Criminal Trial Preferred Barrister List Suspension and Removal Procedure

# Background

Victoria Legal Aid (VLA) is responsible for providing legal aid in the most effective, efficient and economic manner. This includes ensuring quality advocacy for legally aided clients in criminal trials. VLA’s Criminal Trial Preferred Barrister List ensures high quality representation by ensuring Preferred Barristers meet certain competencies. Only Preferred Barristers can be briefed in legally aided criminal trials unless an exception is sought in advance. Only a preferred barrister can be briefed for major criminal trials, defined as trials over 15 days.

# Definitions

**Assisted person** has the meaning given to the term 'Assisted Person' in the *Legal Aid Act* 1978 (Vic).

**Chair** means the Director of Legal Practice (or their delegate), who is the chair of the Selection Committee. As per the Terms of Reference, the Selection Committee makes recommendations to the Chair. Final decisions are made by the Chair.

**Complaint** means a complaint received from a Judge, Justice, Magistrate, court representative, legal practitioner, assisted person or a member of the public about a Preferred Barrister.

**Criminal Trial Preferred Barrister List** means a list of barristers who have met the requisite requirements as set by VLA for entry onto the Criminal Trial Preferred Barrister List. Entry onto and continued membership on the List is subject to a barrister continuing to meet the Entry Requirements and displaying the Criminal Trial Advocacy Competencies, as assessed by the Selection Committee.

**Criminal Trial Advocacy Competencies** means the [competencies and standards](http://www.legalaid.vic.gov.au/information-for-lawyers/doing-legal-aid-work/criminal-trial-preferred-barrister-list/criminal-trial-advocacy-competencies) that Preferred Barristers are expected to have in order to competently conduct legally aided trials in an effective, economic and efficient manner. Each competency criterion is accompanied by several standards. The eight competencies are:

1. Knowledge of the law: Extensive knowledge of criminal law and the rules of evidence and procedure.
2. Preparation and analysis: Comprehensively understands and analyses the evidence and all available material.
3. Preparation and analysis: Engages with relevant parties in a timely and effective way in the preparation and analysis of a case.
4. Preparation and analysis: Manages a case efficiently and effectively, including thoroughly preparing for court hearings and other requirements of a case.
5. Communication and advocacy skills: Represents a client in a robust, efficient and persuasive manner to ensure a fair trial and to achieve the best possible outcome.
6. Communication and advocacy skills: Communicates will all relevant parties in a timely, effective manner.
7. Professional duties, behaviours and ethics: Acts ethically and with competence and diligence in the service of a client.
8. Professional duties, behaviours and ethics: Has up-to-date knowledge and understanding of VLA obligations and processes.

**Entry requirements** means the requirements for the Preferred Barrister’s inclusion on the Criminal Trial Preferred Barrister List, as amended from time to time and as published on VLA’s [website](http://www.legalaid.vic.gov.au/information-for-lawyers/doing-legal-aid-work/criminal-trial-preferred-barrister-list/entry-requirements-and-assessment-guidelines-for-barristers). Each entry requirement is considered by reference to an Assessment Guideline. The four entry requirements are:

1. Expertise in criminal trial advocacy, professional and appropriate practice.
2. Requirement to hold an Indictable Crime Certificate.
3. Requirement to hold a practising certificate.
4. Disclosure of misconduct and complaints.

**Indictable Crime Certificate** means the certificate granted by the Victorian Bar.

**List** means Criminal Trial Preferred Barrister List

**Non-preferred barrister** means a barrister who is not on the Criminal Trial Preferred Barrister List.

**Notice of Intention to Remove** means a notice issued to a preferred barrister where the chair of the Selection Committee seeks to Remove that barrister from the Criminal Trial Preferred Barrister List.

**Notice of Intention to Suspend** means a notice issued to a preferred barrister where the chair of the Selection Committee seeks to Suspend that barrister from the Criminal Trial Preferred Barrister List.

**Preferred Barrister** means a barrister who is on the [Criminal Trial Preferred Barrister List](http://www.legalaid.vic.gov.au/information-for-lawyers/doing-legal-aid-work/criminal-trial-preferred-barrister-list/who-is-on-list).

**Procedure** means the procedure that VLA will adopt when Suspending or Removing a preferred barrister from the Criminal Trial Preferred Barrister List.

**Remove/removal/removing** means the removal of a preferred barrister from the Criminal Trial Preferred Barrister List.

**Response** means a response to a notice to Suspend or a notice to Remove

**Selection Committee** means the Committee that makes recommendations to the chair to appoint, Suspend or Remove a preferred barrister from the Criminal Trial Preferred Barrister List. As per the Terms of Reference for the Criminal Trial Preferred Barrister List, the Selection Committee is made up of:

1. Director, Legal Practice or their delegate (**the chair**)
2. Director, Criminal Law Services or their delegate
3. Chief Counsel or their delegate.

