



Delivering High Quality Criminal Trials

Consultation and options paper

January 2014

Criminal Law Program

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ABOUT VICTORIA LEGAL AID

Victoria Legal Aid is an independent statutory authority set up to provide legal aid in the most effective, economic and efficient manner.

Victoria Legal Aid is one of the biggest legal services in Victoria, providing legal information, education and advice for all Victorians.

We fund legal representation for people who meet eligibility criteria based on their financial situation, the nature and seriousness of their problem and their individual circumstances. We provide lawyers on duty in most courts and tribunals in Victoria.

Our clients are often people who are socially and economically isolated from society; people with a disability or mental illness, children, the elderly, people from culturally and linguistically diverse backgrounds and those who live in remote areas.

Victoria Legal Aid assists people with legal problems about criminal matters, family breakdown, child protection and family violence, immigration, social security, mental health, discrimination, guardianship and administration, tenancy and debt.

We provide:

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

In addition to helping individuals resolve their legal problems, Victoria Legal Aid works to address the barriers that prevent people from accessing the justice system by participating in law reform, influencing the efficient running of the justice system and ensuring 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.

ABOUT THIS CONSULTATION

Approximately 80% of people who face criminal trial in Victoria have their defence funded by Victoria Legal Aid. This means that a significant amount of taxpayer funds are expended on criminal jury trials, with jury trials costing more per client than any other form of legal representation.

This consultation is aimed at making sure that Victoria Legal Aid's expenditure on criminal jury trials is delivering quality services for our clients, efficiency for the courts and value for money for the community.¹

During the first stage of the consultation, Victoria Legal Aid met with a number of key stakeholders (including the courts, legal profession bodies and other interested groups) to get preliminary input on issues of quality and value for money in Victoria Legal Aid funded trials. This stage concluded in late December 2013.

¹ For more information on the consultation process, visit the Victoria Legal Aid website:

<http://www.legalaid.vic.gov.au/information-for-lawyers/doing-legal-aid-work/delivering-high-quality-criminal-trials>

The public release of this Consultation Paper, containing a number of options for reform, represents the second stage of the consultation process.

Members of the public and stakeholders are invited to make written submissions.

Following the completion of the consultation period, responses to the consultation paper will be considered, and any changes to be adopted will be developed.

VLA aims to announce proposed changes in June 2014.

HOW TO MAKE A SUBMISSION

We are committed to a structured, transparent and accountable consultation process that enables all interested people to access the consultation paper and the submissions in response. If you wish to comment on the options raised in this paper, you can provide a written submission, using one of the options below.

Submissions are due by 7th March 2014.

Victoria Legal Aid website

Visit <http://www.legalaid.vic.gov.au/information-for-lawyers/doing-legal-aid-work/delivering-high-quality-criminal-trials/consultation-paper-and-submissions> to access a form to assist you to provide a targeted response to the consultation paper.

Email

Written submissions can be emailed to highqualitytrials@vla.vic.gov.au

Please note that Victoria Legal Aid is committed to ensuring consultation documents, including submissions, are available to the widest possible audience, including readers using assistive technology or accessibility features. For this reason, we require all emailed submissions to be in Word format.

By post

While electronic submissions are preferred, hard copy submissions can be posted to:

High Quality Trials Consultation

GPO Box 4380

Melbourne VIC 3001

All submissions will be published on the Victoria Legal Aid website 14 days after the close of the submission period. However, in certain limited circumstances, we will accept sensitive material in confidence (for example, if it is of a personal or confidential nature). If you do not want your submission published on the website, please indicate that in your submission and Victoria Legal Aid will contact you to discuss whether a redacted version may still be published.

EXECUTIVE SUMMARY

1. Reducing delay and trial duration has been the focus of legal and procedural reform in the Victorian criminal justice system in the last few years. Over the years, a number of government reports and judicial officers have raised concerns about trial efficiency and the quality of legal representation in criminal trials. Recent statistics from Victoria's superior courts suggest that trials are longer and the time to get to trial is also longer.
2. Victoria Legal Aid is one of the primary agencies involved in the delivery of indictable crime trial legal services. We fund approximately 80% of all criminal trials and spend approximately \$33.2 million of taxpayer funds per year on indictable crime. The *Legal Aid Act 1978 (Vic)* (Legal Aid Act) requires Victoria Legal Aid to deliver legal aid to the community in the most '...effective, economic and efficient manner.' As higher court trials account for such a significant part of the Legal Aid Fund², Victoria Legal Aid has undertaken a consultation to explore how trials can be prepared to a higher standard from commencement of the proceedings all the way through to verdict.
3. The focus of this consultation paper is to ensure that Victoria Legal Aid funded representation in criminal trials is of the highest possible standard and regulated by a system of fees that incentivise effort by the right people, at the right intensity, at the right time – particularly before a trial starts.
4. Victoria Legal Aid undertook preliminary consultations with key stakeholders in November and December 2013 to explore how to best tackle the current problems experienced with trials in Victoria. There was consistent feedback in the preliminary consultations from statutory bodies and judicial officers from the County and Supreme Courts that Victoria Legal Aid should assert more control over how legally aided trials are managed. In contrast, legal practitioners consulted suggested that Victoria Legal Aid should focus increased compliance on the small number of practitioners who are perceived to be performing poorly, rather than introduce broader changes which would restrict the majority of good performers. In the preliminary consultations it was also acknowledged that there were a number of systemic and cultural factors that affect trial efficiency, delay and quality.

Funding criminal trials

5. Victoria Legal Aid's fee structure in its current form has evolved in response to new processes or procedures of courts. As a result, it mainly funds court events rather than – with some exceptions – activities out of court or stages of a case. The fee structure in its current form does not seek to incentivise – again with some exceptions – the early identification of case strategy, early appropriate resolution and high quality trial preparation. Private practitioners on Victoria Legal Aid's s29A Indictable Crime Panel and Victoria Legal Aid staff lawyers are able to apply for grants of legal assistance online certifying the application has merit. Funding is then granted or extended often without human intervention but subject to a compliance checking process.
6. Victorian fees sit towards the top end of fee scales for Australian states and territories, particularly solicitor preparation fees. The focus of this consultation is on the cost-effectiveness of current arrangements and how existing funding and resourcing can be best allocated.

² The Legal Aid Fund represents the allocation of money received, managed and controlled by Victoria Legal Aid in accordance with section 41 of the *Legal Aid Act 1978 (Vic)*.

Current problems in Victorian criminal trials

7. The starting point for any change must be to identify the present problems. The current problems - delays in getting cases to trial, increasing trial duration, cases resolving (by plea or late discontinuance) at or just before trial, and concern expressed by the judiciary about the quality and/or experience of defence representation in some legally aided criminal trials - do not exist independently of each other. It could be argued that these problems are all related in some way to lack of trial date certainty.
8. Trial date certainty means that counsel can be involved in a case early, confident that if it runs as a trial then they will be in a position to run it. Having continuity of involvement facilitates early preparation of case strategy, increases the likelihood of early appropriate resolution and ensures that counsel is well prepared, secure in the knowledge that the trial will run. Lack of trial date certainty has the opposite effect.
9. Victoria Legal Aid continues to receive mixed feedback from the judiciary about the quality of representation in legally aided trials in the County and Supreme Courts. This feedback can be grouped into the following three categories:
 - concern about a minority of counsel who lack the required skills or experience to adequately run criminal trials in an appropriate way;
 - concern about a minority of counsel who are experienced and skilled but who run trials in a way that takes a disproportionate amount of court time; and
 - concern that many appropriately skilled counsel appear in legally aided trials without adequate preparation.

Approach to reform

10. This consultation paper examines the various factors that impact on criminal trials, and puts forward a number of options for improvement. In considering the public submissions in response to this consultation, Victoria Legal Aid will adopt transparent principles that reflect the importance of early and meaningful assessment of case strength and strategy; and reflect a desire to properly resource high quality jury trials, confident in the knowledge that the right cases are being listed for trial and that resources are not being wasted. These principles require that Victoria Legal Aid compliance processes balance the need for oversight of significant public money against the expense of the compliance process and the need to respect and harness professional judgement.
11. Victoria Legal Aid considers that where a case can be resolved it should happen as early as is reasonably possible. Where a case resolves at or just before trial, that will often (although not always) be a sign of something having gone wrong. It is only by better filtering pleas from trials (or at least likely trials) that Victoria Legal Aid can confidently invest in the trial process itself to ensure that trials are of the highest quality reasonably possible. A number of options in this paper attempt to facilitate early articulated case analysis and identification of strategy, incentivise appropriate resolution, and ask questions when cases resolve late.
12. Other options – such as a minimum standard for the contents of trial briefs, and separating counsel's preparation fee from the first day appearance fee – target continuity of representation, effective preparation and identifying ways of putting downward pressure on trial costs and ensuring that all expenditure is essential and well targeted. It is also proposed that central to options around the conduct of jury trials is the requirement for a trial brief that treats the defence response, the final directions hearing, the trial and advice on appeal as a

single package and it would need to be accepted as a package or not accepted at all. A variety of other options for change are also canvassed, including fixed fees and sliding scale fees for counsel, hourly instructing solicitor rates and direct briefing to counsel with only limited solicitor involvement. The suite of options is not finite. Submitters are invited, having had the opportunity to reflect on the issues, to suggest alternative options.

13. Major trials are unique and have a disproportionate impact on the Legal Aid Fund. Since July 2009 Victoria Legal Aid spent over \$17 million on 189 cases which exceeded \$40,000. On the basis of expense alone, major trials warrant closer management and greater scrutiny. Options in this paper include treating major trials differently, creating a system of intense case management and allocating all major trials to the Victoria Legal Aid staff practice.
14. This paper considers, in the mixed model of legal aid service delivery, the proportional allocation of work between the staff practice and the private profession, the types of work conducted and by whom. A number of responses in the preliminary consultations suggested that Victoria Legal Aid's staff practice should take on a substantially increased proportion of indictable crime work while others believed that accused people are entitled to choose their publicly funded lawyer.
15. As the discussion throughout this paper demonstrates, issues in relation to indictable crime cases cannot be seen in isolation. The issues are intimately related. Of necessity, this paper deals with various options in groups. However, whatever options are ultimately preferred will need to be considered as an overall package, not as a series of one-off reforms.
16. Victoria Legal Aid acknowledges that processes need to be in place to ensure that those who do legally aided work are appropriately skilled to do so. Accepting our ability to influence and control this, options put forward include mandating the use of checklists by solicitors, the introduction of core advocacy competencies, the expansion of salaried public defenders and the development of a list or panel of barristers approved to do legally aided trials. Of course, the in-house Victoria Legal Aid practice is not exempt from such quality assurance and other compliance frameworks. Continuously improving our own in-house standards, performance and accountability have characterised the work of Victoria Legal Aid in recent years and this will remain as a key priority moving forward.
17. In granting legal assistance for criminal trials, Victoria Legal Aid relies much more heavily on the judgement of the assigned lawyer, than any other comparable jurisdiction, in the approval and extension of a grant of legal assistance. It is arguable that Victoria Legal Aid should require more applications for assistance to be reviewed by a staff member rather than through self assessment by practitioners. Options in this paper include a requirement that the assigned practitioner demonstrate that particular preconditions for next stage of funding have been made out, and increase compliance of indictable crime files.
18. The challenge for Victoria Legal Aid is for its approval and compliance processes to balance the need for oversight of the spending of significant public money with both the expense of the compliance process and with the need to respect and harness professional judgement.
19. Victoria Legal Aid takes seriously its statutory role in ensuring that criminal trials are prepared and conducted to a high standard; and in ensuring that our institutional role and contribution to the criminal justice system is valuable and meaningful, one that facilitates collaborative problem solving on what are systemic issues. We welcome and encourage stakeholders and members of the public to participate in the consultation and provide a written submission in

response to this paper. Written contributions will assist in shaping any reforms that Victoria Legal Aid proceeds with following this consultation.

