connected to the family home and he would share meals with his parents. His parents also supplemented his Centrelink income from time to time. Norman did not pay any rent.

Norman applied for a grant of legal assistance for a summary crime matter. As he had no assets and was receiving the full rate of Newstart, Norman meets the income and assets test. However, when looking at his living and financial arrangements, Norman is being financially supported by his parents. As a result, the income and assets of his parents are relevant to the assessment of Norman's capacity to pay for a private lawyer. It is likely that Norman will be refused assistance, or required to make a contribution, on the basis that his parents are financially associated persons.

Key Issues

Issues with the inclusion of financially associated persons in the assessment of financial eligibility include:

- people have a wide range of different relationships (partners, parents, siblings, children etc.) that are potentially included by the current approach to financially associated persons
- the test may not distinguish between people in established financially supportive relationships and people in relationships where there is possible but no actual financial support being provided
- a person may receive once off support from a person at a time of crisis which may result in the person providing the help being assessed as a financially associated person
- people's relationships may change over the course of the legal matter which may impact their eligibility or the conditions that apply to a grant of legal assistance.

Questions

B14: Do you have any examples of circumstances where you think the assessment of financially associated persons has been unfair or could be improved?

B15: How can we increase fairness in the assessment of people in financially supportive relationships?

B16: Should financially associated persons continue to be included in the assessment of a person's financial resources? Why or why not?

B17: How can the resources of a household be assessed in a fair and transparent way?

B18: Should the definition of 'financially associated person' be changed? If so, how?

B19: Are there any other issues with the assessment of financially associated persons?

Estimated Legal Costs

The amount of legal assistance, and the conditions under which legal assistance is provided, will depend on the estimated cost of a legal matter if the matter were privately funded.

One of the key functions of the means test is to assess whether a person has enough money to pay for a private lawyer. The cost and affordability of a private lawyer will depend on the type of legal issue. If a legal issue is more expensive to resolve, the financial resources required to obtain that service are higher. The inclusion of estimated legal costs in the means test is designed to ensure that the assessment of a person's 'capacity to pay' is related to the actual legal assistance they require.

VLA uses three categories of legal costs to estimate the amount of money a person would have to pay to a private lawyer for the legal services they need. These categories are listed at [Appendix 4](#).

The practical effect of the three cost categories is to provide a graduated approach to financial eligibility for grants of assistance. More generous allowance is made for higher cost matters because it will cost more for a person to obtain these services privately.

Taking into account the estimated legal costs means that a person may be eligible, with or without a contribution, for one type of legal matter but ineligible for another. Generally, if a client contribution exceeds the estimated costs of a legal matter, aid will be refused. This is because that person should be able to pay for legal help from a private lawyer.

The effect of estimated legal costs is illustrated in Shaun's case study.

Case study – Shaun

Shaun approaches a lawyer for assistance with \$8000 worth of infringements and representation in upcoming family law proceedings. Shaun is 45 and owns his own home in regional Victoria. Shaun has been on a full disability support pension for 10 years due to a work-related back injury. He has equity of \$425,000 in his home and no mortgage.

Under the means test, Shaun would be eligible for a grant of assistance for his infringements matter. He would also be eligible for assistance in his family law trial. Shaun may be requested to provide an equitable charge over his property as the estimated legal costs for a family law trial are \$6560 which is more than the \$1700 threshold for securing the cost of a grant of assistance.

Case study – Jack

Jack is a graphic designer who works full time with weekly earnings of \$1200. Jack is single but has sole parental care of his four-year-old daughter. He pays \$350 per week for his house in the outer eastern suburbs of Melbourne. So that he can work, he sends his daughter to childcare which costs him \$350 per week in childcare fees. He does not have any savings.

Jack requires assistance with some outstanding infringements that have spiralled to enforcement stage. His ex-partner has also initiated family law proceedings.

Under the means test, Jack would not be eligible for a grant of legal assistance for his infringement matter. However, as the family law proceedings are in a more expensive cost category, Jack would be eligible for a grant of assistance for the family matter.

Based on his income, Jack would be asked to pay a contribution towards the cost of his legal assistance for the family matter.

Key Issues

Issues relating to the estimated costs to provide legal assistance include:

- people may have to pay a private lawyer more than the estimated legal cost categories used by VLA, as they may be lower than the actual cost of obtaining legal services from a private lawyer
- people have a wide range of different legal issues but there are only three categories of estimated legal costs
- people may be confused if they are only eligible to receive assistance for one of multiple legal issues or where different conditions apply to different grants of legal assistance.

