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# Justice on the Brink Stronger Legal Aid for a Better Legal System

**IMPACT  
ECONOMICS  
AND POLICY**

A report prepared by **Impact Economics and Policy**  
for **National Legal Aid**



## Impact Economics and Policy

Impact Economics and Policy brings together a group of expert economists and policy specialists with experience working for government, non-for-profits and big four consulting. Established at the start of 2022, our mission is to partner with clients for impact through providing robust evidence, fresh analysis, and strategic communication to tackle Australia's biggest public policy challenges.

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## Acknowledgement of Country

We acknowledge Aboriginal and Torres Strait Islander peoples as the Traditional Owners of Australia and their continuing connection to both their lands and seas.

We also pay our respects to Elders – past and present – and generations of Aboriginal and Torres Strait Islander peoples now and into the future.

We accept the invitation of the **Uluru Statement of the Heart** and support the campaign for a **First Nations Voice to Parliament** to be protected by the Australian Constitution.



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# Summary

Access to justice is a fundamental element of a democratic society governed by the rule of law. Inadequate access leaves individuals, businesses, and communities at significant risk of adverse legal, economic, and social outcomes that can have life-long implications.

Since 1973, government funded Legal Aid has been Australia's way of bridging the gap between affordability and access; it is social insurance for the justice system. But Legal Aid remains chronically underfunded.

In 2014, a major report by the Productivity Commission recommended additional Commonwealth funding of \$200 million per year for legal assistance services to address unmet need. This funding would have expanded the means test for Legal Aid, giving more people access and increasing the number of grants.

However, this funding was never provided and instead Commonwealth funding of Legal Aid has reduced by 3 per cent per capita over the past decade, leaving Legal Aid services at crisis point. There is insufficient funding to meet demand and this is leaving many Australians without access to legal representation and services.

This lack of funding disproportionately impacts disadvantaged groups, and while data on demand for Legal Aid services remains inadequate, a recent survey of legal need found certain groups are more likely to experience multiple legal problems. On average compared to the entire population:

- Aboriginal and Torres Strait Islander people experience 64 per cent more legal problems;
- People experiencing severe mental distress experience 156 per cent more legal problems; and
- Single parents experience 46 per cent more legal problems.

In-house and private Legal Aid practitioners we interviewed for this report painted a picture of a sector that is overwhelmed, underpaid, and unable to properly serve the community. Pay for Legal Aid lawyers has not kept up with comparable wages over time, and the Commonwealth pays its own lawyers up to between 70 and 226 per cent higher than it pays Legal Aid lawyers.

As the Albanese Government reviews funding under the National Legal Assistance Partnership, it is time to update and review the findings from the Productivity Commission's report to ensure the new agreement addresses the unmet need for Legal Aid assistance across Australia.

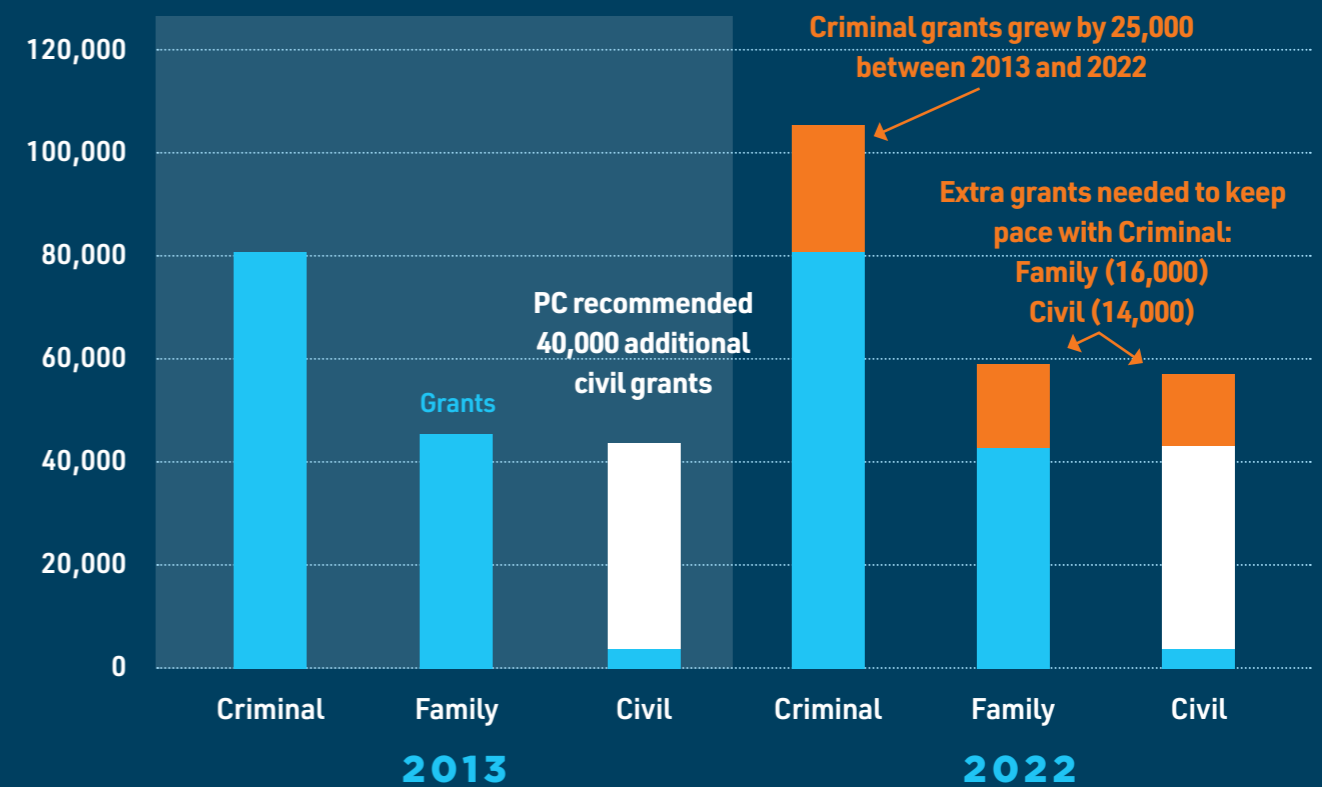
Original modelling for this report by Impact Economics and Policy finds that based on the methodology used by the 2014 Productivity Commission report, an increase of \$484 million in Legal Aid funding per year is required:

- \$317 million to reach the recommended share of family and civil grants; and
- \$98 million to reach the recommended means testing coverage; and
- \$69 million to protect the sector from the immediate threat of supply failure.

This funding boost would underpin an increase consistent with the findings of the 2014 Productivity Commission report, and could deliver over \$600 million in economic and social benefits.<sup>1</sup>

We find that ensuring these needs will be met requires implementation of the Productivity Commission's broader recommendations for increased data quality to measure the level of unmet need accurately. Good policy development will also require collating insights about private practitioners working in Legal Aid.

CHART 1 NEW GRANT ALLOCATIONS TO ALIGN WITH PC RECOMMENDATION.



Source: Impact Economics analysis of National Legal Aid (2023), National Legal Aid dataset; and Productivity Commission (2014), Access to Justice, Page 1025.

1. Impact Economics analysis of PwC (2023), The benefits of providing access to justice, Page iii.

# Introduction:

## access to justice and the critical role of Legal Aid

Access to justice is a foundational part of a fair and robust legal system. All people in a democratic society must be able to exercise their legal rights, including accessing legal assistance when they need it. Accessible justice enables people, businesses, and communities to prevent conflicts and obtain effective, fair, equitable and timely resolution of their legal conflicts if they do occur.<sup>2</sup>

In June 2023 the Attorney General, the Hon Mark Dreyfus KC MP, put it like this:

*[Access to justice] requires acting to address the obstacles that hinder people's engagement with, or understanding of, our legal system, with the ultimate goal of delivering a fair, affordable and accessible justice system for all.<sup>3</sup>*

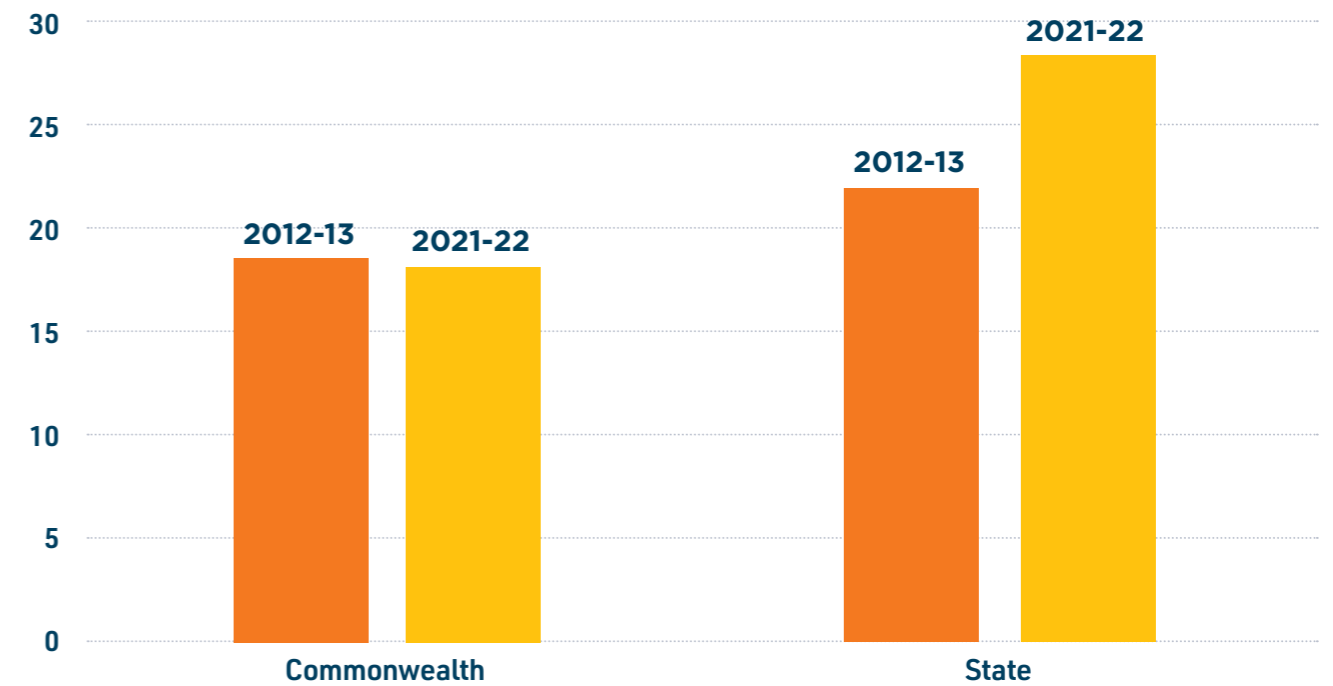
For many people, legal advice is a cost they are unable to meet. Without it, they may be unable to pursue their claims and exercise their rights. There are particular impacts for those with multiple, compounding legal issues, who are often those in vulnerable groups.

Inadequate legal assistance brings significant economic and social costs for individuals, families, and communities. A 2023 report prepared for National Legal Aid (NLA) estimated that the annual benefit of select Legal Aid outcomes was \$601 million.<sup>4</sup> Ignored and underattended legal problems violate our collective democratic values and the dignity every Australian is individually owed. Justice denied places severe restrictions on people's well-being, and their ability to participate in the relationships and activities that give rise to meaningful living.

The justice system also determines the level of economic growth. The justice system is an integral part of the institutional foundations for promoting the thriving investment climate necessary for economic growth. Without a functional legal system, markets don't work and prosperity is undermined. The Hague Institute of Innovation and Law estimates that legal problems cost OECD countries between 0.5 and 3 per cent of GDP in lost income, damaged health and, seeking redress. In 2023, that amounts to between \$11 billion and \$66 billion in Australia.<sup>5</sup> The Victoria Law Foundation's landmark 2023

2. OECD (2023). *Recommendation of the Council on Access to Justice and People-Centred Justice Systems*.  
 3. Dreyfus (2023). *National Access to Justice and Pro Bono Conference*.  
 4. National Legal Aid (2023). *The benefits of providing access to justice*.  
 5. The Hague Institute of Innovation and Law (2023). *Understanding Justice Needs*.  
 6. Balmer, N. (2023). *The Public Understanding of Law Survey (PULS) Volume 1: Everyday Problems and Legal Need*. Melbourne. Pages 12 and 170.  
 7. Impact Economics analysis of ABS (2012). *Australian Demographic Statistics, Dec 2012*; ABS (2022) *National, state and territory population tables, Dec 2022*; and National Legal Assistance Partnership Review (2023) *Issues Paper*. Page 4.