SUMMARY OF OPTIONS

Pre-committal

Option 1: That the available pre-committal fee be amended to require a practitioner to prepare a documented analysis of the hand-up brief and formulation of a case strategy.

Committal

Option 2: That Victoria Legal Aid more heavily scrutinise whether there is a 'strong likelihood' that a benefit will result from representation at contested committal.

Option 3: That Victoria Legal Aid sets expectations as to the content of the brief to appear at the contested committal, including a description of the case strategy and the purpose of having the committal (e.g. whether it is intended to lay the groundwork for resolution, narrow the issues for trial, seek discharge or achieve a summary hearing).

Post-committal

Option 4: Victoria Legal Aid remove, or reduce, the post committal negotiation fee.

Option 5: Victoria Legal Aid remove the fee for sentencing indications.

Option 6: Victoria Legal Aid require more information from practitioners when completing an existing post-committal checklist, including an explanation as to the extent to which the committal narrowed the issues for trial, assisted in resolving the case or otherwise advanced trial preparation.

Pre-trial

Option 7: Where a case resolves at or before first directions hearing, an additional payment to be made available to the solicitor to recognise the effort involved in negotiation. A higher fee could be applied where resolution occurs at or before committal mention, if it can be demonstrated that significant negotiations occurred in order to achieve resolution.

At trial

Option 8: Victoria Legal Aid to require practitioners to explain why a trial resolved on or after the first day of trial, prior to approving payment for trial days prior to the resolution.

Phases of an indictable crime case

Option 9: To structure fees (other than bail application fees) and approvals around phases of an indictable crime case rather than around court events.

1. *Initial phase* – The solicitor's preparation fee becomes a case analysis fee with the brief analysis and resulting case strategy documented, including, whether there is a defence with merit, whether there is no defence and the client was advised to plead guilty, whether there is an opportunity to negotiate a resolution or whether further information is required (and if so what) before a case strategy can be finalised. This phase could incorporate the fee for a Form 32 and committal mention.
2. *For plea* – This phase would follow where a plea is to be entered. It would include funding to prepare and appear at the plea.
3. *Committal* – This phase to include contested committal, post committal negotiation, first directions hearing and sentence indication hearing. A grant of legal assistance would be contingent on certification of merit (noting s24(2) of the Legal Aid Act arising from the

documented case analysis, including justification for the funding of a contested committal hearing.

4. *For trial* – This phase would include funding to prepare for the trial and appear at trial. A grant of legal assistance would be contingent on further certification of merit (noting s24(2) of the Legal Aid Act) arising from a revised and documented case strategy including how the issues have been refined since committal.

Continuity of representation

Option 10: Victoria Legal Aid to enforce an ongoing requirement that the assigned lawyer or counsel must inform us where they form the view that:

- there is no longer merit in the accused's defence; or
- the accused is refusing to make a reasonable concession in relation to the issues in the trial where such refusal has the effect of significantly increasing the required duration of the trial.

Option 11: Victoria Legal Aid remove the 20% uplift fee, or restrict it to only be available if counsel appeared at the contested committal (rather than the first directions hearing).

Option 12: Introduce changes to the eligibility guidelines and fee structures for Melbourne based trials to require the following:

- A trial brief to be provided to counsel no later than 14 days before the defence response is due to be filed, and where possible, earlier.
- The trial brief to reflect the defence response, final directions hearing, trial and advice on appeal.
- Compliance with section 249 of the *Criminal Procedure Act 2009* (Vic).
- The solicitor to notify of the return of any trial brief to Victoria Legal Aid.
- Return of a trial brief disentitles the barrister from receiving the preparation fee (or a proportion of the fee), defence response or final directions hearing fee.
- A returned trial brief to be provided to Victoria Legal Aid to be allocated to a public defender (if available).

Option 13: Impose a condition on the grant of legal assistance requiring the same counsel briefed in a trial that has been adjourned to be re-briefed if he or she is available.

Option 14: Where the same counsel cannot be briefed, the trial brief should be provided to Victoria Legal Aid for allocation to a public defender (if available), or allocation by Victoria Legal Aid to a member of the private bar.

Option 15: Victoria Legal Aid commit to exploring a pilot of Block Briefing in Melbourne with the County Court.

Effective preparation

Option 16: Victoria Legal Aid introduce a minimum standard for trial brief, which sets clear and auditable expectations for the content of the trial brief including a covering memorandum in order to ensure an orderly handover of file knowledge.

Option 17: Separate counsel's preparation from the first day appearance fee to ensure that preparation is done before trial and to enable payment for preparation in the event that trial resolves.

Option 18: Devise a new model for applications for additional preparation fees in non-standard cases negotiated in advance for both solicitor and counsel, that includes:

- volume of material
- complexity of the legal issues
- complexity of the evidential issues
- complexity of the client
- number of co-accused
- other?

Option 19: Where a fee for extra preparation has been granted, require the lawyer undertaking the preparation (solicitor or counsel) to provide a report for the assigned practitioner's file describing the preparation completed to be available for later audit.

Option 20: Victoria Legal Aid no longer continues to pay counsel a full day brief fees for days in the Reserve List.

Trial duration and associated cost

Option 21: Develop a model for fixed fees for counsel in some or all trials.

Option 22: Implement a sliding scale of appearance fees.

Option 23: Fund instructing solicitors on an 'as reasonably necessary' basis relying on assigned practitioners (private and staff practice) to make appropriate decisions about when they are required. The instructor would only be funded where they meet the requirements set out in *R v Chaouk* i.e. the instructing solicitor has a relationship with the client, has been involved in the preparation of the trial and is sufficiently skilled and experienced to provide genuine help to trial counsel.

Option 24: Provide instructing solicitors with an hourly fee to permit greater flexibility than the current half day structure.

Option 25: Provide funding in the form of a 'trial support fee' for the assigned practitioner to support trial counsel in or out of court for the duration of the trial. The fee could be set at a standard amount with the ability to apply for a larger fee depending on the duration of the trial.

Option 26: Introduce direct briefing to barristers with no involvement from a solicitor.

Option 27: Introduce direct briefing with Victoria Legal Aid to provide a limited solicitor function and to divert resources from solicitor to counsel, allowing counsel to take the lead role in indictable crime cases.

Option 28: Reintroduce the ability to apply for second counsel without linkage to instructor funding and with reference to complexity and other criteria.

Option 29: Treat applications for second counsel, Senior/Queen's Counsel and additional preparation as a package in complex trials.

Major trials

Option 30: Victoria Legal Aid treats major cases as a separate category of trial, and defines a major case as a matter that:

- has one accused and is likely to require at least 15 days of trial time

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- involves two legally aided accused and is likely to require at least 10 days of trial time in the County Court
 - involves three or more accused regardless of the likely duration of the trial; or
 - for any other reason (e.g. volume of material, complexity) is likely to cost Victoria Legal Aid more than \$40,000.

Greater scrutiny of costs in major trials

Option 31: Victoria Legal Aid to intensively manage major cases. Case management could include requiring the submission of case plans or introducing obligations to report on case progress.

Option 32: Establish a process to enable the courts to advise Victoria Legal Aid of problematic defence conduct in legally aided major trials.

Different funding models

Option 33: Victoria Legal Aid to decide how to fund individual major trials, either through tendering, funding packages, fixed fees for appearances at trial or funded as an ordinary trial.

Who does the work?

Option 34: All major trials to be allocated to Victoria Legal Aid's staff practice, subject to conflict of interest check and staff capacity.

Option 35: A major trial panel to be created as a subset of the s29A Panel.

Option 36: All major trials (in-house or privately assigned) to be briefed to a public defender, subject to conflict of interest check and staff capacity.

Option 37: Victoria Legal Aid conducts a mandatory file review at the end of all major trials.

Allocation of indictable crime work

Option 38: Retain the current market approach to the allocation of work between Victoria Legal Aid's staff practice and private practitioners.

Option 39: Allocate sexual offence cases to Victoria Legal Aid's staff practice, subject to conflict of interest check and staff capacity.

Quality of legally aided indictable crime work

Option 40: Mandate the use of checklists by all practitioners for indictable crime cases.

Barristers

Option 41: Require Victoria Legal Aid-endorsed counsel be briefed in all legally-aided trials.

Option 42: Establish a panel of barristers for trial work with quality based criteria for entry. Victoria Legal Aid would have the ability to remove barristers from the panel.

Option 43: Establish a list of barristers for trial work with simple criteria for entry. Victoria Legal Aid would have the ability to remove barristers from the list.

Option 44: Develop a set of core competencies for advocates that must be met to receive briefs in legally aided criminal trials (or for the membership of a panel or list, if one is established).

Option 45: Develop a peer review model that enables the provision of feedback to counsel from the judiciary and other senior members of the profession including Victoria Legal Aid and Crown representatives.

Public defenders

Option 46: Increase the number of public defenders employed in Victoria Legal Aid Chambers.

Option 47: Require preferential briefing of public defenders by private practitioners.

Option 48: Victoria Legal Aid to advocate for a New South Wales style Public Defenders Scheme, noting that this would require resourcing and legislative amendments.

Approval, compliance and review

Option 49: Victoria Legal Aid to play a more interventionist role in the approval of applications for grants of legal assistance in indictable crime matters, including consideration of whether the Simplified Grants Process is available for indictable crime matters.

Option 50: Strengthen Victoria Legal Aid's compliance and enforcement processes.

Option 51: Victoria Legal Aid to exercise the ability to refuse payment for legal services if we consider that the expenditure was unnecessary.

Option 52: That Victoria Legal Aid routinely identify and review cases that have any or some of the following features:

- case resolved on or after date listed for trial
- jury discharged
- appeal against conviction allowed
- concern raised by trial judge
- concern raised by prosecutor
- trial duration estimate under by 30% or more.

Option 53: That Victoria Legal Aid seek explanation from the practitioner/s involved in the relevant cases, (as described in Option 52) and that there is a consequence (warning, non-payment, removal from list or panel) for an unsatisfactory explanation.