As per the Terms of Reference, the Selection Committee makes recommendations to the Chair. Final decisions are made by the Chair.

**Suspend/Suspension/Suspending** means the suspension of a preferred barrister from the Criminal Trial Preferred Barrister List.

**Terms of Reference** means the terms of reference governance document for the Criminal Trial Preferred Barrister List Selection Committee.

**VLA** means Victoria Legal Aid.

# Rationale

Barrister quality is fundamental. It ensures high quality representation and well run trials that benefit legally-aided clients, the Courts and the community. Issues that may arise that relate to preferred barrister quality may result in the Suspension and/or Removal procedure being enacted. Where a preferred barrister no longer meets one or more of the Entry Requirements, or where one or more of the Criminal Trial Advocacy Competencies are not met, the procedure may also be enacted.

VLA is likely to identify grounds for Suspension or Removal through its complaints, quality audit and compliance functions. There may also be certain circumstances where VLA is alerted to a potential issue from a key stakeholder, such as a Judge or a court representative, or through a Court of Appeal decision.

**Relationship with Terms of Reference**

This procedure should be read and interpreted in conjunction with the Terms of Reference for the Criminal Trial Preferred Barrister List.

# Grounds for removal and suspension

VLA may Suspend and/or Remove a preferred barrister from the Criminal Trial Preferred Barrister List on the following grounds.

***1. Entry requirements***

The procedure may be invoked where the Selection Committee becomes aware of information that a preferred barrister no longer meets one or more of the Entry Requirements:

1. Where a preferred barrister is determined by the Selection Committee to not display the expertise in criminal trial advocacy, professional and appropriate practice expected of a Preferred Barrister, including:
   * being competent to conduct legally aided trials in an effective, economic and efficient manner
   * complying with VLA’s Criminal Trial Advocacy Competencies
   * conducting practice professionally and appropriately
2. Where a preferred barrister no longer holds a Practising Certificate
3. Where a preferred barrister is not granted, no longer holds or has not made reasonable efforts to obtain an Indictable Crime Certificate (ICC) from the Victorian Bar, or where the ICC is cancelled, suspended or withdrawn
4. Where a preferred barrister has not disclosed findings of professional misconduct or unsatisfactory professional conduct, made by the Legal Services Board, Victorian Bar Council, Indictable Crime Certificate Committee, Legal Services Commission (or equivalent body in another jurisdiction), Victorian Civil and Administrative Tribunal, any other court or tribunal (including any privately constituted body to discipline its members)
5. Where a preferred barrister has not disclosed any complaints or investigations into professional misconduct or unsatisfactory professional conduct handled by the Legal Services Board, Victorian Bar Council, Indictable Crime Certificate Committee, Legal Services Commission (or equivalent body in another jurisdiction), Victorian Civil and Administrative Tribunal, any other Court or Tribunal (including any privately constituted body to discipline its members)
6. Where a preferred barrister has not disclosed any findings of guilt for a criminal offence (other than infringements) or any claims against him or her for professional negligence
7. Where a preferred barrister is charged with a criminal offence other than infringement (suspension only pending outcome of the charges)
8. Where a preferred barrister is found guilty of a criminal offence other than infringement
9. Where a preferred barrister discloses any complaints, misconduct, findings of guilt for a criminal offence, or a claim for professional negligence and the Selection Committee decides the disclosed material:
   * Indicates ‘a material risk of harm to consumers of legal [aid] services’; or
   * Undermines VLA’s obligation under section 7(1)(a) of the Legal Aid Act 1978 to ensure that legal aid provided in a manner that dispels fear and distrust.
10. Information supplied by the preferred barrister in support of their application or continued membership of the Criminal Trial Preferred Barrister List is found to be substantially and relevantly inaccurate or false.

**2. criminal trial advocacy competencies**

The procedure may be invoked where the Selection Committee becomes aware of information that a preferred barrister no longer meets one or more of the Criminal Trial Advocacy Competencies, especially where an issue with quality is raised. There are eight competencies (see *definitions*), with standards that apply to each competency.

**3. Other circumstances**

Other circumstances where the procedure may be invoked:

1. Where VLA becomes aware of information that raises an allegation about a Preferred Barrister’s conduct or quality of legal work or representation provided to an assisted person which VLA considers requires investigation.
2. Where a court, tribunal or professional body has voiced what VLA reasonably regards as serious criticisms of a Preferred Barrister’s conduct or quality.
3. A preferred barrister can also be Removed where he or she no longer wishes to be on the Criminal Trial Preferred Barrister List. This request must be in writing.