CHART 2 COMMONWEALTH AND STATE PER CAPITA SPENDING ON LEGAL ASSISTANCE, 2012 AND 2021, DOLLARS.



Source: Impact Economics analysis of ABS (2012). *Australian Demographic Statistics, Dec 2012*; ABS (2022) *National, state and territory population tables, Dec 2022* and National Legal Assistance Partnership Review (2023) *Issues Paper*. Page 4.

survey, *The Public Understanding of Law Survey (PULS)* found the average Victorian had more than 1.2 legal problems, this would suggest approximately 24 million legal problems nationwide.<sup>6</sup> Many will be ignored or underattended because accessing the complex institutions that make up our legal system requires costly professional assistance.

Since 1973, government funded Legal Aid has been Australia's way of bridging the gap between affordability and access; it is social insurance for the justice system. But Legal Aid remains chronically underfunded. There is a longstanding gap between legal assistance need and legal assistance funding. This issue was highlighted by the Productivity Commission in *Access to Justice Arrangements*.

Instead, Commonwealth funding for Legal Aid per capita has shrunk by 3 per cent over the past decade. Per capita spending went from \$18.59 to \$18.10. State and territory per capita spending grew by almost 30 per cent, from \$21.94 to \$28.40. As a result, the Commonwealth now spends 64 cents on

the state and territory dollar, down from 85 cents.<sup>7</sup>

On the supply side, we find that chronic underfunding and underpayment is eroding the supply of practitioners willing to undertake Legal Aid work threatening the viability of services across the country. Legal Aid lawyers report the pressures of high caseloads, against a backdrop of low and falling wages compared to their counterparts in the commercial sector. As one lawyer working in Indigenous family law put it to us, "Societies talk about how important this 'access to justice' is, and our justice net is completely overwhelmed." This erodes the number, quality, and experience of private practitioners delivering legal assistance.

In order to quantify the funding required, data on need is essential. Currently, this is not routinely collected. As noted by the Productivity Commission and in the Issues Paper, improving data collection is paramount to ensuring that the Australian public and government can have confidence that our legal needs are being met.



# The burden of unmet legal need

When a person is unable to obtain the legal assistance required to pursue their rights, there is an unmet legal need. In Australia, most legal needs are going unmet.<sup>8</sup>

The combination of the existing means test and rising demand for legal assistance has created a large justice deficit. In Victoria alone, the PULS survey found over 12 legal problems per 10 respondents, with over half legal problems ultimately becoming unmet needs.<sup>9</sup> Extrapolating those numbers across the Australian population yields 24 million legal problems nationwide, including 12 million problems that will not be appropriately resolved. In Australia, unmet legal need is intolerably routine.

## Evolving community needs for legal assistance

Demand for legal assistance has been rising, driven by strong population growth and developments across a number of key drivers in legal need.

Employment problems are more common today because 21 per cent more people are employed in Australia than 10 years ago. Housing problems are more common because there are 20 per cent more households. Non-scam contacts recorded in the Australian Consumer and Competition Commission database grew by 60 per cent between 2013 and 2021, so goods and services related legal needs are more prominent. Family law demand is up because 2021 saw 18 per cent more divorces than 2013.

Government payment-related need has grown because the number of people on Commonwealth government payments, benefits, allowances, and pensions is 26 per cent higher this year than a decade ago. Legal need arising from debt has increased because average household debt as a per cent of disposable income grew 10 per cent between 2013 and 2021.

8. Balmer, N. (2023). *The Public Understanding of Law Survey (PULS) Volume 1: Everyday Problems and Legal Need*. Melbourne. Page 153.

9. Balmer, N. (2023). *The Public Understanding of Law Survey (PULS) Volume 1: Everyday Problems and Legal Need*. Melbourne. Pages 12, 153, and 170.

**TABLE 1** EVOLVING LEGAL NEED IN MOST COMMON PROBLEM TYPE.

Type of problem	Per cent of unmet legal needs	Indicator	Original	New	Change
Employment	16%	Employed people	11,454,983	13,809,840	121%
Goods and services	16%	Non-scam contacts to ACCC	68,039	108,754	160%
Housing	15%	Households	7,760,000	9,275,000	120%
Family	15%	Divorces	47,638	56,244	118%
Government payments	9%	Government payment recipients	5,506,098	6,961,475	126%
Debt or money	9%	Household debt as per cent of net disposable income	193	212	110%

Source: Balmer, N. (2023). *The Public Understanding of Law Survey (PULS) Volume 1: Everyday Problems and Legal Need*. Melbourne. Page 153; ABS (2023). *Labour Force Statistics*, July 2023; ACCC (2014) *Annual Report, 2013-14*. Pages 4 and 141; ACCC (2022). *Annual Report 2021-22*. Page 97. ABS (2011) *Australian Census*; ABS (2021) *Australian Census*; ABS (2014) *Marriages and Divorces 2013*; ABS (2022) *Marriages and Divorces 2021*; DSS (2014) *Payment recipients by payment type and state and territory, December 2013*; DSS (2023) *Payment recipients by payment type and state and territory, June 2023*; OECD (2022) *Household accounts - Household debt - OECD Data*.

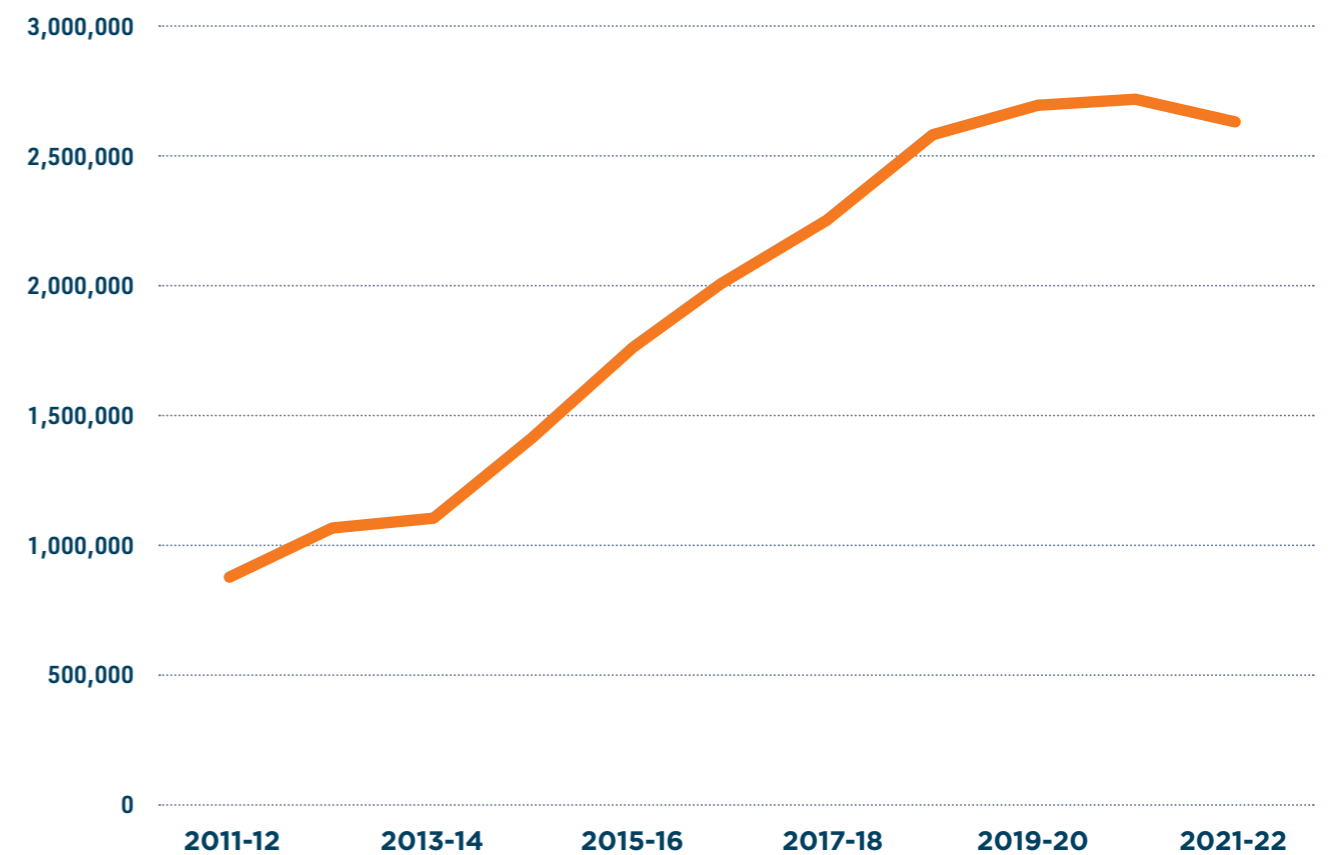
Note: The indicators only provide segments of demand change in legal assistance. In many cases the actual demand change will be significantly greater. Cf. Divorce rates are not representative of growing number of separations among families that were never married.

## Evidence of increasing demand for Legal Aid services

As these demand drivers have been adding to the legal needs of the Australian population, the number of people who contact Legal Aid Commissions (LACs) has been rising at alarming rates.

Visits to the Victoria Legal Aid website tripled over ten years. The website provides information about legal problems and how to get legal assistance. In 2011, the website had 879,807 visits. That number has increased steadily since then, adding an average of 175,000 extra visits every year to 2021, when the total count exceeded 2.6 million.<sup>10</sup>