PART 1: BACKGROUND

1. In 2012–13, 2,387 indictable crime trials and pleas were finalised by the County Court. Of those, 1,693 resolved as pleas of guilty either before or during trial, 387 went to jury verdict, while 223 were discontinued by the prosecution.³ In the same year, the Trial Division of the Supreme Court finalised 38 trials and 56 plea hearings.⁴
2. The underlying upward drivers in indictable crime cases are starting to be seen in the reported courts data:
 - Initiations are up 11.1% in the County Court on 2011–12 levels. As a result, the court's clearance rate has dipped below 100% for the first time in a number of years. This follows a sustained clearance rate of more than 100% over a number of years, notwithstanding increasing trial numbers and duration.
 - Initiations are up more than 60% in the Supreme Court. The clearance rate remains above 100% but is trending down in the face of increased initiations and increasing trial duration, with the Supreme Court reporting an increased number of trials of longer than four weeks.
3. The cost of defending criminal trials is so high that in reality most Victorians cannot afford to pay for their own defence. Reflecting this reality, Victoria Legal Aid funds approximately 75% of accused in the County Court and more than 90% of all trials⁵ in the Supreme Court.
4. Overall, 70% of all grants of legal assistance in indictable crime cases are conducted by private practitioners. The remaining 30% are conducted by Victoria Legal Aid's staff practice. This proportion has remained relatively constant over the past five years.
5. In private practitioner assigned cases, trials are almost all briefed to the private bar. In cases managed by the Victoria Legal Aid staff practice trials are either briefed in-house to public defenders in Victoria Legal Aid Chambers or to the private bar. Anecdotally, an increasing amount of plea advocacy is being performed by assigned practitioners (both private and staff practitioners) personally rather than being briefed out.
6. According to the County Court, the average trial duration has increased dramatically in the last four years from eight to 11 days.⁶ This means an average County Court trial can cost Victoria Legal Aid – in appearance and instructing fees alone – approximately \$20,000, while a Supreme Court trial of the same duration would cost approximately \$34,000 in appearance and instructing fees alone if conducted by one barrister who is not a Senior/Queen's Counsel. With Senior/Queen's Counsel and a junior counsel, the same trial would cost approximately \$55,000.
7. The biggest component of the cost is days of trial. Each standard⁷ extra day in the County Court costs Victoria Legal Aid \$1,749 and each standard⁸ extra day in the Supreme Court

3 County Court of Victoria, *Annual Report 2012/13*.

4 Supreme Court of Victoria, *Annual Report 2012/13*.

5 Trials in this context includes trials where there a multiple accused but at least one is legally aided. This differs from the County Court data which is based on the individual accused for these purposes. It is likely that the legal aid presence is similar in both courts.

6 Data provided by County Court of Victoria.

7 Including one counsel (not silk) and an instructor.

8 Including one counsel (not silk) and an instructor.

costs \$2,910.⁹ By contrast, the appearance fees on a plea (including taking sentence) are \$1,724 in the County Court and \$2,353 in the Supreme Court.

8. Major trials are extremely expensive. There were 189 grants of legal assistance in indictable crime cases opened since 1 July 2009 where costs have exceeded \$40,000. So far¹⁰ these 189 files have cost Victoria Legal Aid \$17,219,136.96 or on average \$91,106.54. Seventeen (9%) of those files are allocated to Victoria Legal Aid's staff practice while the remaining 172 (91%) are allocated to private practitioners.
9. The net result of these arrangements is total expenditure in indictable crime of approximately \$33.2 million per year.

Victoria Legal Aid's role in the criminal justice system

10. As one of the primary agencies involved in the delivery of legal services in indictable crime trials, Victoria Legal Aid carries a statutory obligation to ensure all expenditure represents the efficient and effective use of public funds. Functions within the criminal justice system are closely interconnected and require coordination and collective effort to achieve best results and to maximise efficiency. For example, a prosecution initiative for early resolution will only function effectively if the prosecutor is in a position to negotiate effectively with a defence practitioner. Such actions will be enhanced if they are well supported by court processes.
11. Similarly, and as this paper discusses in more detail, any increased investment in preparation by trial counsel needs to be balanced against the current lack of trial date certainty in the County Court and the associated risk that the investment will need to be re-made for new counsel if the trial cannot proceed or if counsel becomes unavailable.
12. In the last five years Victoria Legal Aid has introduced a number of initiatives designed to address systemic challenges. We have worked with others to promote early resolution, quality advocacy and continuity of counsel.
13. The initiatives include the following:

Private practitioners and barristers

- A post-committal negotiation fee aimed at encouraging early resolution and narrowing of disputed issues.
- New s29A Panel requirements in indictable crime matters with a strong quality focus.¹¹
- A one off fee increase of 10% in 2012 across all fee scales (solicitors and counsel) designed to address fee erosion and help to address concerns about the juniorisation of criminal trial work. This has been associated with an annual indexation of fees.
- A 25% increase in committal fees to encourage continuity of representation by removing the disincentive for trial counsel to conduct committals.
- A 20% higher appearance fee for the first day of trial for counsel who also appeared at a contested committal.

9 To put this into context, every extra day of trial in the County Court would fund representation for four people held in involuntary detention appearing before the Mental Health Review Board under a grant of legal assistance.

10 110 of these files remain open.

11 For further information, visit the relevant section on the Victoria Legal Aid website:

<http://www.legalaid.vic.gov.au/information-for-lawyers/doing-legal-aid-work/panels/opening-of-indictable-crime-panel>

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- Piloting Block Briefing of barristers on circuit in the La Trobe Valley.
 - Delivering the Trial Counsel Development Program¹² – a long term investment in the development of skilled counsel available to do legally aided trials.

Staff practice

- The creation of specialist teams in sexual offences, indictable crime and Commonwealth crime.
- The development of quality assurance tools including comprehensive mandatory checklists for indictable crime files.
- An investment in Law Institute of Victoria accredited specialisation in criminal law, with 35 accredited specialists in the staff practice.
- The development of an in-house public defender practice and measuring its cost-effectiveness.
- Implementation of a major trials strategy that requires early allocation of a public defender or private barrister to major trials with the expectation that they consult as soon as they are allocated to a lawyer in the staff practice.
- Implementation of a coordinated briefing function in-house to ensure the quality and equity of briefing decisions out of Victoria Legal Aid's staff practice.

THE PURPOSE OF THIS CONSULTATION

14. Against this background, the focus of this consultation is to ensure that Victoria Legal Aid funded representation in criminal trials is of the highest possible standard and regulated by a system of fees that incentivise effort by the right people, at the right intensity, at the right time – particularly before a trial starts. Ensuring trials are prepared to a high standard from commencement of the proceedings all the way through to verdict is essential to client, court and community confidence in the fair administration of justice.
15. Ensuring that criminal trials are well conducted is critical given that accused people face loss of their liberty on conviction – sometimes including imprisonment for the rest of their lives. It is vital in a community that believes in fairness and the rule of law that all people have access to a just process where such significant sanctions are at stake. In short, ensuring high quality legal representation in criminal trials is part of the maintenance of a civil society.
16. As the primary funder of criminal defence services – and the largest criminal defence practice in Victoria – Victoria Legal Aid has a statutory responsibility to take the lead on continuous improvement in the conduct of legally aided trials and to administer the Legal Aid Fund in an effective, efficient and economic way.
17. This project is ultimately about tackling the long standing issue of how public money can be best spent through good quality, early trial preparation that enables appropriate early resolution of matters, skilled and focused trial advocacy and a reduction in appellable error and retrials.

¹² The Trial Counsel Development Program commenced in July 2011 and was designed to deliver unique training opportunities to selected junior counsel by partnering them with senior trial advocates, with the aim of developing a skilled and steady pool of quality advocates at the junior Bar.

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18. This paper deliberately takes a problem solving oriented approach to funding legally aided trials. Rather than seeking change for the sake of change, or to maintain the status quo for the same reason, it asks how the limited legal aid dollar can best be spent on this critical activity.

What this consultation is not about

19. It is important to be clear that this consultation will not re-assess the extent to which criminal trials are funded against other Victoria Legal Aid priorities. Victoria Legal Aid already commits approximately \$33.2 million per year to indictable crime cases. This project may ultimately recommend changes to the weighting of fees for different activities, but it will not involve an increase in the proportion of the Victoria Legal Aid Fund dedicated to criminal trials.
20. It is equally important to note that this project is not targeting specific financial savings in terms of those 'lost' by the reversal of the cap on instructing solicitor fees. Instead, our focus is on quality preparation and advocacy at trial on the assumption that a combination of early appropriate resolution, high quality representation and well designed fee structures will result in efficiencies that put downward pressure on trial numbers and trial duration.
21. This project is not focused on the reform required in other parts of the criminal justice system but recognises that any changes we makes sit within a broader context (refer section 'Current problems in criminal trials' and 'Systemic approach to systemic improvement' at page 29 and 34.

Next steps

22. Following a review of all submissions received, Victoria Legal Aid will carefully determine what, if any, changes should be made to current arrangements, how those changes will be implemented and over what timeframe.

PRELIMINARY CONSULTATIONS

23. Victoria Legal Aid met with the following stakeholders in the preparation of this paper:
- Department of Justice
 - Victorian Bar and Criminal Bar Association
 - Law Institute of Victoria
 - County Court of Victoria
 - Supreme Court of Victoria (Trial Division and Court of Appeal)
 - Magistrates' Court of Victoria
 - Office of Public Prosecutions
 - Commonwealth Director of Public Prosecutions
 - Victorian Equal Opportunity and Human Rights Commission
 - Liberty Victoria
 - Victoria Legal Aid staff
 - representatives from the largest suppliers of indictable crime trial legal services in metropolitan Melbourne and regional Victoria.

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24. The Legal Services Board and Commissioner were approached for a meeting but did not consider that their input was necessary. The Federation of Community Legal Centres was also approached for a meeting. However, due to time constraints it was agreed that they would participate via this second phase of the consultation.
 25. The views expressed in preliminary consultations have significantly informed this paper, including the options for reform.

Themes from preliminary consultations

26. There was consistent feedback in the preliminary consultations from statutory bodies and judicial officers from both the County and Supreme Courts that Victoria Legal Aid should assert more control over how legally aided trials are managed, over which counsel are briefed in legally aided matters and that the in-house practice should do a greater proportion of indictable crime work. Some stakeholders also expressed surprise that Victoria Legal Aid did not exercise any control over which barristers private practitioners briefed.
27. In contrast, legal practitioners consulted suggested that Victoria Legal Aid should focus on increased compliance on the small number of practitioners who are perceived to be performing poorly, rather than introduce broader changes which would restrict the majority of good performers.
28. The main themes and suggestions emerging from the consultations included the following:
 - Half of the stakeholders indicated their preference would be to work predominantly with Victoria Legal Aid solicitors or directly with our public defenders.
 - Victoria Legal Aid should consider a statutory public defender scheme.
 - Victoria Legal Aid should be able to direct who is briefed to appear in legally aided trials and appeals.
 - Higher fees at the beginning of an indictable crime file, and lower fees for trial days (sliding scale), may incentivise early and better quality preparation and resolution.
 - Fixed fees or trial judge certification of trial duration will put downward pressure on long trials which impact Reserve List and trial date certainty.
 - Direct briefing (removing or significantly reducing the role of instructing solicitors and private practitioners).
 - Mandating earlier briefing of counsel and for practitioners to review a matter shortly after committal.
 - Better quality preparation focusing on the basics to avoid the 'last minute culture' is necessary (disclosure; case strategy; elements of the offence and strength of the offence; early client conferencing and client management analysis needs to happen at the front end).
 - Trial date uncertainty undermines efforts put into ensuring continuity of counsel.
 - While instructing solicitors may not always be required, they are essential and funding should be available for an instructor as per *Chaouk*¹³.