# Relevant considerations and materials

When the procedure is invoked, the Selection Committee and the chair will have regard to all relevant considerations and materials when making recommendations and making final decisions.

Relevant considerations may include:

* Whether the issue suggests advocacy, representation or other legal work performed by the preferred barrister for an assisted person will be of a lesser quality than is expected of a preferred barrister on the List;
* Whether the issue poses an adverse risk or impact to the assisted person or future assisted persons, VLA, VLA’s reputation or the Legal Aid Fund; and
* Whether the issue involves dishonesty or improper professional conduct.

Where a ground for Suspension or Removal arises relating to the disclosure of an allegation, complaint or finding of misconduct, unprofessional conduct, findings of guilt for a criminal offence, or a claim for professional negligence, the Selection Committee may “give consideration to the honesty, open candour and frankness demonstrated by [the] person in their disclosure” as per the Legal Services Board Fit and Proper Person Policy.

Relevant materials may include:

* any response to a Notice, reasons or other communication received from a Preferred Barrister;
* documents provided or representations made by the preferred barrister for entry onto the List or to maintain membership on the List;
* any investigations or findings conducted by Assignments Criminal Law, another section of VLA or an external stakeholder with direct relation to the issue or ground raised;
* any documentation obtained by or from Assignments Criminal Law, another section of VLA or an external stakeholder with direct relation to the issue or ground raised.

# Criminal Trial Preferred Barrister List Suspension and Removal Procedure

When VLA identifies a ground for suspension and removal, a clear procedure is followed.

***Suspension procedure***

1. The issue is communicated to the Assignments Criminal Law Team in the Legal Practice directorate.
2. Assignments Criminal Law will conduct a preliminary investigation into the issue identified. Relevant information or documentation is gathered. The Assignments Coordinator, Major Criminal Cases will determine whether the issue raises a ground for suspension and/or removal as outlined in section 2.
3. If a ground for suspension and/or removal is identified, the matter is submitted to the Selection Committee in order for a recommendation to be made to the Chair.
4. The Selection Committee may seek further information prior to making a recommendation. If the Selection Committee seeks further information, the preferred barrister or other relevant person will be contacted to obtain the information sought. If a preferred barrister is contacted, he or she will be given up to 28 days to respond, or a shorter reasonable period of time where the circumstances require. If the preferred barrister responds, the Selection Committee will take the further information provided into account in making a decision. Where the preferred barrister does not respond, and the time expires, the Selection Committee may make a decision based on the information before it.
5. The Selection Committee may recommend that:
   * the issue does not raise a need to Suspend or Remove the preferred barrister and therefore no further action should be taken
   * the issue should be communicated to the preferred barrister for noting or with remedial action to be performed
   * a notice of Intention to Suspend should be issued to the preferred barrister pending the outcome of an investigation, for further analysis or for other reasons.
6. Upon receiving a recommendation from the Selection Committee, the chair will make a decision about whether or not to issue a notice to Suspend to the preferred barrister or impose some other remedial action.
7. If the chair decides to issue a notice of Intention to Suspend to a Preferred Barrister, the preferred barrister will be issued with the notice of Intention to Suspend, which will contain full and detailed reasons of all the issue(s) raised. The preferred barrister will be granted an opportunity to respond. The notice of Intention to Suspend is intended to enable the preferred barrister to respond toall relevant issues.
8. The preferred barrister has up to 28 days to respond to any notice of Intention to Suspend.
9. Upon receiving a response from the preferred barrister regarding the notice of Intention to Suspend, the Selection Committee will carefully consider and take the response into account before making or changing a recommendation to the chair under this Procedure.
10. Where the preferred barrister fails to respond to the notice of Intention to Suspend, the Selection Committee will make the final recommendation of whether or not to Suspend the preferred barrister on the basis of the reasons outlined in the notice of Intention to Suspend.
11. The Selection Committee will then make a recommendation to the chair on whether or not to Suspend the Preferred Barrister, or to proceed to the Removal process.
12. If the Selection Committee recommends not to Suspend a Preferred Barrister, the Selection Committee may suggest an alternative outcome, such as a formal caution.
13. Where the Selection Committee recommends to Suspend a Preferred Barrister, clear reasons will be provided to the chair regarding the reasons for recommended Suspension and why the response did not alleviate the Committee’s concerns. This suspension may be with undertakings imposed.
14. The chair will consider the recommendation of the Selection Committee and any response from the preferred barrister in making a final decision. The chair will decide:
    * to Suspend the preferred barrister (with or without undertakings); or
    * to issue an alternative outcome, such as a formal caution.
15. Where the chair decides to suspend the preferred barrister, clear written reasons will be provided to the preferred barrister of the reasons for the decision and address any points raised in the Preferred Barrister’s Response.
16. The period of suspension of the preferred barrister will be made for a set period of time as determined by the Chair.