Questions

B20: Do you have any examples where you think the estimation of legal costs has been unfair or could be improved?

B21: How can we achieve fairness for financial eligibility across different legal issues?

B22: Are the cost categories appropriate? Do they reflect the actual cost of obtaining legal assistance from a private lawyer? If not, how can the cost categories be changed to better reflect the actual cost of private representation?

B23: Are there any other issues associated with estimated legal costs?

Part C – The Contributions Policy

Legal aid is not necessarily free. People may be required to contribute to the cost of providing legal assistance. This is referred to as a 'client contribution'. In 2014/15, VLA collected approximately \$2 million in client contributions.¹⁴ Approximately half of these contributions were secured contributions and the other half were unsecured contributions.¹⁵

¹⁴ Victoria Legal Aid *Annual Report 2014—15*. Available at <http://annualreport.vla.vic.gov.au/our-income-and-expenditure>.

¹⁵ In 2014/15, VLA collected \$1.1 million in unsecured contributions and approximately \$810,000 in secured contributions.

Contributions allow VLA to recover some of the cost of providing grants of legal assistance. VLA uses two principles to guide the calculation of contributions:

- an assisted person should be put in a position which is equal to, but not better than, the position of a person who is paying their own legal fees.
- an assisted person should contribute to their legal costs according to their ability to pay, without undue hardship.

Contributions may promote increased fairness by ensuring that a person continues to be eligible for a grant of legal assistance with a financial contribution rather than being refused a service because the value of their income and/or assets was over a certain limit. In short, the effect of the contributions policy is that there is no 'hard cut-off' for grants of legal assistance.

The amount a person is required to pay is based on the outcome of the means test, considering income, assets and an assessment of the expected cost of providing legal assistance. Tables setting out the calculation of initial contributions based on income and asset are included in [Appendix 5](#).

A contribution may be an upfront lump sum payment or paid by instalments over a period of time. Lump sums are usually payable when the contribution is based on the value of a person's assets, such as their car or savings in the bank. In some cases, a person will be required to make a regular payment from their income. If they lose their job or their circumstances change, VLA may make some adjustments to the amount they are required to pay.

In some cases, the cost of a grant of legal assistance is secured against a person's asset. The contribution is recovered by VLA when that asset is sold or otherwise dealt with. An example of this is a 'caveat' being placed over a person's home. This means that VLA will be notified if there is a dealing with the property (e.g. refinancing, sale, transfer etc.) where the person has an interest in the property so that VLA can recover its costs.

Currently, a caveat will only be considered where the cost of a grant of assistance exceeds \$1700. Recovery of secured contributions can take a long time. The average time before a secured contribution is paid is 12 years. VLA does not impose interest on secured and unsecured debts. If a person does not pay a contribution, legal assistance may be terminated. VLA may also 'write-off' debts in some circumstances.

Decisions about how to deal with people who owe money to VLA are made in accordance with the [Debt Policy](#). The Debt Policy provides a framework for managing secured and unsecured contributions, payment of debts and managing debts where a person experiences hardship or special circumstances.

Different Legal Aid Commissions have different approaches to contributions. For example, Legal Aid NSW requires a compulsory upfront contribution of \$75 in most matters. A further contribution may then be payable depending on a person's income or assets. Most Legal Aid Commissions except Victoria have a compulsory contribution for approved grants.

Key Issues

Issues associated with client contributions include:

- people on relatively low incomes, or with few assets, may be required to pay a contribution towards the cost of legal assistance

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- people may abandon their application for a grant of legal assistance or not seek legal help because they cannot afford, or do not want to pay, a contribution towards the cost of legal help
 - a person may be required to sell an asset (other than the family home) to pay a lump sum contribution. For example, a person may have more equity in a motor vehicle than the allowable amount, but the sale of the car to meet a lump sum contribution could have a significant impact on their employment and family life
 - the debt policy is not always applied strictly which may cause confusion and inconsistency
 - there are administrative costs associated with the collection of contributions.

Questions

C1: Do you have any examples where you think the contributions policy was unfair or could be improved?

C2: Are there any circumstances where a contribution is not appropriate?

C3: Is it fairer to have an upfront contribution for all grants of legal assistance?

C4: Are there any issues with the recovery of debts from people who receive a grant of legal assistance?

C5: Are there any issues with the content or operation of the debt policy?