**CHART 3** VICTORIA LEGAL AID WEBSITE VISITS.

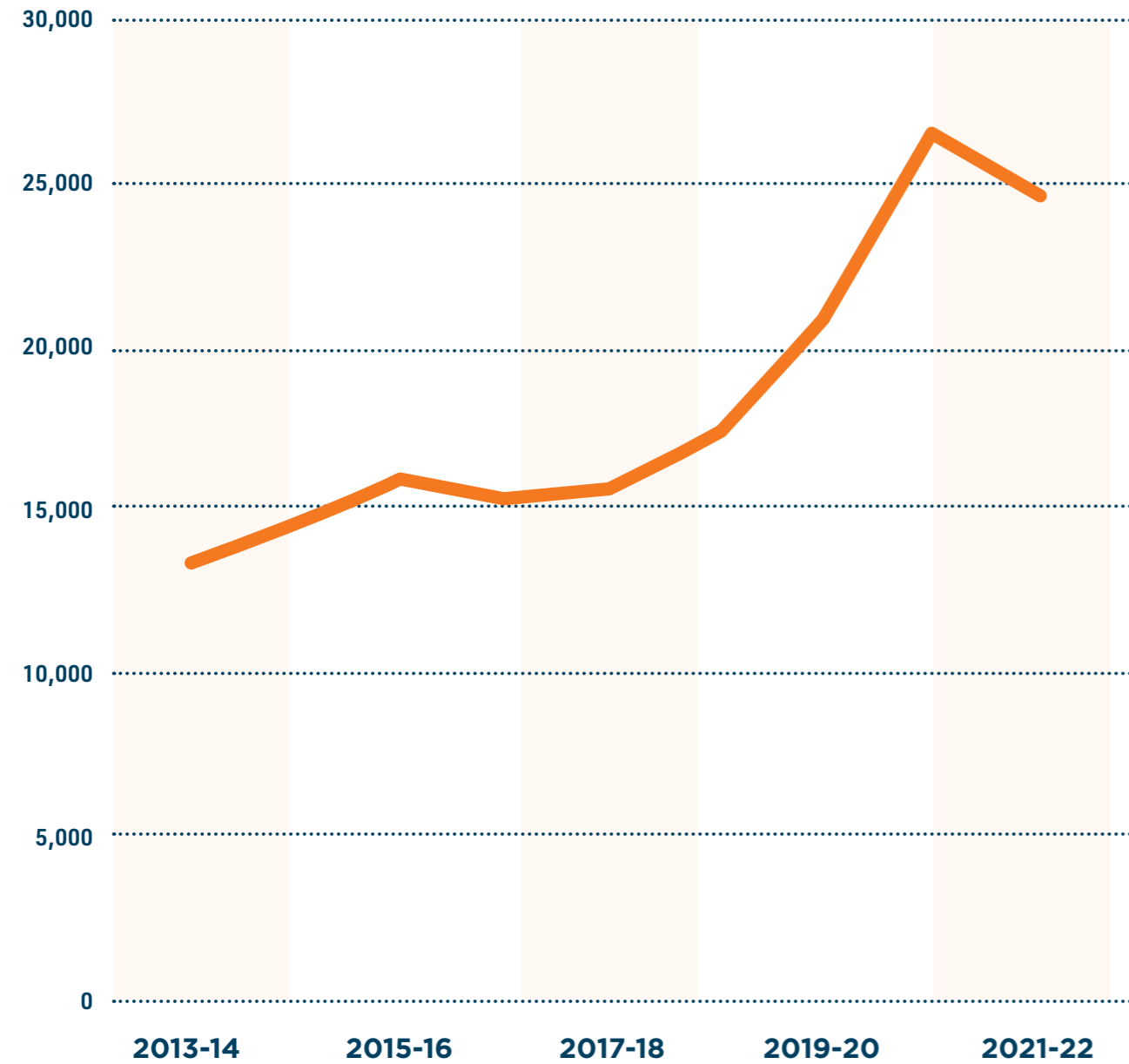


Source: Victoria Legal Aid (2011-12 to 2021-22) *Annual Report, various*.

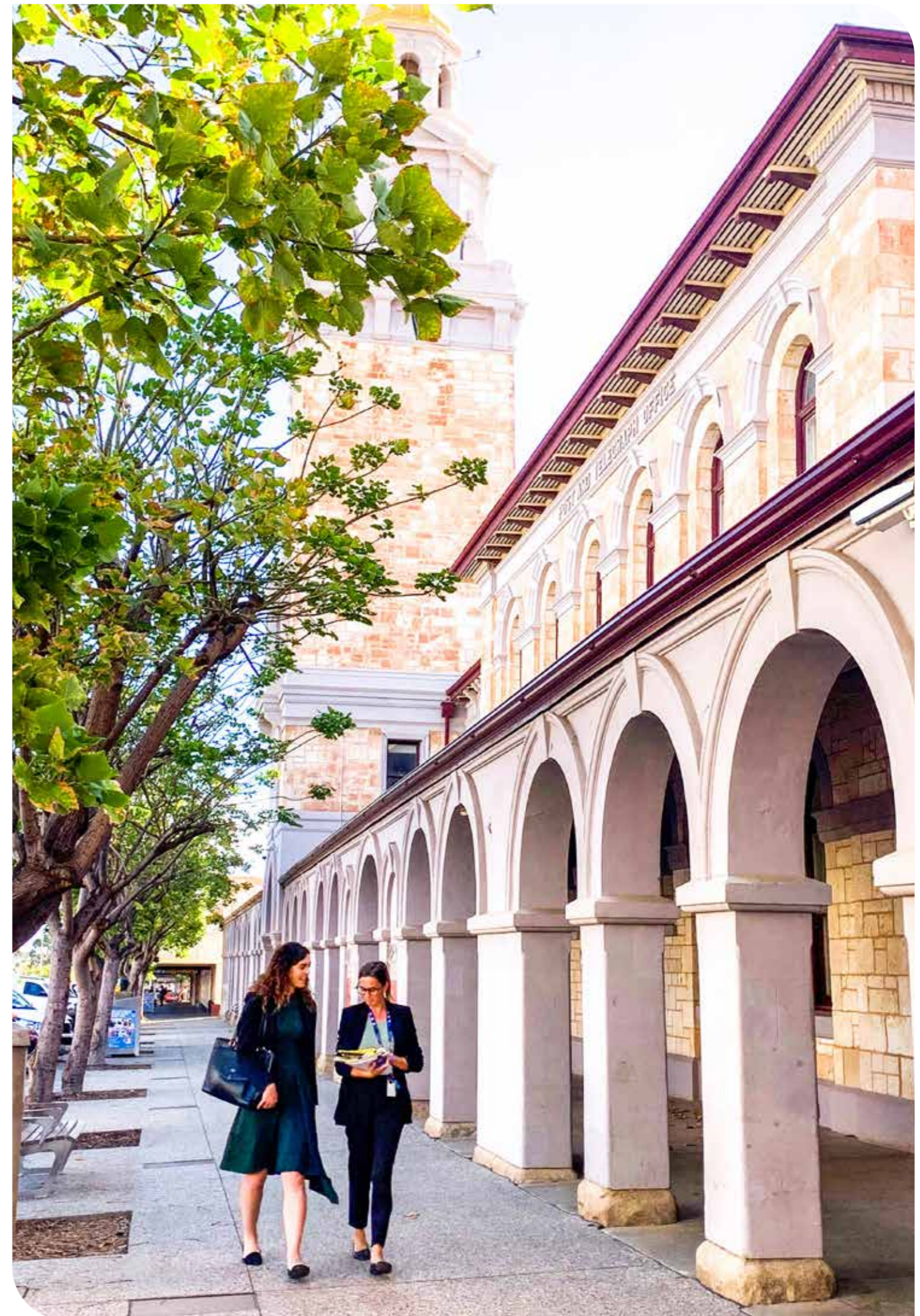
10. Victoria Legal Aid. *Annual Reports, various*. Note: Increased internet usage likely accounts for some of this growth but would struggle to explain the full scale given internet penetration in Australia started the period at 79 per cent and concluded the period at 96 per cent. Source: World Bank (2021) *Individuals using the internet, Australia*.

The Legal ACT Aid Helpline provides guidance over the phone on understanding and dealing with legal problems like family law disputes, neighbour disputes, criminal charges, debt, personal injury compensation, and employment issues. In 2013, the Helpline received 13,356 calls. In 2020, the contact count peaked at 26,539, double what it was in 2013.

**CHART 4** LEGAL AID ACT HELPLINE CALLS.



Source: Legal Aid ACT (2013-14 to 2021-22). [Annual Reports, various.](#)



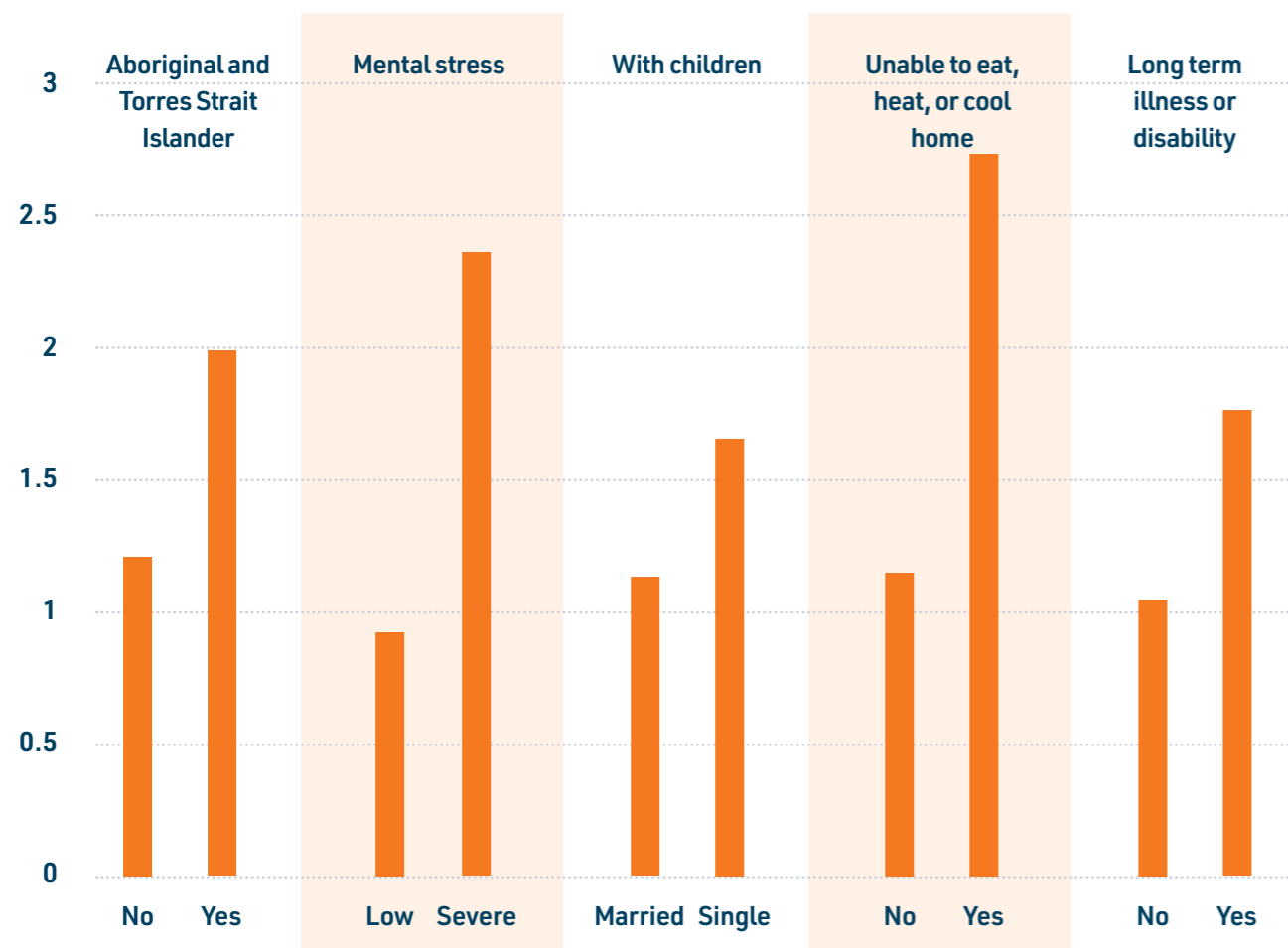
## Disadvantaged groups

The National Strategic Legal Assistance Framework sets out six guiding principles for providing legal assistance, including a service delivery focus on disadvantaged people.<sup>11</sup>

Policy settings relating to legal assistance impact socially and economically disadvantaged groups more than other parts of our community. Where settings foster equality and wellbeing, including gender equity and the wellbeing of marginalised groups, they do so by bringing access to those who would otherwise be excluded.

The PULS report shows that socially and economically excluded cohorts have greater unmet legal need. Respondents who reported difficulty meeting essential household expenses; Aboriginal and Torres Strait Islanders; people suffering mental stress; less qualified people; single parents; and the unemployed were the most likely to report a legal need. They were also more likely to report that a severe problem had gone unmet and that their problem had a longer duration.<sup>12</sup>

**CHART 5** AVERAGE NUMBER OF LEGAL PROBLEMS AMONG DISADVANTAGED GROUPS.



Source: Balmer, N. (2023). *The Public Understanding of Law Survey (PULS) Volume 1: Everyday Problems and Legal Need*. Melbourne. Pages 198 and 199.

11. Council of Attorney Generals (2019). *National Strategic Legal Assistance Framework*.

12. Balmer, N. (2023). *The Public Understanding of Law Survey (PULS) Volume 1: Everyday Problems and Legal Need*. Melbourne. Pages 14, 18, and 20.

## The impact of the means test

Current means test settings for Legal Aid mean that public assistance is available only to the poorest in our community. Between the very poor and the rich, a large cohort does not have functional access to the legal system they rely on and pay for through their taxes. As one Legal Aid lawyer put it in an interview for this report, “Most people, even those who are on six figure incomes, don’t carry around the sort of cash that they need to put up front to run litigation.”