13 *The Queen v Chaouk & Ors* [2013] VSCA 99 at 31; affirming *R v Chaouk* [2013] VSC 48

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- It would be beneficial to categorise cases based on complexity and other case features to ensure that instructing resources are well targeted.
 - Victoria Legal Aid preparation fees for practitioners and barristers are generally insufficient.

GUIDING PRINCIPLES APPLYING TO THIS CONSULTATION

29. For the purposes of this consultation, Victoria Legal Aid has developed a set of principles that will guide our decision making on any options for reform. These have been developed after considering the matters raised in preliminary consultations and the problems and issues discussed above:
- The strengths and weaknesses of a case should be identified early and a case strategy implemented as a result.
 - Where pleas of guilty are to be entered this should happen as early as is reasonably possible in every case.
 - Where a case is to be defended then the trial should be well prepared, focused on the real issues in dispute and run skilfully by capable advocates.
 - An accused person should be treated professionally and with dignity throughout the process.
 - The community is entitled to expect that public money is not wasted by the unnecessary delaying of cases or by the duplication of work.
 - The greater the cost of a case, the greater the level of scrutiny that should be applied before, during and after the life of the case.
 - The extent to which an individual case meets these goals should be capable of identification, review and improvement.
 - Rules and processes need to deal with the inevitable variability of criminal cases without using that variability as an excuse for a lack of scrutiny.
30. These principles reflect the importance of early and meaningful assessment of case strength and strategy. They reflect a desire to properly resource high quality jury trials confident in the knowledge that the right cases are being listed for trial and resources are not being spent on cases that – even after the trial has been listed – are waiting for counsel to be assigned to settle them.
31. The principles require that Victoria Legal Aid approval and compliance processes balance the need for oversight of the spending of significant public money with both the expense of the compliance process and with the need to respect and harness professional judgement.
32. Based on these principles, Victoria Legal Aid's own assessment of opportunities for an improved approach to criminal trials and feedback gathered through preliminary consultations, a range of options are set out in the balance of this paper.
33. The suite of options is not finite. Submitters are invited, having had the opportunity to reflect on the issues, to suggest alternative options.
34. As the discussion throughout this paper demonstrates, issues in relation to indictable crime cases cannot be seen in isolation. The issues are intimately related. Of necessity, this paper

deals with various options in groups. However, whatever options are ultimately preferred will need to be considered as an overall package, not as a series of one-off reforms.

35. Before dealing with the options it is important to put the issues into context. Accordingly, this paper addresses:
- the current approach to funding trials, including an overview of the statutory scheme, the current fee schedule and the rules for assigning cases and granting legal aid
 - the approach to reform in other jurisdictions
 - current problems in Victorian criminal trials including late resolution, concerns about the quality of counsel and trial date uncertainty
 - the respective roles of barristers and solicitors
 - taking a systemic approach to systemic improvement.

THE CURRENT APPROACH TO FUNDING TRIALS

The Legal Aid Act 1978 (Vic)

36. The Legal Aid Act requires Victoria Legal Aid to deliver legal aid into the community in the most '...effective, economic and efficient manner.'¹⁴ Legal aid is defined in section 2 of the Act as including education, advice, information, legal services, duty lawyer services and alternative dispute resolution services.
37. Victoria Legal Aid's statutory objectives require us to make legal aid available at reasonable cost to the community and on an equitable basis throughout Victoria, to improve access to justice and legal remedies and use innovative means to minimise the need for individual legal services.¹⁵ A outline summary of the Legal Aid Act can be found at **Appendix 1** of this paper.
38. The Legal Aid Act is silent as to the areas of law or groups of people that should be prioritised and the Victoria Legal Aid Board is charged with the responsibility of determining or varying the priorities in the provision of legal aid 'as between classes of persons, classes of matters or both.'¹⁶
39. Victoria Legal Aid is required to ration a fixed Legal Aid Fund created by section 41 of the Legal Aid Act. In other words, legal aid is not a fixed entitlement like a pension payment where the cost fluctuates depending on the number of people who qualify. Instead, legal aid must be administered within a capped fund and increased demand or cost must be met by a change in the mix or intensity of services delivered.
40. As the Court of Appeal recently put it in *Slaveski v Smith*, the Act empowers Victoria Legal Aid 'to determine as a matter of discretion its priorities for the application of a limited fund between competing demands for legal assistance.'¹⁷
41. The very high proportion of grants of legal assistance to private practitioners means that increased demand is felt by Victoria Legal Aid in the form of already committed payments as there is a lag between when a grant of legal assistance is approved and when the work is

14 Legal Aid Act, s4(a).

15 Legal Aid Act, s4.

16 Legal Aid Act, s7(1)(c)(i).

17 [2012] VSCA 25, at [27].

done and the payment made. In indictable crime cases those payments can be committed for up to three years. This makes the statutory job of rationing the Legal Aid Fund essentially an exercise in predicting demand, cost and the timing of payments.

42. This is very different from most other agencies in the justice system that operate on an essentially fixed cost model where increased demand is felt in fatigue and delay rather than necessarily in increased expenditure.

Funding criminal jury trials

43. Notwithstanding the broad statutory discretion to determine priorities, the reality is that Victoria Legal Aid has limited control over demands on the Legal Aid Fund to pay for criminal jury trials.
44. This stems from the decision of the High Court in *Dietrich v The Queen*¹⁸ which held that, while there was no enforceable right to legal aid in a criminal trial, a trial court possesses the undoubted ability to stay an unfair trial and that a trial without legal representation will ordinarily be unfair.
45. Victoria was the only state to codify a response to *Dietrich*. Section 197 of the *Criminal Procedure Act 2009* (Vic) is the current form of that codification and allows a court to order Victoria Legal Aid to fund the defence of an accused person in a criminal jury trial where the accused is unable afford the cost of his or her own representation.
46. Importantly, it is not a precondition for an order under section 197 that the accused's defence has merit. Nor is the court bound by any assessment that Victoria Legal Aid makes of the accused's financial means.
47. This can be contrasted with the test that Victoria Legal Aid applies under section 24 of the Legal Aid Act where it is required to consider:
- a. **Means:** Whether the person can afford the cost of legal representation (section 24(1)(a)) and
 - b. **Merit:** Whether it is reasonable to provide the representation (section 24(1)(b)), including in that assessment the public interest in funding the proceeding (section 24(4)(a)) and whether the proceeding is 'likely to terminate in favour of the person' (section 24(4)(b)).
48. Section 24(2) of the Legal Aid Act permits Victoria Legal Aid to disregard merit in an indictable crime case if it is considered in the interests of justice to do so.
49. The existence of section 197 of the *Criminal Procedure Act 2009* (Vic) removes Victoria Legal Aid's ability to control demand in its highest cost activity. This is for understandable policy reasons, but is nonetheless an important part of the current architecture of legal aid.
50. As a result of this reality, while Victoria Legal Aid's eligibility guidelines confirm that Victoria Legal Aid can limit funding to a plea of guilty if it considers that the case has no merit, this has only rarely been done in light of the inevitability of an order being made under section 197 of the *Criminal Procedure Act 2009* (Vic).
51. The impact of the Court of Appeal's recent decision in *Chaouk* is that a court can – at least in relation to the attendance of an instructor – also stay a trial based on the 'adequacy' of the resources provided by Victoria Legal Aid for a person's defence. This places an additional limit on the extent to which Victoria Legal Aid can control costs in relation to criminal trials.

18 (1992) 177 CLR 292.

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52. This combination of limitations means that Victoria Legal Aid must focus on ensuring that indictable crime cases are conducted efficiently and effectively to maximise early appropriate resolution and to avoid waste and duplication of effort.

Simplified Grants Process

53. Victoria Legal Aid operates a Simplified Grants Process. This permits private practitioners on our s29A Indictable Crime Panel¹⁹ and our staff lawyers to apply for grants of legal assistance online through the ATLAS database²⁰ certifying the application has merit. Where the Simplified Grants Process applies, aid is granted or extended by ATLAS often without human intervention based on the practitioner's recommendation but subject to a post fact compliance checking process.
54. A lawyer cannot use the Simplified Grants Process for trials with an estimate of more than 60 days duration, nor can they self-approve additional preparation or applications for Senior/Queen's Counsel. These requests are referred to our staff in the Assignments Unit²¹ for assessment and are subject to statutory reconsideration and independent review processes.²²
55. Prior to the introduction of the Simplified Grants Process, all requests for all stages of indictable crime matters were assessed by Assignments staff, including committal and trial duration. Currently, Victoria Legal Aid does not scrutinise the reasons why trials are estimated to be of a particular duration, nor cases where those estimates are exceeded. More so than any other legal aid commission, Victoria Legal Aid has relied on the professional judgement of assigned practitioners.
56. Victoria Legal Aid's staff practice is treated in the same way as private practitioners in relation to both the granting of legal aid and post-fact compliance checking. Victoria Legal Aid, as a legal practice and responsible employer, supervises the work of staff lawyers. In this sense, the staff practice is no different to a private law firm.
57. The Simplified Grants Process means that Victoria Legal Aid has the least expensive grants assignments function in Australia. This has the obvious virtue of ensuring that more resources can go into direct legal service delivery. However, an open question that arises throughout this paper is whether Victoria Legal Aid currently has the balance right or whether we should scrutinise trials – particularly high cost trials – in a more interventionist way before aid is granted, and as the case proceeds, as we did prior to the introduction of the Simplified Grants Process.

Assignment of cases

58. A number of years ago Victoria Legal Aid revoked our previous 'in-house allocation of work' guideline which, in essence, required the staff practice to be fully utilised before cases were assigned to private practitioners. Accordingly, the current split of 70% private practitioner and 30% staff practice in indictable crime is the result of the organic settling of work rather than a deliberate regulation of case allocation.

19 Victoria Legal Aid's s30 Panel is also able to do so; however, is subject to different requirements.

20 ATLAS is Victoria Legal Aid's online database for practitioners to lodge and track applications for grants of legal assistance.

21 Victoria Legal Aid's Assignments Unit is responsible for administering grants of legal assistance. This unit incorporates family, criminal and civil law teams.

22 Sections 34 and 35 of Legal Aid Act.

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59. This approach stands in contrast with the approach taken in a number of other jurisdictions where an in-house allocation of work guideline is used to both ensure that the staff practice is fully utilised and to direct certain types of cases to the staff practice, in particular major cases where costs can be managed through a fixed cost rather than a variable cost structure. This issue arises throughout this paper, particularly in relation to the management of major trials.