Part D – Exemptions from the means test

The means test and contributions policy apply to all applications for grants of legal assistance except for children, war veterans, and any person who is subject to a supervision order under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*.¹⁶ In some circumstances, a person may request discretion for an application to be approved that does not meet the means test. This is discussed further in [Part E](#). There are also other matters – such as indictable criminal matters and family violence proceedings – where VLA may be required to provide representation to people who may not qualify for assistance under the means test.¹⁷

Current exemptions are based on a mixture of the characteristics of the client and the type of legal matter. VLA did not decide to exclude these groups of people and legal matters. We are required to exclude these matters due to the operation of laws and agreements relating the provision of legal aid.¹⁸

Key Issues

Issues with the current exemptions from the means test, include:

¹⁶ See *Legal Aid Act 1978*, section 24 (2A) and [VLA Handbook for Lawyers](#).

¹⁷ See, for example, sections 71 & 72 of the *Family Violence Protection Act 2008* and section 197 of the *Criminal Procedure Act 2009*.

¹⁸ VLA is required to exempt veterans from the means test for certain legal matters but VLA has decided to apply this exemption across all matter types.

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- people may have other vulnerabilities that are not reflected in the current exemptions. Those people are still subject to the means test and no allowance is made in the assessment of financial eligibility for their disadvantage or priority client status
 - people in exempt categories may have more income or assets available to them to pay for a private lawyer than people who miss out on legal aid
 - there is no exemption for matters which may bring broad public benefit to a larger group of people and result in systemic change beyond the individual client.

Questions

D1: Should any additional groups of people be exempted from the means test?

D2: How should VLA decide which other matters or groups of people to exempt from the means test?

D3: Should certain types of legal matters (e.g. public interest matters) be automatically exempted from the operation of the means test?

Part E – Use of discretion

A person may request that VLA use discretion to approve an application that does not meet the means test. This means that VLA can choose to approve some applications even though they don't meet the requirements for financial eligibility.

The means test does not provide guidance or examples on the use of discretion. It is up to the individual decision-maker to determine how to use their discretion. However, examples may include:

- allowing a vehicle of a higher value because it has been modified for a person living with disability
- allowing additional cash savings in excess of the allowable limit of assets because the money was already allocated to upcoming bills and expenses
- where a person does not have access to their financial resources due to family violence.

Some other Legal Aid Commissions have more structure to the exercise of discretion in relation to financial eligibility for grant of legal assistance.¹⁹

¹⁹ For example, Legal Aid NSW sets out the circumstances where discretion may be exercised at <http://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/7.-means-test/7.10.-discretions-under-the-means-test>. Legal Aid Queensland also has a process for considering a person's disadvantage where they may not otherwise meet the means test. See <http://www.legalaid.qld.gov.au/Find-legal-information/Factsheets-and-guides/Factsheets/Means-test-special-circumstances-guidelines>. The United Kingdom has a Hardship Review which provides for situations where an applicant has expenses that are not taken into account under the means test. See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/345743/legal-aid-crm16-guidance.pdf.

Key Issues

Issues with the current approach to the use of discretion, include:

- people may not know that they can request discretion for their application to be approved or for changes to the contribution required
- there is an administrative cost associated with the exercise of discretion as these decisions must be made on a case-by-case basis
- the use of discretion by decision-makers may not support transparency and strong understanding of how the means test works
- there may be common circumstances where discretion will be routinely exercised in favour of applicants and it may be clearer to deal with these issues in the content of the means test.

Questions

E1: In what circumstances should discretion be exercised?

E2: Should some of the matters that are currently considered on a discretionary basis be specified in the means test? For example, medical expenses, disability aids and financial hardship?

E3: Should there be more structure or guidance to the exercise of discretion? What do you think should be included?

E4: How can we balance fairness with transparency?

Part F – Looking beyond the means test

The *Legal Aid Act 1978* requires VLA to consider whether a person has the capacity to pay for a private lawyer, which is the starting point for our assessment of eligibility. However, there is increasing recognition that an income and assets based assessment of financial resources may not provide a complete picture of a person's experience of social exclusion or disadvantage. It is also true that there are a number of other factors, such as education, living with a disability, being a sole parent or being from an Aboriginal or Torres Strait Islander or CALD background, that may influence a person's legal need or whether or not they seek legal help for their problem. For these people, forging a connection with legal assistance services may be particularly important.

The fact that the means test is the first threshold for eligibility is significant. VLA already targets 'priority clients', who are groups of people with characteristics or circumstances that make them vulnerable to legal problems or a high priority for receiving our services. However, these factors are not considered if a person is not financially eligible for assistance. This means that many people who might be considered vulnerable or disadvantaged in some way may miss out on the basis of their finances when they apply for legal help.