The *Access to Justice Arrangements* report estimated that 8 per cent of households across Australia met the income and assets tests in 2014.<sup>13</sup> At that time, about 13 in 100 Australians were living in poverty.<sup>14</sup> The report recommended increasing means test thresholds by 10 per cent.<sup>15</sup>

Using the most recent ABS Survey of Income and Housing (2019-20), Impact Economics replicated the PC analysis and found that the headline household access rate, 8 per cent, remains unchanged. The poverty rate has also held steady.

“I think that there’s now a wider band of people who can’t access Legal Aid, whereas there wasn’t maybe such a wide band before. And then there’s still not as many CLCs who can pick up that slack. The client hasn’t necessarily changed, but I think there’s a widening of people who need the access.”

**MIRANDA**, PRIVATE PRACTITIONER  
DELIVERING FAMILY AND CRIMINAL LAW  
LEGAL AID SERVICES, ADELAIDE



13. Productivity Commission (2014). *Access to Justice*. Page 20.

14. ACOSS (2023). *Poverty and Inequality*.

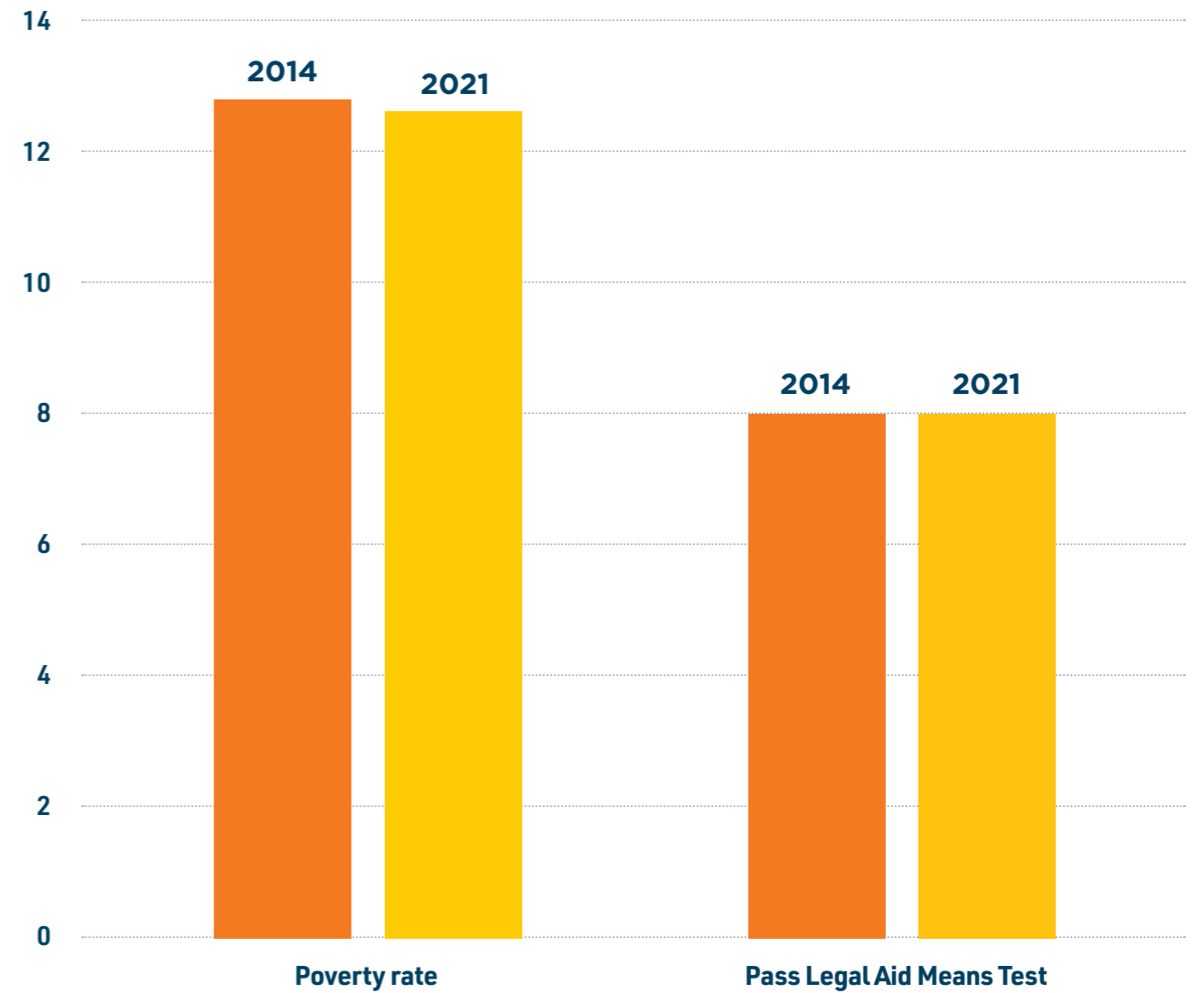
15. Productivity Commission (2014). *Access to Justice*. Page 1023.





**CHART 6**

2014-2021 POVERTY RATE AND ESTIMATED PROPORTION OF HOUSEHOLDS THAT QUALIFY FOR LEGAL AID, PER CENT.



Source: Impact Economics Analysis; National Legal Assistance Partnership Review (2023) *Issues Paper*, Page 4; and ACOSS (2023). *Poverty and Inequality*.

The Victoria Legal Aid website puts the outcome of current means testing simply:

*There is a gap between the income and asset thresholds used in our means test and the costs of paying for a lawyer privately. This may lead to a situation where an applicant does not qualify for a grant of Legal Aid because they do not meet the means test, and they cannot afford to pay for a lawyer to obtain the legal service they need.<sup>16</sup>*

16. Victoria Legal Aid (2023). *Handbook for Lawyers: Means Test*.

# Future challenges: the supply of Legal Aid services

Alongside the demand side of the access to justice deficit is the story of insufficient supply. In-house and private Legal Aid practitioners we interviewed for this report painted a picture of a sector that is overwhelmed, underpaid, and unable to properly serve the community.

“I primarily left because I got to a point where the pressure was too significant and it was essentially affecting my health.”

**JOHN**, PRIVATE PRACTITIONER DELIVERING FAMILY LAW LEGAL AID SERVICES, REGIONAL VICTORIA

## Supply is failing the community

Private Legal Aid practitioners are essential to delivering adequate amounts and quality of legal assistance. For the past ten years, the proportion of approved cases assigned to external practitioners, as opposed to being handled in-house, has been about 7 in 10. Increasing from 69 per cent in 2013 to 72 per cent, with an in-period peak of 78 per cent in 2022.

Without private practitioners, legal assistance would grind to a halt. However, the incentives work against private practitioner engagement as outlined in the NLAP Review Issues Paper:

*Legal assistance lawyers are among the lowest paid in the profession and grants of Legal Aid for private practitioners are in many cases inadequate.*

The inadequacy of private practitioner fees was a strong focus of submissions to the Productivity Commission’s *Access to Justice* Inquiry with the Law Council of Australia evidencing:

*... if the rates offered to the private profession for accepting Legal Aid work do not increase significantly, the withdrawal of the private profession from the legal assistance sector will continue. This will threaten the viability of the mixed model for legal service delivery and the efficiencies that model achieves.<sup>17</sup>*

The Commission ultimately found that:

*... over the medium term, it will be necessary to narrow the gap between the Legal Aid rate and the ‘market rate’ so that experienced private lawyers continue to undertake Legal Aid work.<sup>18</sup>*

But the medium term has come and gone, and the problem is worse. Since 2013 private practitioner fees have failed to keep up with either inflation or the wage price index, with average payments reducing \$31 per hour, or 18 per cent, in real terms.<sup>19</sup>

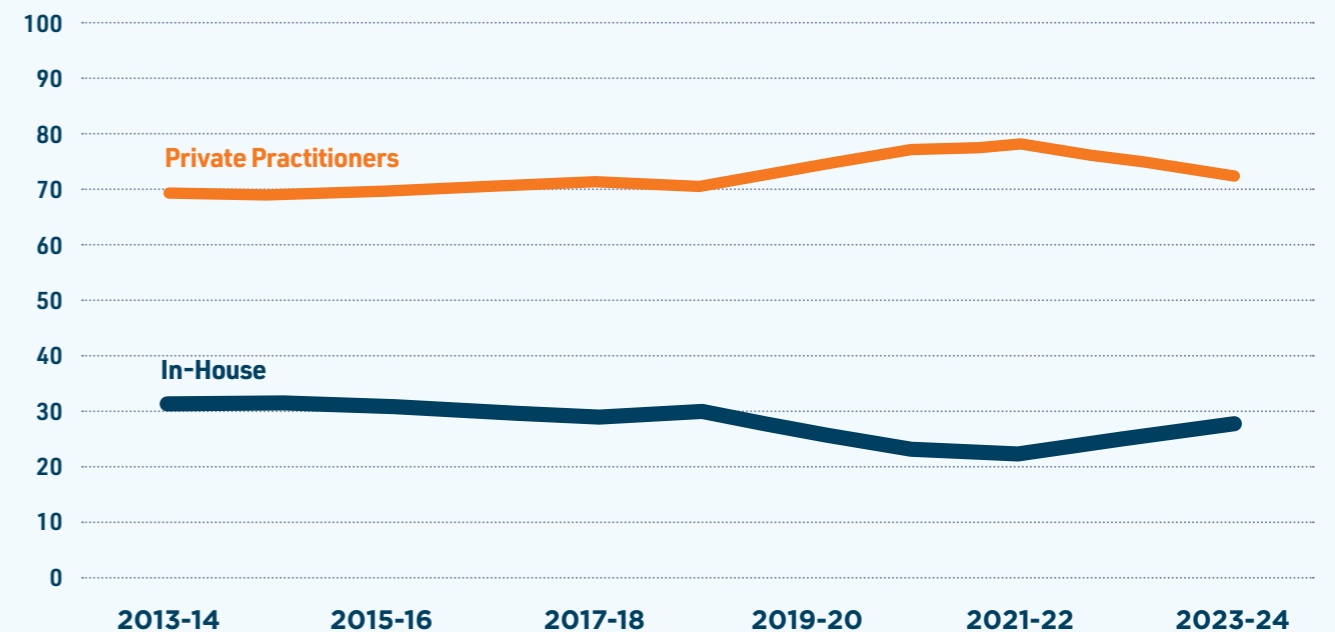
hourly compensation of private practitioners engaged by Legal Aid for family matters across all payment categories was \$155 in 2013, today it is \$170. This is an absolute increase of \$13.90. Compared to the consumer price index growth, it is an earnings cut of more than \$31 per hour.