Current fee structure

60. The way in which fees in indictable crime cases are structured exerts an influence on how cases are conducted.
61. The fee structure in its current form has evolved over time, often in response to the new processes or procedures of courts. As a result, it mainly funds court events (with some exceptions) rather than activities out of court or stages of a case. Nor does the fee structure in its current form seek to incentivise (again with some exceptions) the outcomes that are reflected in the principles discussed above, particularly the early identification of case strategy, early appropriate resolution and high quality trial preparation.
62. A number of the options discussed later in this paper are based on changes to the fee schedule. In order to contextualise those options it is necessary to have an understanding of the current arrangements.

Overview of current fee arrangements

63. Victoria Legal Aid funds indictable crime cases through the Magistrates' Court and the trial court (Supreme Court or County Court).
64. As noted earlier in this paper, all fees were increased in 2012 by 10% to reflect the erosion in the real value of fees over many years. In addition, a recent commitment to annual indexation has seen all fees increased by at least a further 3% in the last two financial years.
65. Funding in Magistrates' Court includes:
- specific fees to prepare and run a bail application
 - a lump sum preparation fee for solicitors
 - separate fees for appearances at each of a committal mention, case conference and summary jurisdiction application
 - an additional preparation fee for solicitors where there is a contested committal
 - appearances at a daily rate for a contested committal
 - additional preparation for counsel for a contested committal based on volume of material.
66. Funding post-committal includes:
- a post-committal negotiation fee for work by counsel to resolve the matter or narrow the issues for trial
 - appearance at all directions hearings
 - drafting the defence response
 - application for a discontinuance
 - sentence indication hearing

- a lump sum preparation fee for the solicitor
- additional preparation available for the solicitor in voluminous cases
- brief fee for first day of trial (includes conferences)
- brief fee for subsequent days of trial
- a fee for an instructing solicitor or junior counsel at trial²³
- additional preparation available for the barrister in voluminous cases and where additional conferences are required
- Senior/Queen's Counsel may be approved in complex cases and higher fees are payable for all activities
- fee to trial counsel for advice on merits of appeal against conviction and sentence.

67. The full fee schedule for indictable crime matters is at **Appendix 2** while the details of the fees are found in the *Victoria Legal Aid Handbook for Lawyers*.²⁴
68. In order to understand how the fees operate in practice, three case studies are included at **Appendix 3** showing the fees payable for a normal County Court trial, a Supreme Court Trial of equivalent duration and a long County Court trial with multiple accused people.
69. Victoria Legal Aid's guidelines also facilitate a trial of Block Briefing barristers for circuits in the La Trobe Valley. The guidelines requires all legally aided cases within a circuit to be briefed to a single barrister who conducts the whole circuit at a daily rate of \$1,100. The equivalent of five days is paid as preparation time for the block briefed barrister. The preparation fee can be confidently paid because having the block briefed barrister neutralises, in large measure, the problem of trial date uncertainty.

Comparison with other jurisdictions

70. While it is important to recognise that arrangements for legal aid for criminal trials in Victoria need to be tailored to local conditions, we must also be aware of how fees compare to other jurisdictions.
71. As the following table demonstrates, Victorian fees sit towards the top end of fee scales for Australian states and territories,²⁵ particularly solicitor preparation fees. Western Australia has the highest brief fee, but does not have instructing solicitors. Trials in the Northern Territory are commonly run by solicitor advocates who receive \$1,000 per day. If a silk is briefed they receive \$2,000 per day. The New South Wales Legal Aid Commission pays solicitors by the hour to instruct, which is an option proposed in a number of the preliminary consultations

Table: Comparison of interstate trial fees for Supreme Court trials²⁶

23 Interim Instructing Guideline following the Court of Appeal decision in *Chaouk*.

24 <http://handbook.Victoria.Legal.Aid.vic.gov.au/handbook> .

25 Looking more broadly, in New Zealand there are substantial fees for preparation at various stages of a prosecution, and fees per half hour of hearing time. There are also categories of cases and experience levels which dictate the amount counsel would be paid – for example, counsel with four to nine years litigation experience get \$144 (about AUD\$133 as at 13 January 2014) per hour for a jury trial where accused is facing life imprisonment. In Ontario, Canada, lawyers are paid an hourly rate for attending court, and four hours preparation for every day of court to a maximum of 64 preparation hours. For lawyers with more than 10 years' experience in criminal law, the rate is \$123.74 (about AUD\$126 as at 13 January 2014). The equivalent hourly rate for experienced counsel preparing for, and appearing in a Victorian Supreme Court matter is \$256.

²⁶ Fees as at December 2013.

Supreme Court	VIC	NSW	QLD	WA	SA	ACT
Counsel trial preparation	Included in first day fee	\$1,290	\$2,767	\$2,240	Included in first day fee	Included in first day fee
Counsel first day fee	\$3,712	\$1,140	\$974	\$1,750	\$1,882	\$1,920
Counsel subsequent day fee	\$1,724	\$1,140	\$974/full day \$487/up to 3 hours	\$1,400	\$1,129	\$1,200/full day \$720/half day)
Solicitor preparation for trial	\$3,555 15 hours	\$300	\$502	-	\$982	\$1,200 (solicitor instructing counsel)
Solicitor instructing	\$593/ half day	\$150/hour (max. \$750/day)	\$696/full day \$348/up to 3 hours	-	-	\$600/day \$360/half day

72. As the following table shows, an average 10-day Supreme Court trial²⁷ costs at least 50% more in Victoria than in comparative Australian states.

Table: Comparison of interstate trial fees for 10-day Supreme Court trial

10-DAY SUPREME COURT TRIAL	VIC	NSW	WA	ACT	QLD
Solicitor jail conference	\$148	\$150	-	-	\$177
Counsel at mention/directions x 2	\$646	\$398	\$1,110	\$480	\$564
Solicitor trial preparation	\$3,555	\$300	-	\$1,200	\$502
Counsel trial preparation	-	\$1,290	\$2,240	-	\$2,767
Solicitor instructing for 10 half days (or three hours)	\$5,930	\$4,500	-	\$3,240	\$3,480
Counsel appearance first day	\$3,712	\$1,140	\$1,750	\$1,920	\$974
Nine subsequent days for counsel	\$15,516	\$10,260	\$12,600	\$10,800	\$8,766

²⁷ Where there is one jail conference, two pre-trial hearings, and the solicitor instructs for half-day (or three hours) every day of trial.

10-DAY SUPREME COURT TRIAL	VIC	NSW	WA	ACT	QLD
TOTAL	\$29,507	\$18,038	\$17,700	\$17,640	\$17,230

REFORM IN OTHER JURISDICTIONS

73. The challenge of keeping downward pressure on the cost of jury trials while promoting quality improvements is not unique to Victoria or Australia. The following snapshot reveals a range of responses in similar jurisdictions.

74. Queensland

In June 2013, Legal Aid Queensland commenced a consultation on improving criminal law grants of aid as a result of an increasing proportion of the Legal Aid Fund being directed to negotiating a relatively low number of major cases.²⁸ Some proposals arising in this consultation included standard preparation fees available dependant upon categorisation of cases, case management by Legal Aid Queensland of non-standard matters by submission of case plans to support additional funding applications, and a panel of solicitors and counsel who could undertake non-standard work. Changes arising from this recent consultation have not yet been announced.

75. New South Wales

In March 2009, the Trial Efficiency Working Group, tasked by the Attorney-General to identify the causes of unnecessary delays and unnecessary duration of criminal trials, released a report with 17 recommendations on how criminal trials could run more efficiently.²⁹

Following this report, in December 2010, specialist criminal law barrister panels were introduced by Legal Aid New South Wales.³⁰ Only panel barristers could be briefed for Supreme Court pleas and trials, complex trials, trials with a number of expert witnesses, trials estimated to go for 20 days or more, or where the brief of evidence is more than 5,000 pages. These panel arrangements augment the statutory public defender scheme. A legally aided case (in-house or privately assigned) can only be briefed to a private barrister if the Public Defender's Office does not have capacity to take it and issues a certificate to that effect.

76. New Zealand

In 2010, the New Zealand Ministry of Justice reviewed the quality of legal services provided in legally aided matters. The *Legal Services Bill 2010* introduced provisions allowing the Ministry of Justice to conduct quality assurance checks. A quality assurance framework was introduced in 2011, and lawyers now need to obtain approval from the Ministry of Justice to provide legal aid services.³¹ Because New Zealand has an essentially fused profession in criminal law these requirements apply equally to appearance work as well as what would be considered in Victoria to be solicitor work.

28 <http://www.legalaid.qld.gov.au/about/policy/Policy%20submissions%20and%20research/criminal-law-grants-of-aid-consultation-paper.pdf>

29 http://www.lpcldr.lawlink.nsw.gov.au/agdbasev7wr/lpcldr/documents/pdf/tewg_reportmarch2009.pdf

30 Legal Aid New South Wales *Annual Report 2010-2011*, page 33.

31 <http://www.justice.govt.nz/services/information-for-legal-professionals/information-for-legal-aid-providers/legal-aid-quality-assurance-framework-an-overview>

The 2010 review followed a foundational report³² after concerns were raised about the quality and cost of services being provided by a minority of private practitioners. This report concluded that a substantial staff practice should be established for the conduct of up to 50% of criminal cases in New Zealand. Until that point legal aid for criminal cases had been provided on a wholly contracted out basis, other than for a pilot of a Public Defence Service in Manukau. The review concluded, in part relying on an independent evaluation³³ of the pilot, that a significant staff practice for legally aided cases would bring both quality and cost improvements. This has resulted in the establishment of a nation-wide Public Defence Service.

77. Ontario, Canada

In November 2008, the Ontario Ministry of the Attorney-General released a 'Report of the Review of Large and Complex Criminal Case Procedures.'³⁴ This review resulted in Legal Aid Ontario introducing a Big Case Management program which governs costly and complex criminal trials.³⁵ The program sets individual case budgets for criminal cases expected to cost more than \$20,000 using its standard fee to determine maximum hours available to counsel. Detailed budget requests are submitted, following which a meeting is held between counsel and a district funding director to discuss the application. Funding applications for matters where costs are expected to exceed \$75,000 are determined by an Exceptions Committee with necessary attendance by the practitioner. Practitioners are also subject to annual dollar billing limit.

78. United Kingdom

In the United Kingdom, fees were reduced in April 2010 and April 2012, and a number of stakeholders in the criminal justice system worked to embed a 'right first time' principle aimed at resolving matters more quickly and cheaply, and reducing the amount of time defence solicitors and barristers spend on each case.

The United Kingdom's Ministry of Justice held an exhaustive consultation in early 2013 entitled 'Transforming Legal Aid: Delivering a more credible and efficient system.'³⁶ One proposal to come out of that review includes the introduction of competitive tender for a number of criminal legal aid matters, excluding Crown Court³⁷ advocacy and Very High Cost Cases.

For Crown Court matters, the 2013 consultation paper proposed having the same fee for guilty pleas, 'cracked trials',³⁸ and trials. The fee would be determined by offence type and pages of prosecution evidence, as indicators of complexity. There is also a proposal to taper daily fees from day four of the trial, by varying percentages based on the offence category by about 20% to 30%. The redistribution of funds aims to encourage prompt resolution.