***Removal Procedure***

1. The issue is communicated to the Assignments Criminal Law Team in the Legal Practice Directorate.
2. Assignments Criminal Law will conduct a preliminary investigation into the issue identified. Relevant information or documentation is gathered. The Assignments Coordinator, Major Criminal Cases will determine whether the issue raises a ground for removal as outlined in section 2.
3. If a ground for Removal is identified, the matter is submitted to the Selection Committee in order for a recommendation to be made to the chair.
4. The Selection Committee may seek further information prior to making a recommendation. If the Selection Committee seeks further information, the preferred barrister or other relevant person will be contacted to obtain the information sought. If a preferred barrister is contacted, he or she will be given up to 28 days to respond. If the preferred barrister responds, the Selection Committee will take the further information provided into account in making a decision. Where the preferred barrister does not respond, and the time expires, the Selection Committee may make a decision based on the information before it.
5. The Selection Committee may recommend that:
   * that the issue does not raise a need to Remove the preferred barrister and therefore no further action should be taken;
   * the issue should be communicated to the preferred barrister for noting or with remedial action to be performed;
   * a notice of Intention to Remove should be issued to the Preferred Barrister.
6. Upon receiving a recommendation from the Selection Committee, the chair will make a decision about whether or not to issue a notice of Intention to Remove the preferred barrister or impose some other remedial action.
7. If the chair decides to issue a notice of Intention to Remove to a Preferred Barrister, a notice of Intention to Remove will be issued to the Preferred Barrister, which will be contain full and detailed reasons of the issue(s) raised. The preferred barrister will be granted an opportunity to respond. The notice of Intention to Remove is intended to enable the preferred barrister to respond toall relevant issues.
8. The preferred barrister has up to 28 days to respond to any notice of Intention to Remove, or a shorter reasonable period of time where the circumstances require.
9. Upon receiving a response from the preferred barrister regarding the notice of Intention to Remove, the Selection Committee will carefully consider and take the response into account before making or changing a recommendation to the chair under this Procedure.
10. Where the preferred barrister fails to respond to the notice of Intention to Remove, the Selection Committee will make the final recommendation of whether or not to Remove the preferred barrister on the basis of the reasons outlined in the notice of Intention to Remove.
11. The Selection Committee will then make a recommendation to the chair on whether to or not to Remove the preferred barrister or suggest an alternative outcome, such as a formal caution or a Suspension.
12. Where the Selection Committee decides to recommend the Removal of a Preferred Barrister, clear reasons will be provided to the chair regarding the reasons for Removal and why the response did not alleviate the Committee’s concerns.
13. The chair will consider the recommendation of the Selection Committee and any response from the preferred barrister in making a final decision. The chair will decide:
    * to Remove the Preferred Barrister; or
    * to issue an alternative outcome, such as a Suspension or a formal caution.
14. Where the chair decides to Remove the Preferred Barrister, clear written reasons will be provided to the preferred barrister of the reasons for the decision and address any points raised in the Preferred Barrister’s Response.

16. The period of Removal of the preferred barrister will be made for a set period of time as determined by the Chair. After this time has lapsed, the Barrister must re-apply for inclusion on the List.

# Administrative law considerations

# When making decisions under the Suspension and Removal Procedure, the Selection Committee will seek to ensure that the principles of natural justice and procedural fairness are met. The Selection Committee will have regard to all relevant considerations and will not have regard to irrelevant considerations. If the Selection Committee decides to Suspend or Remove a preferred barrister from the Criminal Trial Preferred Barrister List, full and detailed reasons will be provided to the Preferred Barrister. The preferred barrister will be given a reasonable opportunity to respond. The Selection Committee will take the Preferred Barrister’s response or other communications into account when making a recommendation to the Chair. Decisions made under the Suspension and Removal procedure will clearly refer to whether the preferred barrister meets the Entry Requirements or Criminal Trial Advocacy Competencies.

# Future Applications to the Criminal Trial Preferred Barrister List

A Non-preferred barrister that has been removed from the Criminal Trial Preferred Barrister List may reapply for membership after the removal period has expired. The non-preferred barrister must reapply in the same way as the original application was lodged and must meet the entry requirements and the Criminal Trial Advocacy Competencies. In addition to meeting these general requirements the non-preferred barrister must address the issues that resulted in their removal, and demonstrate that there has been a material change in their circumstances so that the same issues are unlikely to be raised again. The Selection Committee will make a decision on whether the non-preferred barrister may be readmitted to the Criminal Trial Preferred Barrister List.