17. Law Council of Australia (2014). *Submission to the Access to Justice Inquiry*.

18. Productivity Commission (2014). *Access to Justice*, Page 728.

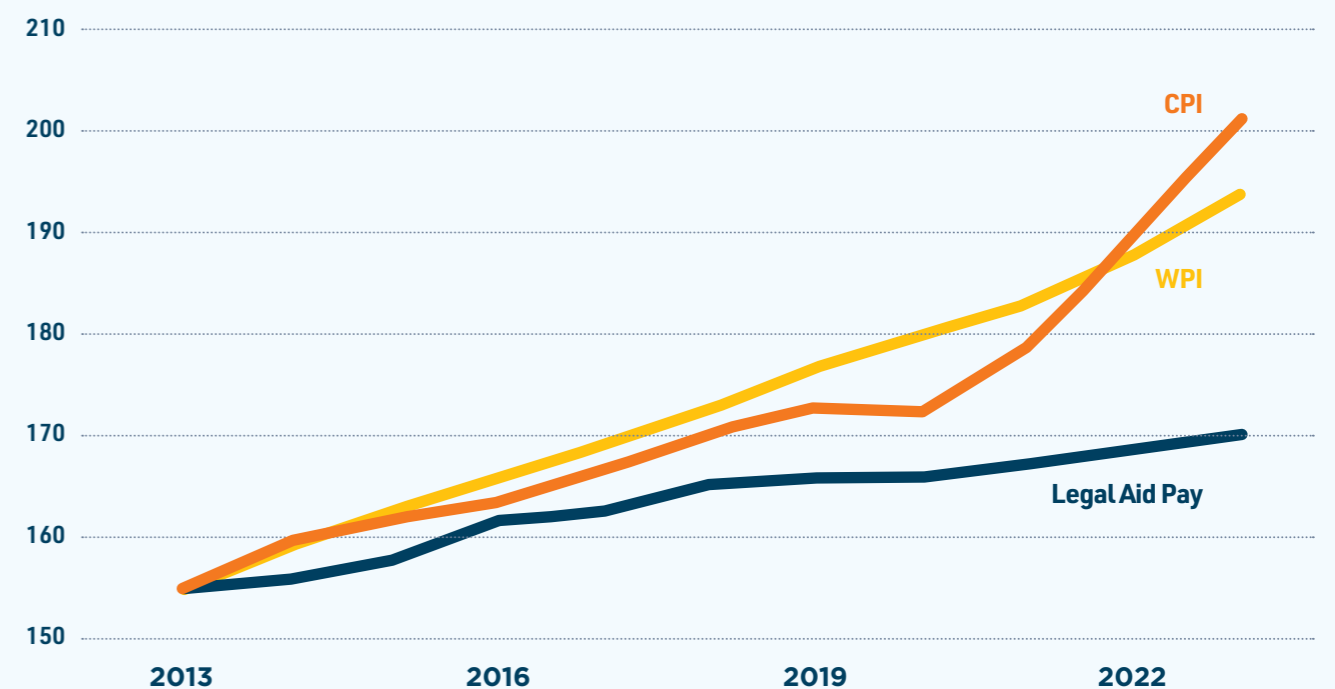
19. Family lawyers are paid at different rates in different jurisdictions, with most jurisdictions affording some level of consideration to seniority or work type. The average unweighted

**CHART 7** PRIVATE PRACTITIONER V INHOUSE SPLIT OF LEGAL GRANTS OF AID.



Source: National Legal Aid (2023). *National Legal Aid dataset*.

**CHART 8** HOURLY RATE OF PRIVATE FAMILY PRACTITIONER PAY GROWTH V WPI V CPI.



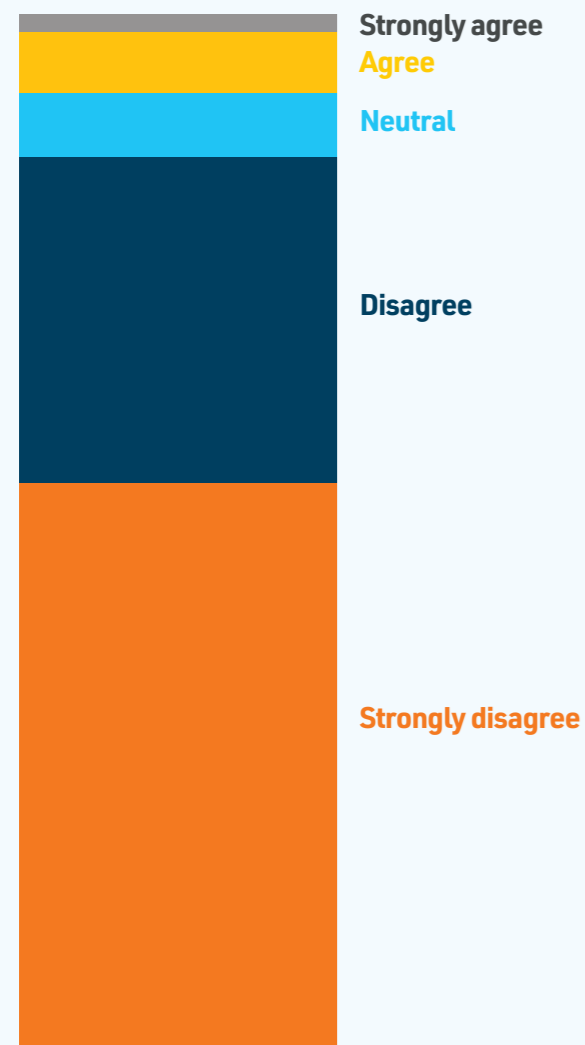
Source: Impact Economics analysis of Legal Aid Commission Hourly Rates Tables, provided by National Legal Aid; ABS (2023). *Labour Force Statistics*, July 2023; and ABS (2023). *Consumer Price Index*, June 2023

A 2022 Private Legal Practitioner supply analysis by Victoria Legal Aid found that grant fees were the main reason practitioners were not on a Legal Aid panel. Panels are lists of lawyers who have been approved to do Legal Aid work, and many practitioner comments on joining a panel echoed the same sentiment:

It just doesn't make financial sense to do Legal Aid work and the funding doesn't match the work that you are doing. The activities don't match the work that you do.<sup>20</sup>

**CHART 9** SURVEY RESPONSE

**Legal Aid pays a reasonable hourly rate, Western Australia.**



Source: Legal Aid WA (2022). Panel Practitioner Survey Results.

A survey of the hourly rate required found panel members report an average required increase of \$80 per hour to undertake more Legal Aid work. The maximum required increase reported by panel member was \$220 per hour. Non-panel members reported an average required increase of \$174 per hour and the maximum reported increase was \$320 per hour.<sup>21</sup>

Legal Aid WA also surveyed private practitioners in 2022 with similar results. Almost 90 per cent of respondents listed fees as a critical barrier to Legal Aid work. Less than 7 per cent of respondents agreed with the statement *Legal Aid pays a reasonable hourly rate.*<sup>22</sup>

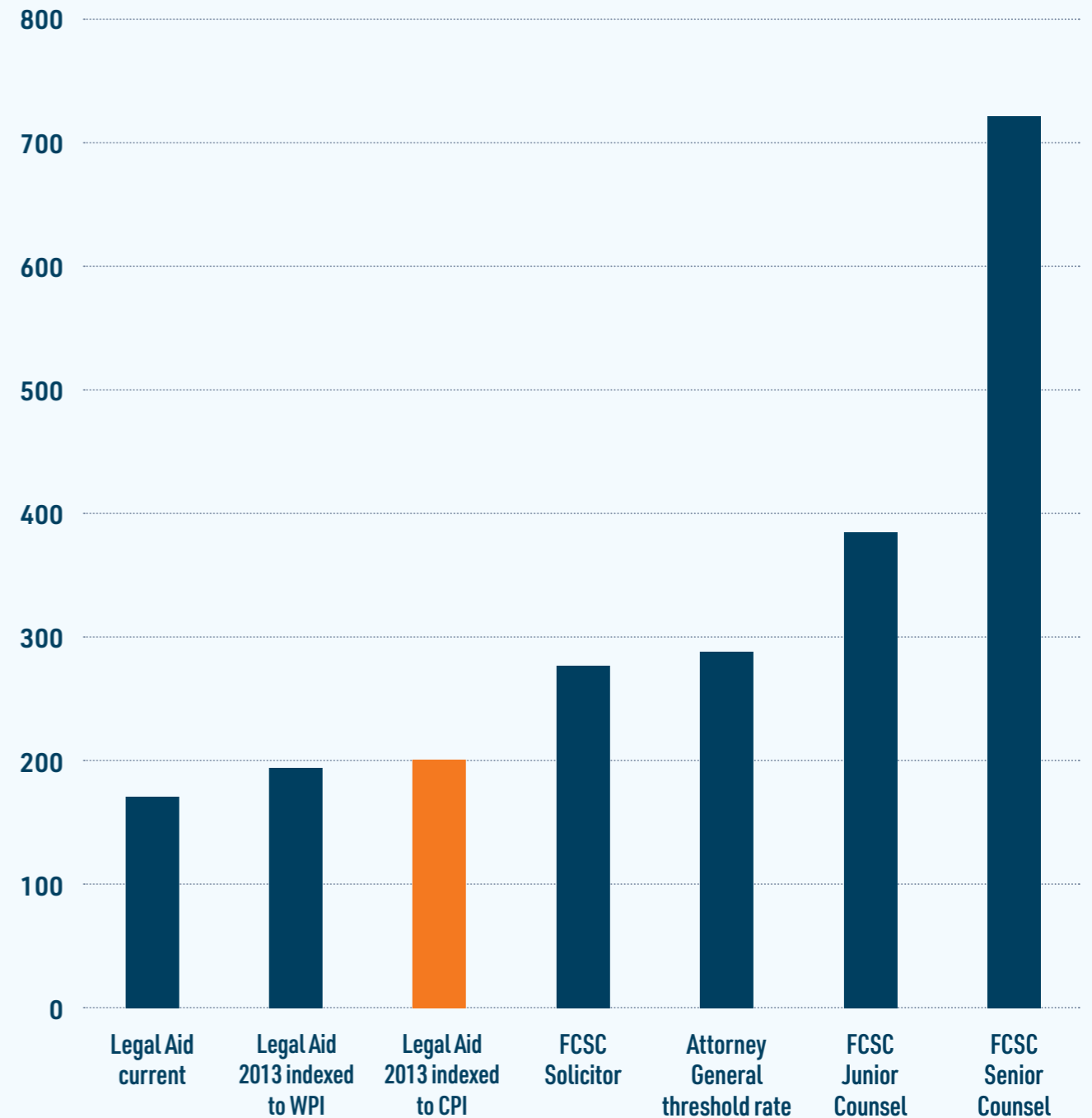
The other side of the low-hourly-rate coin is that the professional skillset fetches better pay elsewhere in the market. Legal Aid ACT made this point clearly in its submission to the Productivity Commission Inquiry a decade ago:

*In relation to family law proceedings, it is noted that hourly rates in the Canberra area range from around \$300 per hour to around \$650 per hour, depending upon the experience of the lawyer. Lawyers who agree to work at Legal Aid rates are paid a discounted rate of \$160 per hour.*<sup>23</sup>

The government also sets prices for legal services elsewhere and when it does, they are considerably higher than the payment made to Legal Aid lawyers. *Legal Services Directions 2017* set threshold rates for a Federal government agency hiring legal counsel. The junior counsel daily threshold is \$2,300, \$288 hourly or 170 per cent of the current Legal Aid pay.<sup>24</sup> Family court scale costs (FCSC) outline rates of payment between parties when the court orders one party to pay the legal costs of another. FCSC rates for a solicitor junior counsel, and senior counsel sit at \$277, \$385, and \$722 respectively; or 163 per cent, 226 per cent, and 424 per cent of the current Legal Aid pay.<sup>25</sup>

20. Victoria Legal Aid (2022). Private Legal Practitioner supply analysis.  
 21. Victoria Legal Aid (2022). Private Legal Practitioner supply analysis.  
 22. Legal Aid WA (2022). Panel Practitioner Survey Results.  
 23. Legal Aid ACT (2014). *Submission to the Access to Justice Inquiry*.  
 24. Australian Parliament (2017). *Legal Service Directions 2017*.  
 25. Australian Parliament (2021). *Federal Circuit and Family Court of Australia (Family Law) Rules 2021*.