32 <http://www.justice.govt.nz/publications/global-publications/t/transforming-the-legal-aid-system/>

33 <http://www.justice.govt.nz/services/legal-help/legal-aid/public-defence-service/about/evaluation-of-the-pds-pilot-april-2013>

34 http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/lesage_code/lesage_code_report_en.pdf

35 <http://www.legalaid.on.ca/en/info/bigcasemgmt.asp>

36 <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid>

37 The Crown Court in the United Kingdom deals with serious criminal cases, ranging from robbery to murder.

38 Cracked trials - on the trial date, the defendant offers acceptable pleas or the prosecution offers no evidence. A cracked trial requires no further trial time, but as a consequence the time allocated has been wasted, and witnesses have been unnecessarily inconvenienced

http://www.judiciary.gov.uk/Resources/JCO/Documents/Protocols/cit_guidance_v3_1007.pdf

The United Kingdom also recognises a category of Very High Cost Cases based on trial duration. There are few Very High Cost Cases but their cost is disproportionately high. Only practitioners accredited by the United Kingdom Legal Aid Agency can work on a Very High Cost Case. Work performed by practitioners on these cases is actively managed by a Legal Aid Agency case manager. The 2013 consultation paper proposes to cut the hourly rates provided to practitioners working on Very High Cost Cases by 30%.

CURRENT PROBLEMS IN VICTORIAN CRIMINAL TRIALS

79. The starting point for any changes to existing arrangements must be to identify the problems that currently exist. There was much discussion at all of the preliminary consultations about the impediments to quality trial preparation.
80. It is difficult to accept that a system operating as it should would exhibit:
- significant delays to get cases to trial
 - increasing trial duration
 - a high number of cases resolved (by plea or discontinuance) at or just before trial
 - concern expressed by the judiciary about the quality and/or experience of defence representation in some legally aided criminal trials.
81. The first of these problems is largely limited to the County Court, which carries the largest trial workload. The remainder are, to a greater or lesser extent, present in both the County Court and the Supreme Court.
82. These problems do not exist independently from each other but are interlinked in a vicious cycle. Addressing the interlinking contributors to the problem should be the collective priority of all those responsible for the proper functioning of the system. Although it is beyond the scope of this paper to propose the detail of the reform required, understanding the problems is essential to any changes that we make as part of this project.
83. Identifying the existence of these problems must be viewed within the context of a criminal justice system that remains very highly regarded by many. Victoria remains at the forefront of significant, forward thinking reform in key areas, for example, appeals and jury directions. At its best, the Victorian system can operate as a gold standard with courts and lawyers of the highest calibre.
84. Nor can it be said that the current suite of problems are the fault of any one agency, group or person. As with most complex endeavours, the reality is that most problems are caused by system evolution and the solutions lie at that level.

Delays in getting to trial

85. Data from the Productivity Commission about backlog in criminal matters reports that 22.9% of County Court cases are older than 12 months, and 4.5% older than 24 months.³⁹ These figures are some of the longest in Australia. These delays do not factor in time in the Magistrates' Court through until committal for trial which can be up to 12 months.
86. As a result it is not unusual for trials in Victoria to occur up to three or more years after the alleged offences were detected or committed. As discussed below, even after such delays a

³⁹ Productivity Commission, *Report on Government Services 2012-2013*, p 7.34.

significant proportion of cases then resolve at or during trial. In other words, it regularly takes years for the system to provide the circumstances for a case to resolve. For non-sexual offence cases delays have been exacerbated by the statutory priority given to sexual offence cases. The significant and increasing volume of sexual offence cases in the court means that they constantly push other cases 'down the list'.

87. The current delays from charge to trial in the County Court are extreme both objectively and comparatively. It cannot be in the interests of the community, accused people, victims and witnesses, for the system to take as long as it does to resolve a serious criminal charge.
88. The court consistently operates at a clearance rate of at or near 100% notwithstanding that it has dealt with an increasing number of cases and increasing trial duration in recent years. The pressure of increased initiations and trial duration is now starting to show with the clearance dropping below 100% for 2012–13.⁴⁰
89. It follows that the current delays to get cases to trial are, in part, a result of the current backlog. This impacts on the approach to be taken to preparation for trial and magnifies the importance of taking advantage of opportunities for early appropriate resolution.

Increasing duration of trials

90. In 2007, a report by the Australian Institute of Criminology found that the average duration of trial increased from five to eight days.⁴¹ County Court data confirms that since then average trial duration has increased from eight days to 11 days. The increase in average duration is being seen across all trial categories i.e. short trials, medium duration and long trials are all getting longer.⁴²
91. The reasons for increases are multiple. In preliminary consultations it has been suggested that the increasing complexity and volume of prosecution evidence is having an impact, at least in relation to drug and fraud cases. It also seems likely that the increasing legal and procedural complexity of sexual offence trials, coupled with the increasing volume of those trials, is having an impact.
92. Important steps have been taken to reduce the duration of jury directions which were, at least until recently, the longest in Australia by some margin. Early indications are that the effort to simplify directions through the *Jury Directions Act 2013 (Vic)* is having an impact on length of the judge's charge. However, some responses in our preliminary consultations suggested that the savings are, at least to some extent, offset by the time taken before the charge to complete the new processes required by sections 10 and 11 of the *Jury Directions Act 2013 (Vic)*.
93. Trial duration is also impacted by the length of time taken before a jury is empanelled and the trial itself gets underway. This can often take a number of days while legal arguments are made and while the trial judge considers his or her rulings. Often time is then required for the prosecution to adjust its case, for example, by edits to recorded interviews. It is not unusual in this early period to see the court not sitting on some days or only sitting for part days.

40 County Court of Victoria, *Annual Report 2012-13*.

41 <http://www.aic.gov.au/documents/C/6/7/%7bC6708A1E-A29D-45D9-B8D7-0003A3EE379E%7drpp74.pdf> at p12.

42 County Court of Victoria *Annual Report 2012-13*.

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94. While much of this time is genuinely required for the resolution of pre-trial issues,⁴³ it is also likely that some of this time compensates for a lack of preparation by counsel briefed late, which is itself a function of a lack of trial date certainty as is discussed in more detail below. However, in the preliminary consultations, a number of judicial officers and stakeholders with interstate and international experience remarked that Victoria is wedded to a culture of delay and often an indulgent contemplation of every possible legal argument having to be explored through the trial process. As trials get longer and more complex, the absence of early and good preparation leading to the narrowing of issues has a compounding effect on trial duration.

Cases resolving at or just before trial

95. According to the County Court, in 2011–2012, 46% of trials commenced, resolved with pleas being entered either immediately before jury empanelment or just prior to verdict.⁴⁴ Although not specifically commented on in its 2012–13 Annual Report, the existence of 281 'trials turned plea of guilty' and 223 discontinuances indicates no significant improvement. This appears to follow a long term trend given that in 2000, 80% of County Court criminal trials failed to proceed on the listed day.⁴⁵
96. In preliminary consultations, a number of reasons were proffered for the late resolution of cases. It was reported that an appropriate agreement often cannot be reached until trial counsel on both sides are in place. In a similar vein, late discontinuances by the Crown are said to reflect both the late allocation and analysis of cases by prosecuting counsel and failures by the defence to make appropriate submissions for a discontinuance at an earlier stage. It was also suggested that an accused person is in 'no hurry' to resolve a case by a guilty plea. A significant number of stakeholders, including judicial officers and the profession, expressed frustration about late disclosure by police and prosecution at various stages of the trial process, as late disclosure leads to a multitude of problems including delay and unfairness.
97. No doubt these issues all have some validity and reflect current arrangements and norms. However, the fact that they exist is no reason to think that the problem cannot be significantly improved.
98. Trial date certainty is discussed in more detail below. However trial date uncertainty contributes to the problem of late resolution because it reduces the ability to brief and retain counsel with certainty at both ends of the Bar table. Equally, the fact that a significant proportion of cases listed for trial will not actually proceed to trial makes the job of the County Court in listing cases extremely difficult. The court is forced to over-list so as to avoid any wastage of judicial resources. However, over-listing creates a lack of certainty that trials will proceed on the day they are listed and cases can sit in a Reserve List for a number of days before being allocated to a judge or adjourned to a future date. Victoria Legal Aid and the Office of Public Prosecutions carry the costs of Reserve List days and the court carries a backlog of cases that interferes with its ability to provide trial date certainty.
99. There have been periods in the last few years when the County Court's Reserve List has worked well and where cases in the list were allocated to judges quickly. Anecdotally,

43 At least while legal issues continue to be dealt with immediately before the trial starts rather than well before the trial as is permitted by the combination of sections 199, 204 and 205 of the *Criminal Procedure Act 2009* (Vic) and the norm in some jurisdictions.

44 County Court of Victoria *Annual Report 2011-2012*.

45 Australian Institute of Criminology, *Criminal trial delays in Australia: trial listing outcomes* (2007) at p14.

practitioners were noticeably better prepared because they genuinely believed that the case would run. However, experience has shown that once the Reserve List starts to slow down it has a knock on effect. If trial judges are not allocated until late in the week then that makes it harder to find judges for the next Reserve List. This problem is only compounded by increasing trial duration.

100. The County Court continues to critically examine its list management practices and to make changes to constantly improve them.⁴⁶ However, it is working under the weight of a very significant backlog which has the effect of preventing even very good ideas from having more than a limited effect.

Trial date certainty

101. The three problems discussed above are all related in some way to lack of trial date certainty. This uncertainty leads to a number of consequences:
- It impacts on the way in which counsel arrange their work, increasing the likelihood that counsel will become unavailable at late notice.
 - It removes incentives for thorough preparation because of the likelihood that counsel will not, in fact, end up running the trial. In turn, this encourages a pre-trial culture of going through the motions while waiting until the people who will actually conduct the trial are in place.
 - The reality of counsel coming into a trial late is that, when it does start, much time in the first few days of trial can be spent on tasks that could and should have been done before the trial started. This can manifest in early finishes and non-sitting days to arrange witnesses, prepare legal argument, edit the record of interview and the like.
 - At a less tangible level, it is inevitable that those operating in the system become inured to a certain way of doing things. In short, as one person put it during consultation, “delay begets delay.”
102. Providing greater trial date certainty means that counsel can be involved in a case early, confident that if it runs as a trial then they will be in a position to run it. Having continuity of involvement facilitates early preparation of case strategy, increases the likelihood of early appropriate resolution and ensures that counsel is well prepared, secure in the knowledge that the trial will run.
103. However trial date certainty is not simply a matter of the County Court making it so. From Victoria Legal Aid’s perspective, a lack of trial date certainty, and the late change of counsel and inadequate preparation that flow from it creates a wicked problem for proper investment in preparation fees.
104. Victoria Legal Aid recognises the critical value of a well prepared case strategy where counsel has sufficient time to prepare to implement that strategy before the trial starts. However, where there is no certainty that counsel who currently holds a brief will be counsel at trial, preparation fees of any significance will often be wasted and need to be repaid.

⁴⁶ See discussion in County Court of Victoria *Annual Report 2012-13* at p8.