Given that the levels for financial eligibility are very low, vulnerable people may experience even greater disadvantage as a result. For socially excluded or isolated people, a missed opportunity to connect with legal assistance may compound their experience of social exclusion. It may also increase future costs to the community.

There is also growing awareness that even when people have a regular income and some assets, they may experience ‘financial stress’ and be unable to pay bills or meet emergency expenses.²⁰

Questions

F1: What are some of the barriers to applying for a grant of legal assistance? How can VLA remove or reduce the impact of these barriers?

F2: What should be the key considerations for assessing relative need?

F3: Do you have any examples of people who have missed out on legal assistance despite being socially or financially disadvantaged? What happens when a person misses out?

F4: Should the means test allow for the exercise of discretion to consider special circumstances? If so, what kind of circumstances do you think we should consider?

F5: How can VLA incorporate other measures of social or financial disadvantage in the assessment of eligibility?

Part G – Better information about financial eligibility

One of the objectives of the Means Test Review is to increase the accessibility of information about financial eligibility for grants of legal assistance.

Currently, information about the means test is included in the [VLA Handbook for Lawyers](#) and on the [VLA website](#). This sets out the elements and requirements of the means test and contributions policy. While this information is publicly accessible, the audience for the VLA Handbook is lawyers providing legal aid services. The information may be difficult and confusing for members of the general public.

General material on financial eligibility that provides guidance to applicants can be hard to provide because financial eligibility is closely linked to the individual circumstances of applicants.

Some Legal Aid Commissions have adopted self-help tools where potential applicants can enter their financial information and receive a response that indicates whether they may be eligible for a grant of legal assistance. This is not a final decision about eligibility but assists people to understand what options may be available for the resolution of their legal issue.

For example, Legal Aid NSW has a ‘Means Test Indicator’ on its website and mobile application.²¹ Other jurisdictions publish a simple overview for applicants on the test for financial eligibility. The United Kingdom includes a self-help tool for financial eligibility on its website that also assists a person to understand whether legal aid is available for their particular legal issue.²²

²⁰ For example, ‘financial stress’ may be relevant as it goes directly to the question of whether a person has resources available to pay for a private lawyer.

²¹ See <http://www.legalaid.nsw.gov.au/get-legal-help/applying-for-legal-aid/means-test-indicator>.

²² See <https://www.gov.uk/check-legal-aid>. There are also detailed eligibility calculators for use by practitioners. See, for example, <https://www.gov.uk/guidance/civil-legal-aid-means-testing>.

Questions

G1: Where do people usually get information about financial eligibility for grants of legal assistance?

G2: How can VLA improve the information available to people about financial eligibility for grants of legal assistance?

G3: Are there examples of useful information about financial eligibility for services that promote community understanding that you think the review should consider?

Part H – Reviewing and updating the means test

There is no regular update or review mechanism for the existing means test. The National Means Test includes a suggested regular review period but the financial circumstances of each of the Legal Aid Commissions has meant that the means test thresholds are not regularly updated or reviewed. Centrelink, by contrast, updates its thresholds on a quarterly basis.

The effect of this lack of review and update is that the means test has become harsher over time. As a result, an increasing number of people are not poor enough to qualify for legal aid but still cannot afford a private lawyer. However, without additional funding, regular increases in the means test are not affordable without applying other restrictions to service eligibility, such as narrowing existing guidelines.

Questions

H1: Should the means test be updated or reviewed at regular intervals?

H2: How regularly should the means test be reviewed?

H3: What factors should be considered as part of the regular review process?

H4: Who should be involved or consulted as part of regular reviews?

Appendix 1 – Summary of Questions

Part B – Means Test

Income Test

B1: Do you have any examples of circumstances where you think the income test has been unfair or could be improved?

B2: How can we make the assessment of income fairer to make sure people who need legal assistance are eligible for help?

B3: How can we make it easier for people to understand if they are eligible for a grant of assistance based on their income?

B4: What changes do you think there should be to the financial information required to support an application for a grant of legal assistance?

B5: Should there be any additional allowances for household costs? If so, what should they be?

B6: Should there be any additional allowances for other types of expenses? If so, what should they be?

B7: Are there any other issues with the income test?

Assets Test

B8: Do you have any examples of circumstances where you think the assets test has been unfair or could be improved?

B9: How can we increase fairness in the assessment of assets?