**CHART 10** ALTERNATE PAY SETTINGS FOR PRIVATE PRACTITIONERS BEING ENGAGED BY GOVERNMENT.



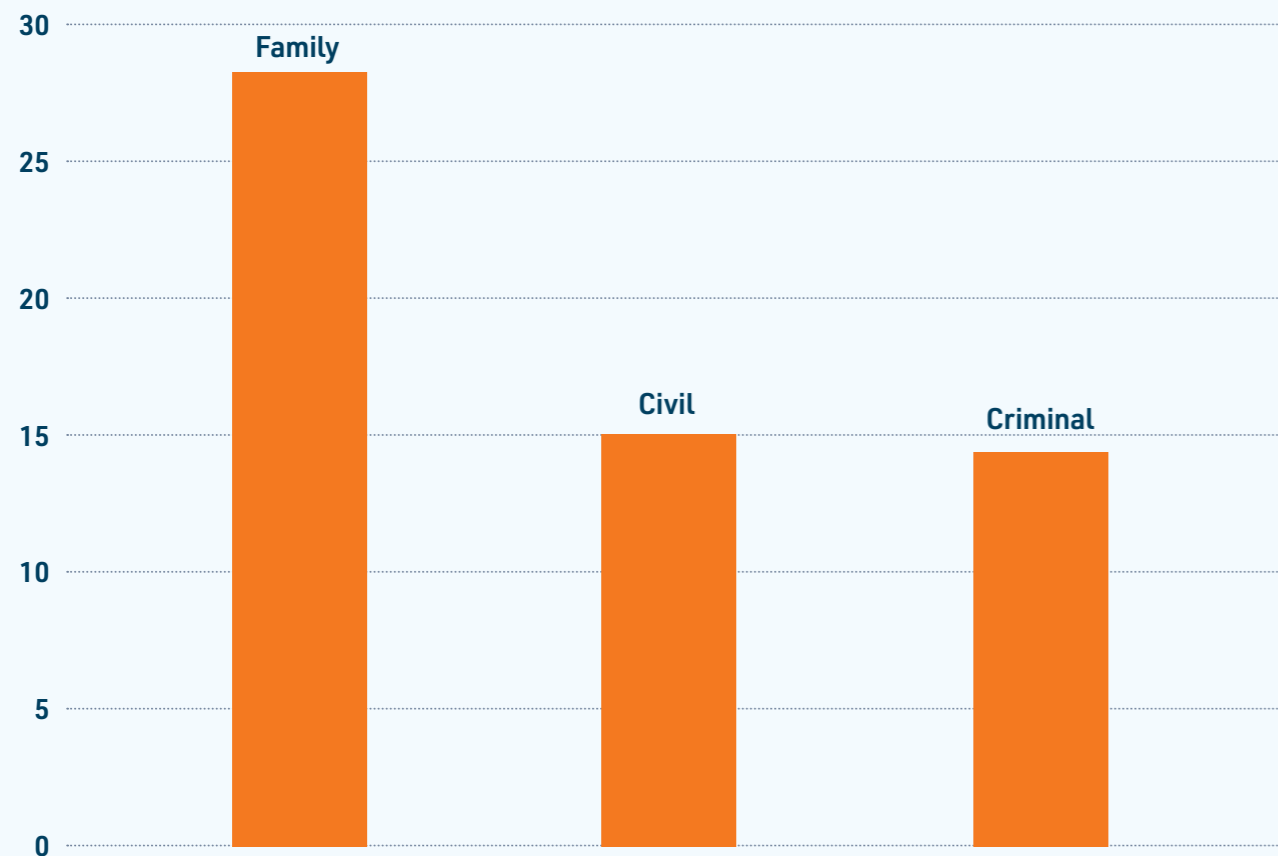
Source: Impact Economics analysis; National Legal Aid; Attorney-General's Department. *Engagement of Counsel*; and Federal Circuit and Family Court of Australia. *Legal costs in family law matters*.

## Practitioners leaving Legal Aid services

Private practitioners can leave Legal Aid in two ways. The first is formal withdrawal from the panel. The second is to remain on the panel but indicate they are unavailable. Shading occurs when practitioners wish to stay on the panel but indicate they are unavailable to take on Legal Aid grants. This means the number of lawyers on a panel at any given time can give a false impression of the number of available lawyers.

Legal Services Commission South Australia has the second highest pay rate for family solicitors and the highest pay rate for criminal solicitors in the country.<sup>26</sup> Data from South Australia on available lawyers since 2018 shows falling absolute and per capita rates in each practice area. Between October 2018 and April 2022, available criminal lawyers per capita fell 14 per cent. Available civil lawyers per capita fell 15 per cent and available family lawyers per capita fell 28 per cent.

**CHART 11** FALL IN AVAILABLE LAWYERS PER CAPITA, 2018 TO 2022, SOUTH AUSTRALIA, PER CENT.



Source: Legal Services Commission South Australia (2022). Panel Data.

## Service footprints are shrinking

Comparing current service delivery footprints with service delivery footprints from a decade ago shows a reduction in the range provided across Legal Aid commissions. In 2015, Legal Aid Queensland amended grant criteria in response to funding shortfalls. This included limiting aid grants for family reports in Independent Children's Law (ICL) matters; reducing the number of funded psychiatric reports; narrowing parenting order guidelines by limiting eligibility to vulnerable clients; and restricting reading fees for barristers to extremely large briefs. Civil law policy amendments were also necessary in 2017, impacting employment service delivery, and in 2019, affecting NDIS service delivery.

Legal Aid WA introduced restricted guidelines for family law aid grants in 2016 to manage limited funds. These guidelines have remained in place and include:

- Parties in property proceedings can only be funded in exceptional circumstances such as an urgent injunction, serious family violence or severe mental health concerns; and
- Where an ICL is appointed, a party to parenting proceedings is only funded if special circumstances are impacting the person's ability to self-represent (such as family violence or mental health).

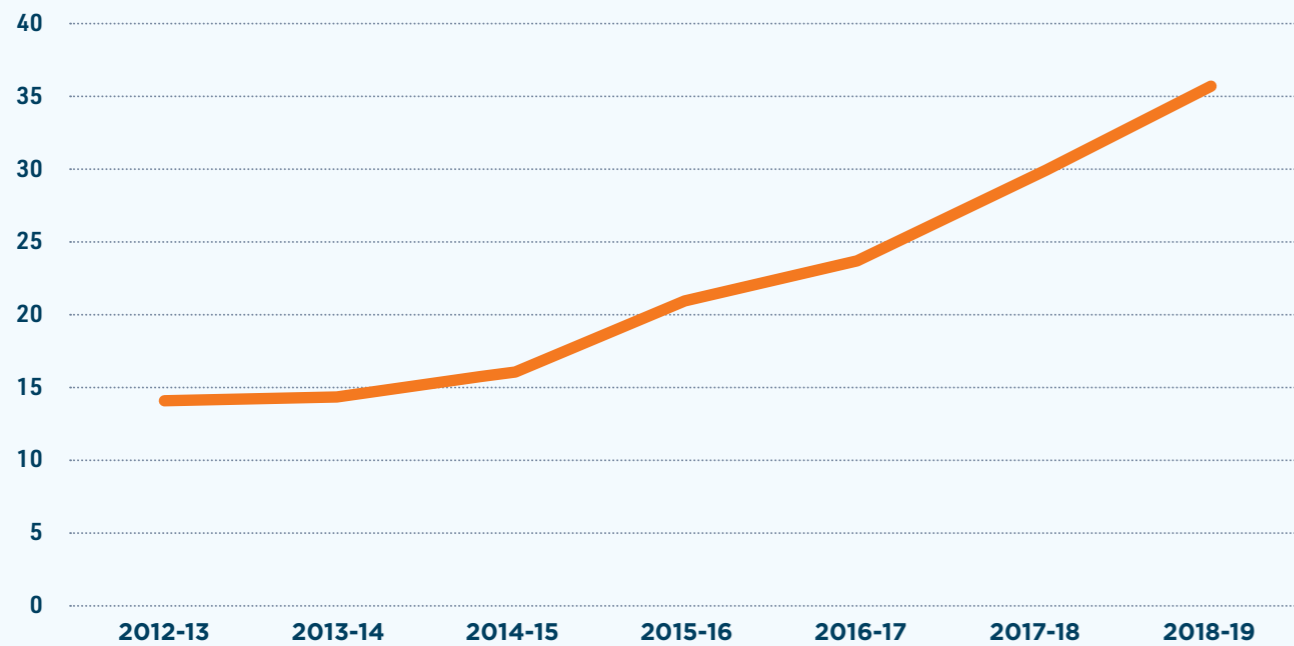
In June 2022, Legal Aid WA also tightened existing restrictions to ICL grants to address a critical shortage of ICLs. An ICL is only appointed in cases involving allegations of child abuse or where the conduct is alleged to be anti-social to the extent that it seriously impinges on the child's welfare. The practical impact of these policy movements is a narrowed space in which legal assistance is available.

## Services are getting more complex & expensive

At the same time Legal Aid services are being stretched by increasing demand and reduced practitioner supply, there has been a pronounced increase in the complexity and cost of delivering cases. In NSW the average number of sitting days per completed criminal trial has risen from just under six to just over 10, over 75 per cent growth, since 2013-14.<sup>27</sup>

Family law case complexity has increased significantly. New Family Law Amendment Rules in 2020 made it compulsory to file a Notice with every initiating application seeking parenting orders. This saw a significant increase in the number of Notices of Child Abuse, Family Violence or Risk of Family Violence. Even before this rule change, there was significant increase in the proportion of cases including this type of notice. While the proportion was less than 15 per cent in 2012, this had grown to over 35 per cent by 2018.

**CHART 12** FINAL ORDERS CASES INCLUDING A NOTICE OF CHILD ABUSE OR FAMILY VIOLENCE, PER CENT.



Source: Family Court of Australia (Various). Annual Reports.

Victoria Legal Aid puts the degree of client complexity and the accompanying challenges clearly:

*Clients who are eligible for Legal Aid typically have multiple issues and require more time and engagement to support; where clients have high needs some firms indicated that they can only have so many at one time, and some firms have decided not to take on these clients.<sup>28</sup>*

**CASE STUDY**

**SAM, PRIVATE PRACTITIONER DOING LEGAL AID WORK, REGIONAL VICTORIA**

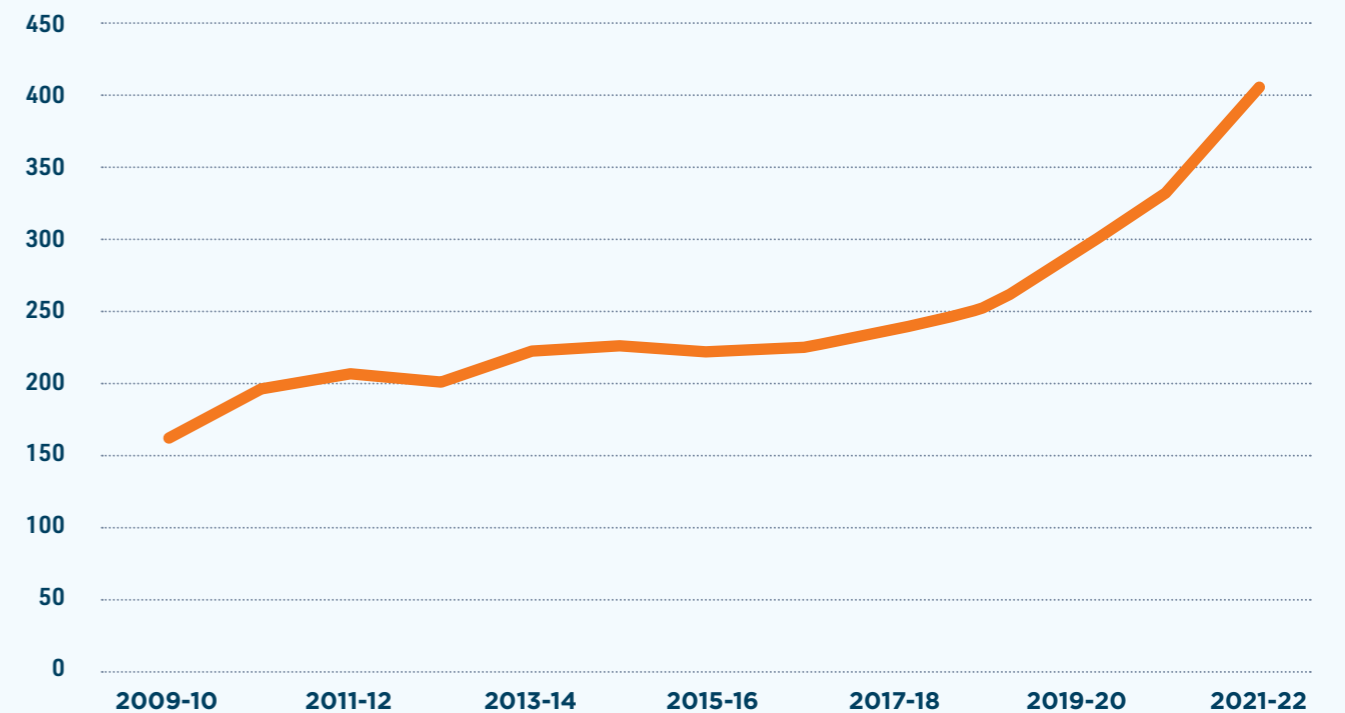
**Sam works in family law and criminal law. Around 70 per cent of his work is Legal Aid, but this works out to only 35 per cent of his income.**

The amount of work involved in file has exponentially increased over the last four or five years, but the number of clients Sam is taking is roughly the same. The number of lawyers in Sam's area doing Legal Aid has decreased. Sam says there is no doubt that his firm has had to take on more work as a result.