Defence representation

105. In 2009, the Victorian Law Reform Commission's 'Jury Directions Final Report' noted that '...various members of the profession expressed concern that some barristers are appearing in criminal cases for which they do not have the necessary experience or expertise' and that trials '...frequently commenced with counsel who had little familiarity with the facts in issue or appreciation of the issues concerning admissibility of evidence.'⁴⁷ The report proposed a barrister specialist accreditation scheme as a way of raising practice standards. As noted earlier, in 2007, a report by the Australian Institute of Criminology found that the average duration of trial days increased from five to eight days, with one of the reasons suggested being a decline in quality legal representation.⁴⁸
106. Victoria Legal Aid continues to receive mixed feedback from the judiciary about the quality of representation in legally aided trials in both the County and Supreme Courts. This feedback, which was repeated in preliminary consultations, universally falls into three categories:
- Concern about a minority of counsel who appear in legally aided cases who lack the required skills or experience to adequately run criminal trials in an appropriate way.
 - An allied concern about a minority of counsel who are both experienced and apparently skilled but who run trials in a way that takes a disproportionate amount of court time and therefore public money.
 - Concern that many appropriately skilled counsel too often appear in legally aided trials without adequate preparation.
107. This feedback echoes the Victorian Law Reform Commission's report which reported that some defence counsel consider that the fees paid for pre-trial preparation and late briefing practices make pre-trial preparation difficult. A similar point, that Victoria Legal Aid fees are substantially lower than private briefs, was repeatedly made in preliminary consultations. These issues are discussed later in this paper.

THE ROLE OF BARRISTERS AND SOLICITORS

108. As a result of the Court of Appeal's judgment in *Chaouk* – endorsing as it did Justice Lasry's judgment at first instance – it is accepted that under current arrangements a fair trial in Victoria requires an instructing solicitor at the trial of the accused where that instructing solicitor has prepared the matter for trial, is experienced and well versed in the facts of the case and the relevant law and is therefore capable of participating in the ways anticipated by Justice Lasry in *R v Chaouk* at [29] – [31] and Justice Forrest in *M K v Victoria Legal Aid* [2013] VSC 49 at paragraph [45].
109. *Chaouk* and *MK* both deal with the important foundational question of what the respective roles of barristers and solicitors are both at and before trial.
110. The involvement of at least two professionals carries the risk of duplicating effort if there is not clarity about who is doing what. As well as duplicating effort, there is a risk that, without role clarity, important tasks are not completed, or are not carried out in as effective way as they could be.

47 Victorian Law Reform Commission, *Jury Directions Final Report* (2009) p32 and p128.

48 Australian Institute of Criminology, *Criminal trial delays in Australia: trial listing outcomes* (2007) p12.

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111. A split profession also necessarily increases the number of people with whom a legally aided client has contact. This can be particularly challenging for people who have significant mental health, addiction and other vulnerabilities. The lack of continuity in representation is exacerbated by the reality that a number of barristers may be briefed for various hearings during the life of an indictable crime file. The duration of many indictable crime cases also increases the chances of a change of solicitor.
 112. There are some benefits to having two legal professionals involved in a person's defence, particularly regarding having two minds to develop the case strategy. A number of barristers and solicitors consulted referred to the 'moral support' that a team approach provides in what is difficult work.
 113. It became apparent during preliminary consultations that there are significant differences in the perception that barristers and solicitors have as to their functions. Those differences were apparent within each arm of the profession, as well as between them. For example, some barristers describe receiving briefs for trial which contain no more than the hand-up brief with limited additional material. Others report receiving extensive instructions, helpful file analysis and a clear articulation of case strategy to date. Clarity around respective tasks can help inform the way in which funding can be arranged and allocated.
 114. As well as the benefits of improved clarity in the conduct of cases, the community is also entitled to some level of certainty as to the respective services that taxpayer funds are purchasing from barristers and solicitors in a profession that operates, in the main, on a split basis notwithstanding that it is legally fused.
 115. The options discussed in this paper, where appropriate, seek to be explicit about the respective functions of solicitors and barristers at various stages of the process.

A SYSTEMIC APPROACH TO SYSTEMIC IMPROVEMENT

116. Efforts made by courts and agencies independently and through collaborative processes have improved some parts of some indictable crime processes. For example, efforts to reduce delays in clogged up circuit courts and the Office of Public Prosecution's Early Resolution Unit in the committal stream of the Magistrates' Court.
117. However, the good will, thoughtfulness and endeavour that has accompanied efforts to change have not significantly improved the underlying problems identified above.
118. As with any complex system, the solution often lies in whole of system thinking and reform coordinated at a level that sits above, but incorporates as essential the interests of, the individual parts of the system. In the context of the criminal justice system, the courts have a critical and independent leadership role which, when exercised boldly and thoughtfully, has the capacity to facilitate effective systemic redesign. As the review of the Massachusetts courts demonstrates, complex systemic management and change design are expert fields of endeavour in themselves.⁴⁹
119. It may be that the circumstances are currently as good as they may ever be to facilitate an effort at reform of the system designed to deliver to the Victorian community the criminal justice system that it expects and deserves. For example, the system would be improved if

49 <http://www.mass.gov/courts/sjc/cmab.html>

there were tangible advantages for early guilty pleas, disincentives for late ones and processes to facilitate informed decision making by defence lawyers and accused people.

120. This would require legislative reform to permit sentence indications to be given as to duration of sentence as well to sentence type. Similarly, legislative certainty as to the level of reduction in sentence for a guilty plea and the diminishing value of that reduction the later a plea is entered could make a major difference. These issues have been considered elsewhere⁵⁰ but are important enough considerations to warrant emphasis.
121. Similarly, addressing the backlog in the County Court requires a whole of system response to avoid the backlog getting in the way of what would otherwise be effective reform.
122. These sorts of reforms, and the process required to implement them, are beyond the scope of this paper. However, the need for a whole of system approach to serious criminal cases cannot divest Victoria Legal Aid of our obligation to ensure that the Legal Aid Fund is used in the most effective, efficient and economical manner possible.

PART 2: OPTIONS FOR REFORM

IDENTIFYING CASE STRATEGY AND RESOLVING CASES

123. Seeking guilty pleas at all costs has no part in a well functioning system. The role of defence lawyers is to achieve the best possible outcome for their clients. Sometimes this involves advising clients to plead guilty. On other occasions the appropriate advice is to proceed to trial. It must be recognised that most indictable crime cases do result in guilty pleas either to the charge or charges as laid or to a negotiated charge or charges.
124. Victoria Legal Aid considers that where a case can be resolved it should happen as early as reasonably possible. It follows that where a case resolves at or just before trial that will often (although not always) be a sign of something having gone wrong.
125. The following discussion traces the phases of an indictable crime case, highlighting the opportunities for resolution. It concludes with options intended to facilitate earlier and more accurate identification of cases that will be resolved to a plea as against those that will go to trial.
126. It is only by better filtering pleas from trials (or at least likely trials) that Victoria Legal Aid can confidently invest in preparation and appearance at trials to ensure that they are run as and when required and are of the highest quality possible.

Pre-committal

127. Other than a bail application fee, the pre-committal phase in the Magistrates' Court attracts a lump sum preparation fee and separate fees for appearances at each of a committal mention, case conference and summary jurisdiction application. The committal mention fee carries with it a fee to prepare a Form 32 setting out whom (if anyone) is required for cross-examination at the committal.
128. The structure of the fees in their current form do not focus on what is arguably the most important task at this stage of the proceeding, namely an analysis of the hand-up brief, an

⁵⁰http://sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/sentence_indication_and_specified_sentence_discounts_final_report.pdf

assessment of the merit of the case and a positive decision as to case strategy. By describing the task as 'preparation' the fee structure provides little guidance as to what is required.

129. This pre-committal phase is important as it is one of the main opportunities to resolve cases, not least because the Office of Public Prosecutions Early Resolution Unit operates at this phase.
130. It follows that this should be treated as the first opportunity to identify whether the case can be resolved early or whether it needs to proceed.

Option 1: That available pre-committal fee be amended to require a practitioner to prepare a documented analysis of the hand-up brief and formulation of a case strategy.

N.B. This option is incorporated under 'phasing of an indictable crime case' at Option 9

Committal

131. Reform of the committal process has been foreshadowed by the Victorian Government. Any possible changes to the funding of committals needs to be viewed in that light.
132. A contested committal should be focused on narrowing issues in dispute, genuinely preparing a case for trial or facilitating the possible resolution of a case. At present, Victoria Legal Aid permits lawyers to self assess the need for a committal of not more than two days. Funding for more than two days must be approved by Victoria Legal Aid.
133. Currently, contested committals can only be funded if:
- the person has been charged with homicide (including culpable driving and attempted murder); or
 - there is a real issue of consent or identification; or
 - there is a 'strong likelihood' that a benefit will result from representation of the person.
134. The fees for a contested committal were increased by approximately 25% in 2011. The reason for the change was to bring trial fees and committal fees into closer alignment to deal with the reality that committals were often not being done by the counsel who ultimately appeared at trial and that part of the reason was that only junior counsel would accept the fees for a committal.
135. A number of Supreme Court and County Court judges have provided feedback, separate to this consultation, as to the generally poor quality of committal advocacy. Some judges indicated they often do not read committal transcripts due to the lack of relevant cross examination that genuinely narrowed the issues for trial or tested the strength of the evidence.

Option 2: That Victoria Legal Aid more heavily scrutinise whether there is a ‘strong likelihood’ that a benefit will result from representation at contested committal.

Option 3: That Victoria Legal Aid sets expectations as to the content of the brief to appear at the contested committal, including a description of the case strategy and the purpose of having the committal (e.g. whether it is intended to lay the groundwork for resolution, narrow the issues for trial, seek discharge or achieve a summary hearing?)

Post committal

136. In January 2011, Victoria Legal Aid introduced a post-committal negotiation fee. The rationale was to take advantage of the case knowledge held by counsel on both sides who had just conducted a contested committal. The fee allows for three hours of negotiation. The fee is also available for negotiations prior to the first directions hearing following a hand-up committal where the accused is committed for trial rather than plea.
137. The period immediately post committal and leading up to the first directions hearing in the County Court is often the last opportunity for resolution before the matter is listed for trial.
138. The County Court is currently piloting a system where the initial directions hearing is listed for the day after committal.⁵¹ The pilot follows the same rationale as the post-committal negotiation fee i.e. that there is an opportunity to take advantage of the case knowledge of those who conducted the contested committal.
139. Since January 2011, the post-committal negotiation fee has been claimed on 300 files totalling \$139,522. The take-up of the fee is relatively low. Feedback on the fee in preliminary consultations indicated that it was welcome but did not truly incentivise negotiations because ‘it would happen anyway.’ Concerns were raised that the fee was open to abuse through being claimed in the absence of genuine negotiations.
140. In January 2011, we also introduced a fee for sentence indication hearings. Although sentence indication hearings are limited to whether a term of imprisonment will be applied, nonetheless that information should be a powerful tool in a small number of cases to help with resolution and provide the accused with a level of certainty. There has been minimal take-up of the fee. This is probably due to the limited sentencing indication scheme that is currently provided for. It was used 42 times in 2011–12 reducing to 21 in 2012–13.
141. A suggestion made in a number of the preliminary consultations was to have the fee more closely linked to the pre-trial period, rather than the post committal period, although there is currently no restriction as to when the sentence indication fee can be claimed.