B10: Should VLA consider a person's whole assets pool or should the separate asset categories be maintained?

B11: What assets should be excluded under the assets test?

B12: Should the assets test treat homeowners and non-homeowners differently? Why or why not?

B13: Are there any other issues with the assessment of assets for applicants for legal assistance?

Financially Associated Persons

B14: Do you have any examples of circumstances where you think the assessment of financially associated persons has been unfair or could be improved?

B15: How can we increase fairness in the assessment of people in financially supportive relationships?

B16: Should financially associated persons continue be included in the assessment of a person's financial resources? Why or why not?

B17: How can the resources of a household be assessed in a fair and transparent way?

B18: Should the definition of 'financially associated person' be changed? If so, how?

B19: Are there any other issues with the assessment of financially associated persons?

Estimated Legal Costs

B20: Do you have any examples where you think the estimation of legal costs has been unfair or could be improved?

B21: How can we achieve fairness for financial eligibility across different legal issues?

B22: Are the cost categories appropriate? Do they reflect the actual cost of obtaining legal assistance from a private lawyer? If not, how can the cost categories be changed to better reflect the actual cost of private representation?

B23: Are there any other issues associated with estimated legal costs?

Part C – The Contributions Policy

C1: Do you have any examples where you think the contributions policy was unfair or could be improved?

C2: Are there any circumstances where a contribution is not appropriate?

C3: Is it fairer to have an upfront contribution for all grants of legal assistance?

C4: Are there any issues with the recovery of debts from people who receive a grant of legal assistance?

C5: Are there any issues with the content or operation of the debt policy?

Part D – Exemptions from the means test

D1: Should any additional groups of people be exempted from the means test?

D2: How should VLA decide which other matters or groups of people to exempt from the means test?

D3: Should certain types of legal matters (e.g. public interest matters) be automatically exempted from the operation of the means test?

Part E – Use of discretion

E1: In what circumstances should discretion be exercised?

E2: Should some of the matters that are currently considered on a discretionary basis be specified in the means test? For example, medical expenses, disability aids and financial hardship?

E3: Should there be more structure or guidance to the exercise of discretion? What do you think should be included?

E4: How can we balance fairness with transparency?

Part F – Looking beyond the means test

F1: What are some of the barriers to applying for a grant of legal assistance? How can VLA remove or reduce the impact of these barriers?

F2: What should be the key considerations for assessing relative need?

F3: Do you have any examples of people who have missed out on legal assistance despite being socially or financially disadvantaged? What happens when a person misses out?

F4: Should the means test allow for the exercise of discretion to consider special circumstances? If so, what kind of circumstances do you think we should consider?

F5: How can VLA incorporate other measures of social or financial disadvantage in the assessment of eligibility?

Part G – Better information about financial eligibility

G1: Where do people usually get information about financial eligibility for grants of legal assistance?

G2: How can VLA improve the information available to people about financial eligibility for grants of legal assistance?

G3: Are there examples of useful information about financial eligibility for services that promote community understanding that you think the review should consider?

Part H – Reviewing and updating the means test

H1: Should the means test be updated or reviewed at regular intervals?

H2: How regularly should the means test be reviewed?

H3: What factors should be considered as part of the regular review process?

H4: Who should be involved or consulted as part of regular reviews?

Appendix 2 – Overview of key elements of the means test



Appendix 3 – Cost of living allowances

The allowable deductions are as follows:

Allowance	Allowable deduction – Victoria Legal Aid	National Means Test benchmark
Housing	<ul style="list-style-type: none"> To a maximum of \$400 per week for inner, middle and metropolitan areas; \$300 per week for outer areas; and \$240 per week for regional areas 	Percentage as determined by each Legal Aid Commission of the average rent of a 2-bedroom flat with reference to local Real Estate Institutes or other authorities
Child Care	<ul style="list-style-type: none"> \$310 per week (per household) 	Percentage of the figure for childcare relief as determined by the Department of Health and Community Services (Cth) (i.e. A maximum of 50 hours per week)
Dependant (any person who relies on the person for financial support. This may include a spouse, partner or child of the person applying for a grant of legal assistance.)	<ul style="list-style-type: none"> \$130 for the first dependant \$125 for subsequent dependants 	Percentage of the Henderson Poverty Line ²³ figures of the difference between 'Head in Workforce, Cost other than Housing, Single parent plus 1' and 'Head in Workforce, Cost other than Housing, Single Person' as set out in Table 1 of the published figures.