He says the phenomenon of family violence has meant that family law files are significantly more complex.

There is also evidence that the cost of legal services is growing faster than other costs. Economy wide inflation ran at about 30 per cent from 2009 to 2021, meanwhile growth in the average cost per legal advice for Legal Aid WA increased by 153 per cent.<sup>29</sup>

**CHART 13** LEGAL AID WA AVERAGE COST PER LEGAL ADVICE.



Source: Legal Aid WA (2009-10 to 2021-22). Annual Report, various.



28. Victoria Legal Aid (2022). Who is eligible for Legal Aid.

29. Legal Aid WA (Various). Annual Report, various.



# The funding gap

It is clear that the current level of Commonwealth funding for legal services is not adequate and requires a substantial increase to address unmet need for legal services and maintain access to justice.

In *Access to Justice Arrangements*, the Productivity Commission estimated that an additional \$200 million in legal assistance funding was required each year. Using the same methodology as the Productivity Commission, Impact Economics estimates that this figure is now \$484 million, as follows:

- \$317 million to reach the recommended share of family and civil grants; and
- \$98 million to reach the recommended means testing coverage; and
- \$69 million to protect the sector from the immediate threat of supply failure.

## Additional grants are needed

In 2014 Productivity Commission recommended a 40,000 increase in non-family, civil grants.<sup>30</sup> This would have resulted in civil grants accounting for 26 per cent of the legal assistance grants, compared to 27 per cent for family law and 48 per cent for criminal law. Since that time:

- recorded crimes have shrunk while Legal Aid grants for criminal matters have grown; and
- indicators of civil and family law need have grown while Legal Aid grants for civil and family matters have reduced.

As a result a more significant share of Legal Aid grants are directed to criminal matters today than ten years ago. There are good reasons for the growing resourcing of criminal Legal Aid, like changes to bail and sentencing practices. As discussed above, we have also seen growth in the average sitting days in these cases. But the available evidence suggests that civil and family grants would have grown at least as quickly as criminal grants in the absence of severe supply caps.

In 2013, civil law accounted for three per cent, and family law accounted for 35 per cent of grants. In 2022, those percentages were down to two and 28 per cent. At the same time, criminal grants increased from 62 to 70 per cent.

**TABLE 2**  
LEGAL AID GRANTS ALLOCATED BY LEGAL AREA.

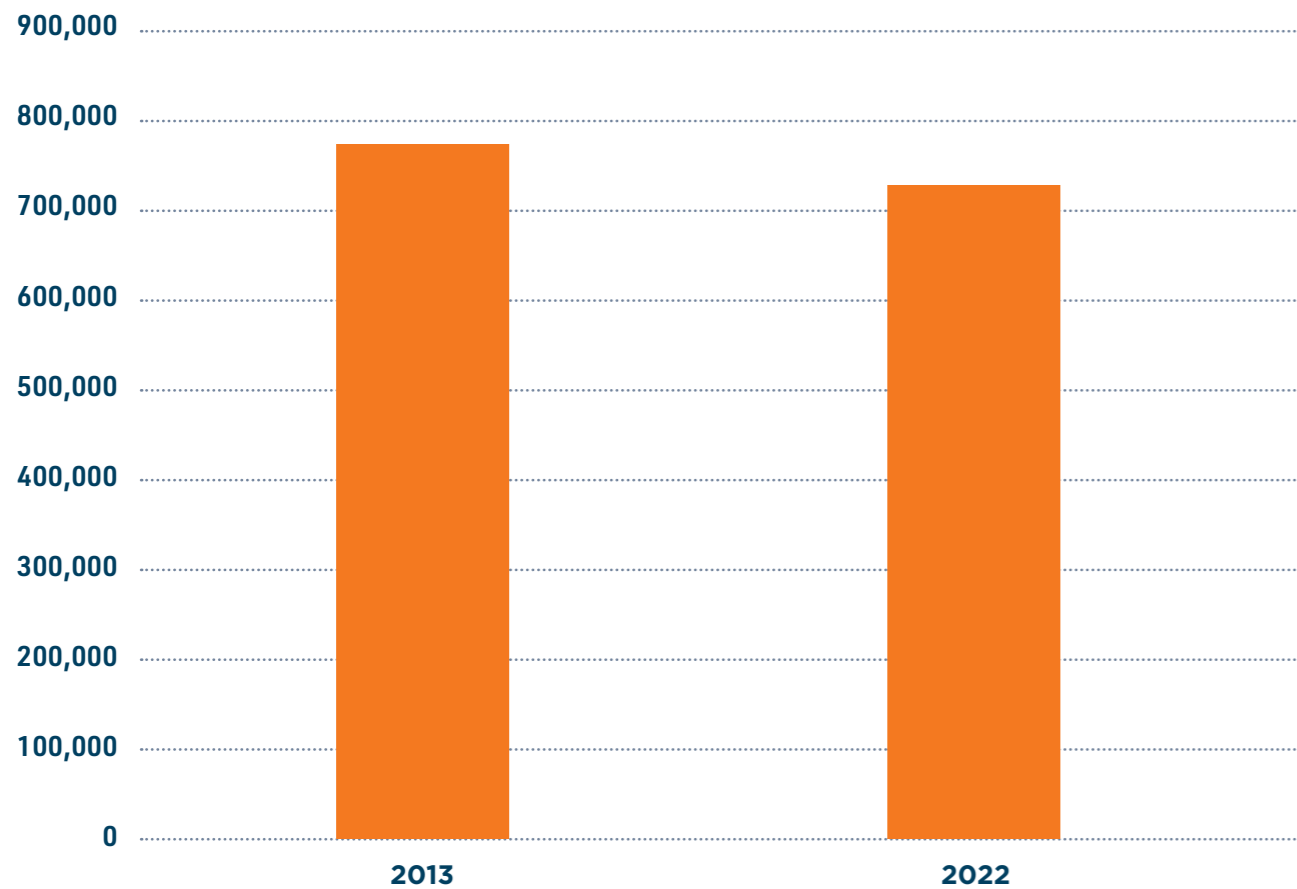
	2013 -14	2022 -23	Productivity Commission Recommendation
Civil	3%	2%	26%
Crime	62%	70%	48%
Family	35%	28%	27%

Source: National Legal Aid (2023). [National Legal Aid dataset](#).

30. Productivity Commission (2014). *Access to Justice*. Page 1025.

The increase in criminal case share of total Legal Aid grants is against the downward trend in recorded crime. Between 2013 and 2022, the total number of crimes fell by almost 50,000 or 6 per cent; from 774,000 to 727,000.<sup>31</sup>

**CHART 14** NUMBER OF RECORDED CRIMES IN AUSTRALIA, 2013 AND 2022.



Source: ABS (2023) *Recorded Crimes, 2022*.

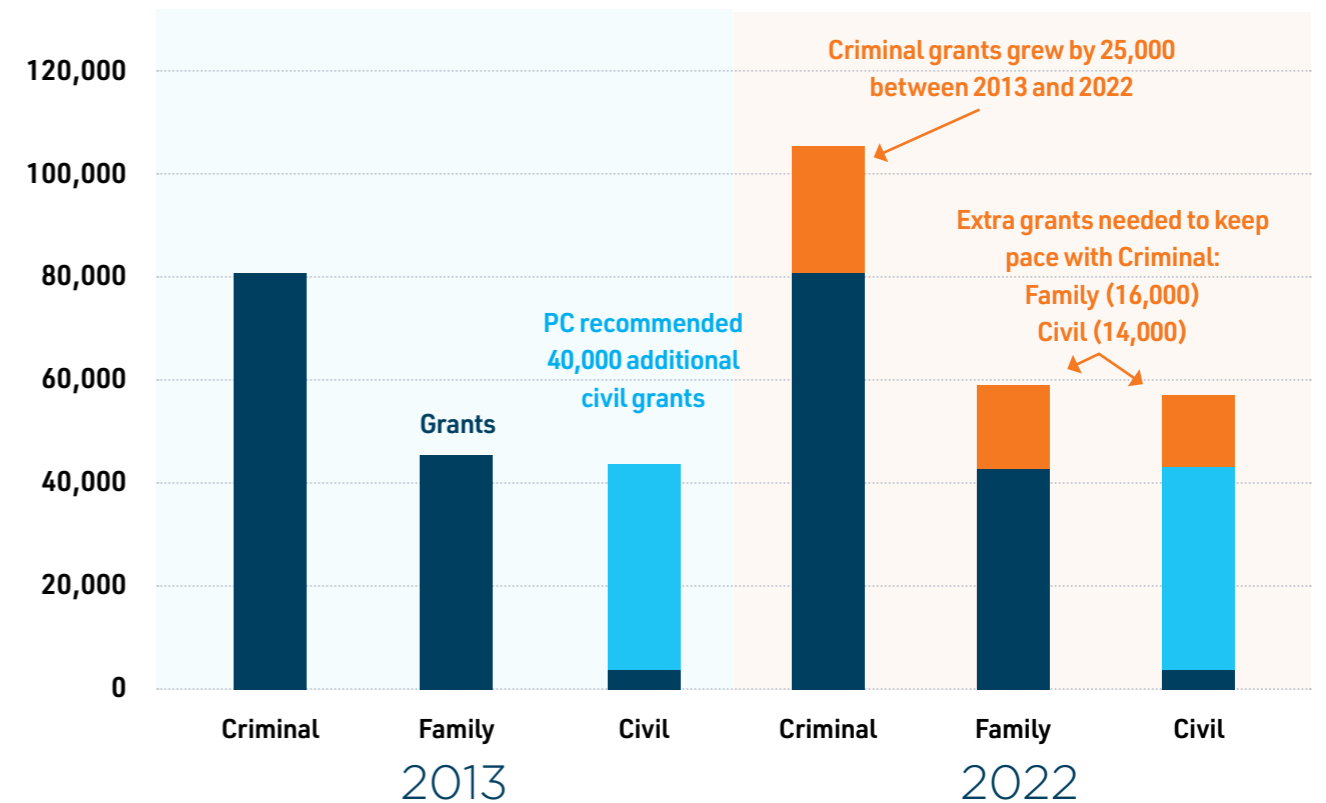
The Access to Justice report identified a significant issue with the under-resourcing of civil matters due to criminal matter prioritisation. The PC observed that priority is given to criminal matters over civil and family matters in part because of judicial requirements to address them. Criminal court proceedings can be halted when there is a lack of legal representation, civil matters have no comparable requirement.<sup>32</sup>

Even assuming that civil and family law needs have grown at the same rate as criminal need,

notwithstanding evidence they are growing faster, then an additional 53,783 civil grants and 16,402 family grants are now required. Assuming average costs of \$4,092 and \$5,883 this now represents an additional \$317 million per year.<sup>33</sup> The NLAP review should also give consideration to whether these prices are sufficient given growing complexity over the period, which is not accounted for in these figures.

31. ABS (2023) *Recorded Crimes, 2022*.  
 32. Productivity Commission (2014). *Access to Justice*.  
 33. Based on Productivity Commission (2014) estimates adjusted for inflation. Page 32.

**CHART 15** NEW GRANT ALLOCATIONS TO ALIGN WITH PC RECOMMENDATION.



Source: Impact Economics analysis of National Legal Aid (2023). *National Legal Aid dataset*; and Productivity Commission (2014). *Access to Justice*. Page 1025.