²³ The Henderson Poverty Line was developed in the mid-1960s and was originally defined as the basic wage plus child endowment for a family of four (two adults and two children). It aims to set out the minimum income levels required to avoid a situation of poverty for a range of family sizes and circumstances. Quarterly updates to the Henderson Poverty Line are published by the University of Melbourne at <https://melbourneinstitute.com/miaesr/publications/indicators/poverty-lines-australia.html>.

Appendix 4 – Categories of estimated legal costs

The three categories of estimated legal costs and the assistance granted for each category are as follows:

Costs Category	Estimated Legal Costs	Assistance granted
<p>Category 1 Includes: summary crime, family violence, personal safety intervention orders, infringements.</p>	Less than \$1555	<ul style="list-style-type: none"> • VLA will make a grant of assistance for net disposable income up to \$469 a week. • Between \$361 and \$469 the person would be required to pay a contribution.
<p>Category 2 Includes: family law (up to and including trial stage), child protection, criminal appeals to the County Court, family law appeals.</p>	Between \$1555 and \$6560	<ul style="list-style-type: none"> • VLA will make a grant of legal assistance for net disposable income up to \$539 a week. • Between \$361 and \$539 a week the person would be required to pay a contribution.
<p>Category 3 Includes: indictable crime, family law (trial stage), criminal appeals to the Court of Appeal.</p>	More than \$6560	<ul style="list-style-type: none"> • If net disposable income is more than \$360 per week, VLA will usually make a grant of legal assistance unless the required contribution would exceed the estimated legal costs.

Appendix 5 – Calculating contributions

Calculation of the initial contribution based on income

If the net disposable income of a person applying for a grant of legal assistance is \$361 or more a week, the following table²⁴ shows how VLA calculates:

- the amount of the initial contribution which VLA will require the person to pay towards their legal costs; and
- the period of time over which the person must pay the amount in instalments.

Assessable income	Category 1: • estimated costs less than \$1555 • contribution paid over 13 weeks	Category 2: • estimated costs \$1555–\$6560 • contribution paid over 26 weeks	Category 3: • estimated costs more than \$6560 • contribution paid over 52 weeks
\$365	\$280	\$580	\$1175
\$375	\$340	\$800	\$1605
\$385	\$430	\$1005	\$1995
\$395	\$530	\$1230	\$2455
\$405	\$605	\$1500	\$3030
\$415	\$740	\$1765	\$3545
\$425	\$870	\$2060	\$4180
\$435	\$1070	\$2395	\$4855
\$445	\$1219	\$2840	\$5670
\$455	\$1418	\$3240	\$6485
\$465	\$1617	\$3640	\$7305
\$475	–	\$3830	\$7720
\$485	–	\$4360	\$8770
\$495	–	\$4890	\$9735
\$505	–	\$5375	\$10,900
\$515	–	\$5885	\$11,780

²⁴ Please note that this table has been adapted from [Table 2](#) in the VLA Handbook for Lawyers. The net assessable income amounts shown are the midpoint of the range for ease of reference.

\$525	–	\$6435	\$12,835
\$535	–	\$6980	\$13,900
\$540 and over	–	–	\$13,900 plus \$1065 for every \$10 of net disposable weekly income more than \$540

Calculation of the initial contribution based on assets

The following tables²⁵ shows how the initial contribution payable is calculated for:

- a person who has no relevant financially associated person and the total value of the person's assets is more than \$1095
- a person who has an FAP and the total value of their combined assets is more than \$2190.

No financially associated person

Total Assessable Assets	Contribution
\$1195	\$20
\$1295	\$40
\$1395	\$60
\$1495	\$80
\$1595	\$100
\$1695	\$130
\$1795	\$160
\$1895	\$190
\$1995	\$220
\$2095	\$250
\$2195	\$290
\$2295	\$330
\$2395	\$370
\$2495	\$410

²⁵ Please note that this table has been adapted from [Table 3](#) in the VLA Handbook for Lawyers. The amounts show the total assessable assets rather than the assets over the allowable limit for ease of reference.

Total Assessable Assets	Contribution
\$2595	\$450

With financially associated person

Total Assessable Assets	Contribution
\$3790	\$500
\$3890	\$550
\$3990	\$600
\$4090	\$650
\$4190	\$700
\$4290	\$760
\$4390	\$820
\$4490	\$880
\$4590	\$940
\$4690	\$1000
\$4790	\$1060
\$4890	\$1120
\$4990	\$1180
\$5090	\$1240
\$5190	\$1300
more than \$5190	\$1300 plus the full value of assets above \$5190