## Moving the means test

Implementing the Productivity Commission's recommendation to relax the means test by 10 per cent will cost \$85 million. The PC modelled the means test based on:

- an income test that allows for \$300 per week base, \$150 per week per dependant under 15 years of age, \$300 per week per household in rental assistance, and \$100 per week per household for other household expenses; and
- an assets test that allows for \$500,000 in home equity for the place of residence, \$250,000 in business equity, \$15,000 in vehicle equity, and \$1,000 for other assets.<sup>34</sup>

Impact Economics has reproduced the Productivity Commission's modelling and found that the

proportion of eligible households remains unchanged in 2023, at 8 per cent. Unweighted changes to the average Legal Aid Commission means test thresholds were used to uplift the PC's modelled means test.

Lifting the test by 10 per cent pushes the eligible households to 9 per cent. This is also in keeping with the Productivity Commission's finding.<sup>35</sup>

The Productivity Commission's preferred estimate of the associated cost was \$57 million. Extending the unit count to include the additional grants outlined above requires an uplift of 30 per cent. A 32 per cent uplift is needed to incorporate increased prices over the period. Accounting for both population and price, the cost of this increase in 2023 is \$98 million.

34. Productivity Commission (2014). *Access to Justice*. Page 1016.  
 35. Productivity Commission (2014). *Access to Justice*. Page 1023.

## Addressing private practitioner pay

Halting legal assistance supply failure by increasing private practitioner pay in line with national wage growth since 2013 will cost \$69 million.

Private practitioner expenses accounted for 43 per cent of all Legal Aid commission expenses in 2021-22. Commonwealth spending on Legal Aid sits at \$466 million and would reach \$880 million if the above recommendations (additional grants and moving the means test) were implemented.<sup>36</sup> Under these settings, the estimated spend on private practitioners would be \$379 million.

**TABLE 3**  
LEGAL AID COMMISSION SPENDING ON PRIVATE PRACTITIONERS, 2021-22, \$'000S.

State	Private practitioner expenses	Total expenses	Per cent
NSW	161,063	426,022	38%
Victoria	115,352	268,447	43%
Queensland	90,743	163,927	55%
Western Australia	35,350	96,918	36%
South Australia	32,504	56,839	57%
Tasmania	7,272	19,616	37%
<b>Total</b>	<b>442,284</b>	<b>1,031,769</b>	<b>43%</b>

Source: Legal Commission (Various). Annual reports, various.

The average Legal Aid hourly private practitioner engagement in family law was \$154.82 in 2013 and grew to \$170 in 2023.<sup>37</sup> If this pay rate had followed economy wide wage growth as measured by the wage price index it would have reached \$194, 14 per cent more.<sup>38</sup> If it had of grown in line with the consumer price index it would have reached \$201, 18 per cent more. An 18 per cent increase on the \$379 million total bill equates to \$69 million

## WHAT LEGAL AID AND IN-HOUSE PRACTITIONERS TOLD US ABOUT PAY

**“It got to the point where I was the only practitioner in the town that was still doing family law for legally aided clients because it was just uneconomic for the other firms.”**

CLARE, FAMILY AND CIVIL LAW, REGIONAL NSW

**“When I do the costs notices for example, I might have been paid \$7,000 including counsel fees. When private lawyers in their matters might cost up to \$130,000. That’s one of the problems with Legal Aid paying so badly is that some lawyers think ‘alright, well, if I do enough volume I can make it work’, but all they do is accept the matters and do nothing.”**

RACHEL, FAMILY AND CIVIL LAWYER, REGIONAL NSW

**“There’s not a month goes by when there isn’t an example of how we have lost significant money by undertaking Legal Aid work.”**

SAM, FAMILY AND CRIMINAL LAWYER, REGIONAL VICTORIA.

**“It’s pretty obvious that Legal Aid fees have not been able to keep pace with the fees and costs in private practice. So it’s become a space where firms are having junior lawyers run these files that don’t have the full skill set to have to run them and sometimes doing that without the appropriate level of supervision.”**

TOBY, REGIONAL VICTORIA, CIVIL LAW

## Economic & social benefits of the additional investment

The *benefits of providing access to justice* report, prepared by PwC for National Legal Aid quantified select benefits of work being undertaken by Legal Aid. That report found, between seven key areas of benefit, a \$601 million return on current Commonwealth funding.<sup>39</sup>

Impact Economics estimates the additional \$484 million investment recommended in this report will deliver an annual return of \$639 million, within the benefit categories analysed by PwC. The recommended investment will also have additional and significant return in other areas.

**TABLE 4**  
SELECT ECONOMIC AND SOCIAL BENEFITS OF THE RECOMMENDED INVESTMENT.

Benefit	PWC estimate (\$ millions)	Units	Per unit benefit (\$)	Recommended additional units	New benefit (\$ millions)
Cost savings from legal representation	22	27,644	796	90,185	72
Cost savings from dispute resolution services	92	27,644	3,328	26,402	88
Efficiency of duty lawyers	62	23,392	2,650	0	0
Improved livelihood and wellbeing from reduced domestic and family violence	307	26,534	11,570	26,402	305
Reduced pain & suffering from more efficient proceedings	25	27,644	904	90,185	82
Avoided costs to government – Domestic and family violence	71	26,534	2,676	26,402	71
Avoided costs to government – Out of home care costs	22	26,534	829	26,402	22
<b>Total</b>					<b>639</b>

Source: Impact Economics analysis of PwC (2023). *The benefits of providing access to justice*.

36. Legal Commission (Various). *Annual reports, various*.

37. Impact Economics analysis of Legal Aid Commission Hourly Rates Tables, provided by National Legal Aid.

38. ABS (2023). *Labour Force Statistics*, July 2023.

39. Impact Economics analysis of PwC (2023). *The benefits of providing access to justice*. Page iii.



# Future proofing the Legal Aid sector

**The persistent knowledge gap limits the findings of this report to meeting standards recommended by the Productivity Commission. But a lot has changed since that report and those recommendations were originally made in the presence of considerable information gaps. Optimal funding and policy can only be set with a clear understanding of demand, supply, and delivery.**

There is a lot about the prevalence and nature of legal problems that we don't know, which hinders responding to the legal needs of the Australian population. NLAP requires considerable but incomplete reporting. Not all the information we need to make good policy decisions is collected and held by legal assistance providers.

Additional data from providers would help decision-makers and reviewers understand the legal assistance environment better which would help them make better, more efficient policy. The PC recommended that additional information be collected on:

- fees paid by clients and available billing structures.
- alternate dispute resolution use and effectiveness in avoiding traditional process.
- targeted pre-action protocols and their effectiveness in narrowing disputes.

“There’s so much rich data there and we just don’t know what the other life issues are that our clients are experiencing.”

LIZZY, IN HOUSE LEGAL AID LAWYER, MELBOURNE

A sorely missing piece of service data is active demand for services, or how much legal assistance is being requested by the public. Legal assistance providers rarely collect this data. Without this information we know little about the cohort of people who just miss out on legal assistance.

If this cohort of people can access justice without government support, then decision makers could reasonably conclude that legal assistance settings were effective. However, if this cohort of people are enduring injustices that we as a community are unwilling to tolerate and that in the absence of legal assistance they have no access to remedy, decision makers may conclude differently. Legal assistance providers should report on the people and cases seeking legal assistance, regardless of whether or not they receive assistance.

Beyond service data, good policy development requires an understanding of legal need in the community, this can only be measured by survey. Without regular surveys we are limited in what we can say about the changing nature of legal need over time. The PC recommended periodic legal needs surveys to provide this insight, this was to include targeted collection on priority groups.

This recommendation has not been followed. In the ten years since the last significant legal needs survey was undertaken in Australia, key methodologies have changed. This means the new, exclusively Victorian, survey is meaningfully different to previous surveys and meaningful comparison isn't possible.

Beyond demand and provision, understanding the supply landscape is essential to good policy development. As already shown in this report, the incentives for private practitioners to do Legal Aid work are failing. Pre-existing data on the specifics of Legal Aid practice has been piecemeal and does not provide a sufficiently detailed picture of supply. The UK has commenced undertaking a census of Legal Aid practitioners which includes questions on the challenges to establishing a career in Legal Aid, the financial viability of the work and, reasons for exiting the work. A similar census should be regularly undertaken in Australia.

# Conclusion

Legal assistance is important because an inaccessible justice system is ultimately more expensive than an accessible one. Denial of justice comes with economic costs, health costs, and ultimately, costs to wellbeing. We know that these costs fall disproportionately on disadvantaged groups, including First Nations people, people living with disability, and poorer people.

Australia's justice system is in crisis because people can't access it, and the program designed to insure access is buckling under the weight of growing demand and shrinking supply.

Demand has been driven by strong population growth and developments across several key drivers in legal need. This is demonstrated in the doubling and tripling of engagement with Legal Aid contact points.

At the same time, Commonwealth funding has shrunk in per capita terms. Falling from \$18.59 to \$18.10 between 2012-13 and 2021-22.

The result is stress on supply. Legal Aid services have been forced to narrow the spaces that legal assistance is delivered.

Funding constraints have also capped pay indexation for private practitioners. Private practitioners are essential to the delivery of legal assistance and now they are turning away from the system at a stability threatening rate.

These challenges are not new, but they have grown more entrenched since the Productivity Commission recommended an annual funding uplift of \$200 million in 2014. That funding would have expanded the means test for Legal Aid giving more people access and increasing the number of grants funded.

But that recommendation was ignored and ten years on the cost of repair has grown. If we fail to make the necessary investment today, the annual cost of a dysfunctional system will grow alongside the bill for necessary structural repair.

# Recommendations

## RECOMMENDATION ONE

Increase funding by \$317 million to increase the number of family and civil grants by 16,000 and 54,000 respectively.

## RECOMMENDATION TWO

Increase funding by \$98 million to expand the reach of means testing coverage.

## RECOMMENDATION THREE

Increase funding by \$69 million to protect the sector from the immediate threat of supply failure from private practitioner withdrawal.

## RECOMMENDATION FOUR

- 4.1 A regular survey of legal need, focussed on unmet legal need, should be undertaken nationally.
- 4.2 Additional administrative information should be collected to frame decision makers' understanding of service provision, including:
  - requests for legal assistance, even when assistance cannot be provided.
  - fees paid by clients and available billing structures.
  - alternate dispute resolution use and effectiveness in avoiding traditional process.
  - targeted pre-action protocols and their effectiveness in narrowing disputes.
- 4.3 A census of private practitioners should be undertaken regularly to understand the legal assistance supply landscape.

# Definitions

**Civil law** – the law governing the rights and responsibilities of individuals, government entities and private or non-government organisations in their interactions with each other. A breach of a civil law right or obligation does not usually lead to criminal processes and sanctions. Example of civil law issues include housing, social security, NDIS, migration, discrimination, and mental health.

**Criminal law** – the law regulating the conduct in society to protect the community and providing sanctions against those who commit crimes.

**Family law** – the law concerning matters relating to the family, such as divorce and who a child spends time with, the rights of children and the responsibilities that each parent has towards their children.

**ICL** – Independent Children’s Lawyer, representing a child’s best interests in a court, appointed under section 68L of the *Family Law Act 1975*.

**Legal Aid** – legal assistance funded by government for individuals who are experiencing disadvantage and unable to afford a private practitioner.

**Legal Aid grant** – a funding allocation arising at the end of an application process for the express purpose of delivering legal assistance in keeping with the application.

**Legal Aid lawyer** – a lawyer providing legal assistance to Legal Aid clients in a Legal Aid practice or a private practitioner when they are undertaking Legal Aid work.

**Private practitioner** – a lawyer providing legal assistance to commercial and Legal Aid clients in a commercial legal practice.

# Appendix Methodology for Legal Aid funding

Having accounted for the Productivity Commission’s recommendations regarding means testing (increase allowable income and assets by 10 per cent) and additional grants (an extra 40,000), we grew the number of civil and family grants in line with the growth of criminal grants over the past decade.

We think this is a conservative assumption because evidence suggests civil and family need has grown materially above criminal need.

We also grew relevant costs in line with the wage and consumer price indexes.



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