Option 4: Victoria Legal Aid remove, or reduce, the post committal negotiation fee.

Option 5: Victoria Legal Aid remove the fee for sentencing indications.

Option 6: Victoria Legal Aid require more information from practitioners when completing an existing post-committal checklist, including an explanation as to the extent to which the

⁵¹ Appearances at a 24 hour Initial Directions Hearing in the County Court is payable at \$376. This fee is payable in addition to a post-committal negotiation fee of \$564. Appearances at 24 hour Initial Directions Hearings require little preparation because they occur the day after a contested committal hearing and the issues will remain fresh in the minds of all parties.

committal narrowed the issues for trial, assisted in resolving the case or otherwise advanced trial preparation.

Pre-trial

142. By the time a case reaches the final directions hearing stage a summary of prosecution opening and defence response will have been filed. The fee schedule currently combines the appearance fee with the fee for the preparation of the defence response.
143. In preliminary consultations, it was suggested that defence responses are often relatively poorly drafted, reflecting a lack of preparation or late briefing or both. It may also be that the approach to some defence responses reflects the likelihood that counsel briefed at that stage may not be trial counsel. This encourages the use of minimalist defence responses motivated by a desire not to bind or limit counsel who may ultimately run the trial. This issue is addressed in more detail under the heading **Continuity of representation** later in this paper.
144. From January 2011, Victoria Legal Aid permitted counsel who resolved a case at final directions hearing to claim the first day brief fee as an incentive to remove cases from the Reserve List to improve trial date certainty. Again, take-up of this fee has been minimal reflecting the extent to which the final directions hearing is not used as a point of resolution.
145. A suggestion made in a number of preliminary consultations was for a funded pre-trial conference, to bring together counsel from both sides close to the start of the trial to avoid resolutions on day one of the trial, and with the expectation that counsel will be familiar with the trial issues in the preceding days or week before the trial. In response it could be said that this simply creates another hearing to substitute for a lack of preparation at final directions hearing. It would also have resource implications for both the Office of Public Prosecutions and for the court if the conference were to have the benefit of involvement from the court. In preliminary consultations, a number of stakeholders indicated that judicial case management of an in-depth nature was helpful, as opposed to a number of quick mentions based on checklists.

Option 7: Where a case resolves at or before first directions hearing, an additional payment to be made available to the solicitor to recognise the effort involved in negotiation. A higher fee could be applied where resolution occurs at or before committal mention, if it can be demonstrated that significant negotiations occurred in order to achieve resolution.

At trial

146. As discussed throughout this paper, many cases are being resolved on or after the day the trial is listed to commence. While there are occasionally good reasons why a case does not resolve earlier (e.g. a key witness changes his or her mind and does not want to give evidence) in the main, with good process, any resolution at trial should have been possible at an earlier stage.
147. It is open to consider that any resolution that occurs in the Reserve List or after a trial starts should at least be examined.

148. The United Kingdom has directly addressed the problem of what they call 'cracked trials.'⁵² For Crown Court matters, a 2013 consultation paper proposed having a higher fee for pleas, the same fee for cracked trials and a lower fee for trials.

Option 8: Victoria Legal Aid to require practitioners to explain why a trial resolved on or after the first day of trial, prior to approving payment for trial days prior to the resolution.

Phases of an indictable crime case

149. Victoria Legal Aid prefers options that facilitate early articulated case analysis and identification of strategy; options that incentivise appropriate resolution at the points in the process where the chances of resolution are highest, and ask questions when cases resolve late. This basic approach would see a more explicit focus on case strategy and early resolution. Putting case analysis and strategy at the centre of the scheme appears to be a better approach than a structure focused on simply advancing through the procedural steps of a case. Plainly it could be adapted by weighting fees more heavily to some phases than others.

150. The following options are also directed towards a more vigilant approach to the assessment of a case and, in particular, to legal aid in cases assessed as being unmeritorious.

Option 9: To structure fees (other than bail application fees) and approvals around phases of an indictable crime case rather than around court events.

1. *Initial phase* – The solicitor's preparation fee becomes a case analysis fee with the brief analysis and resulting case strategy documented, including, whether there is a defence with merit, whether there is no defence and the client was advised to plead guilty, whether there is an opportunity to negotiate a resolution or whether further information is required (and if so what) before a case strategy can be finalised. This phase could incorporate the fee for a Form 32 and committal mention.

2. *For plea* – This phase would follow where a plea is to be entered. It would include funding to prepare and appear at the plea.

3. *Committal* – This phase to include contested committal, post committal negotiation, first directions hearing and sentence indication hearing. A grant of legal assistance would be contingent on certification of merit (noting s24(2) of the Legal Aid Act) arising from the documented case analysis, including justification for the funding of a contested committal hearing.

4. *For trial* – This phase would include funding to prepare for the trial and appear at trial. A grant of legal assistance would be contingent on further certification of merit (noting s24(2) of the Legal Aid Act) arising from a revised and documented case strategy including how the issues have been refined since committal.

Option 10: Victoria Legal Aid to enforce an ongoing requirement that the assigned lawyer or counsel must inform us where they form the view that:

1. there is no longer merit in the accused's defence; or

⁵² Cracked trials - on the trial date, the defendant offers acceptable pleas or the prosecution offers no evidence. A cracked trial requires no further trial time, but as a consequence the time allocated has been wasted, and witnesses have been unnecessarily inconvenienced:

http://www.judiciary.gov.uk/Resources/JCO/Documents/Protocols/cit_guidance_v3_1007.pdf

2. the accused is refusing to make a reasonable concession in relation to the issues in the trial where such refusal has the effect of significantly increasing the required duration of the trial.

CONDUCT OF JURY TRIALS

151. The previous discussion has focused on how to improve early resolution of cases so that those that end up being listed for trial are cases that are highly likely to run. The value of getting this filtering process right is that it permits more confident and targeted resourcing of trials that will actually run.
152. The focus of the following discussion is to identify options to improve the quality, effectiveness and cost efficiency of legally aided trials that actually run. This is considered under three themes:
- Continuity of representation – to limit counsel coming into the trial at the last minute.
 - Effective preparation – to ensure that the respective functions of barrister and solicitor are clear and those tasks are appropriately resourced to ensure a focused and prepared trial.
 - Trial duration and cost – to identify ways of putting downward pressure on trial costs and ensure that all expenditure is essential and well targeted.
153. The related issue of quality and choice of trial counsel is dealt with later under the heading of **Quality assurance**.

Continuity of representation

154. As discussed earlier, late change of counsel is intimately related to lack of trial date certainty. This means Victoria Legal Aid has only limited capacity to improve the situation. This issue is directly linked to the issue of appropriate funding of counsel preparation for trial which is discussed in the next part of this paper.
155. Victoria Legal Aid has introduced two initiatives over the past two years to address continuity of representation; an uplift on the brief fee and a pilot of Block Briefing in the La Trobe Valley.
156. The issue of continuity (as with many trial related issues) differs profoundly between Melbourne based trials and circuit trials, although the principles remain the same. The first part of this discussion is focused on Melbourne based trials.
157. The brief fee uplift means that where counsel who appeared at contested committal or special hearing, or at the first directions hearing if the committal was not contested, also appears at the trial they are entitled to an uplift of 20% of the day 1 brief fee.⁵³ The uplift was claimed 159 times in 2011–12 and 183 times in 2012–13.
158. Feedback during preliminary consultations suggest that while the uplift fee is seen as a good idea it has not incentivised any change in practice. This is because, while solicitors and barristers would both prefer to have continuity of representation, in practice continuity is undermined by the lack of trial date certainty. In addition, the appropriate target may not be continuity between committal and trial (although that is obviously desirable) but rather ensuring that counsel who is briefed to prepare the defence response also runs the trial.

⁵³ Twenty percent of the brief fee in County Court trials amounts to \$468 and \$742 in Supreme Court trials.

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159. This could be achieved by amending our guidelines to require trial counsel to be briefed in sufficient time to prepare the defence response. The brief would treat the defence response, the final directions hearing, the trial and advice on appeal as a single package and it would need to be accepted in its entirety or not at all.
 160. The point at which this trial brief is given would then become an important milestone in a legally aided trial. It would mark a changing of roles with the solicitor handing-over the trial strategy and preparing to conduct the instructors role in the way envisaged in *Chaouk*. The minimum requirements for the trial brief are discussed later under **Effective preparation** at paragraph 187.
 161. A number of steps could be taken to ensure that the barrister remains in the case once he or she has accepted the trial brief, including requiring a report to an assigned practitioner when a barrister returns a trial brief. This could tie into improved processes around choice of counsel that are discussed below under **Quality assurance**.
 162. Similarly, a suggestion in preliminary consultations was to have a condition attached to the grants of assistance to require leave from the court to return a trial brief within seven days of a trial in compliance with section 249 of the *Criminal Procedure Act 2009* (Vic). If counsel fails to comply then that could be reported to Victoria Legal Aid.
 163. Tied into improved preparation fees for counsel, (discussed below) where counsel returns a trial brief before the trial starts then they could be disentitled to preparation fees, or a proportion of preparation fees, regardless of any work done to date, including becoming disentitled to payment for the defence response and final directions hearing.
 164. An alternative to disentitling counsel from receiving certain payments would be to require such returned briefs to be allocated to public defenders if there is capacity. This would deliberately interfere with the acceptability of the movement of briefs around private barristers close to trial. Equally, it would likely heighten the focus on continuity in briefing choices by solicitors i.e. in avoiding briefing barristers with a history of returning a brief close to trial. Finally, it would ensure that the costs of duplicating preparation work are borne within the fixed cost structure of Victoria Legal Aid's staff practice.
 165. Improving brief retention is a necessary precondition to any consideration of improved counsel preparation fees. As discussed earlier, the other precondition is improved early identification of issues.

Option 11: Victoria Legal Aid remove the 20% uplift fee, or restrict it to only be available if counsel appeared at the contested committal (rather than the first directions hearing).

Option 12: Introduce changes to the eligibility guidelines and fee structures for Melbourne based trials to require the following:

1. A trial brief to be provided to counsel no later than 14 days before the defence response is due to be filed, and where possible, earlier.
2. The trial brief to reflect the defence response, final directions hearing, trial and advice on appeal.
3. The trial brief to require compliance with section 249 of the *Criminal Procedure Act 2009* (Vic).
4. The solicitor to notify of the return of any trial brief to Victoria Legal Aid.
5. Return of a trial brief disentitles the barrister from receiving the preparation fee (or a proportion of the fee), defence response or final directions hearing fee.
6. A returned trial brief to be provided to Victoria Legal Aid to be allocated to a public defender (if available).

166. The problem with continuity of representation becomes more acute where a trial is not reached in the Reserve List and is adjourned. It is common place for the brief to be returned and for different counsel to be briefed.

Option 13: Impose a condition on the grant of legal assistance requiring the same counsel briefed in a trial that has been adjourned to be re-briefed if he or she is available.

Option 14: Where the same counsel cannot be briefed, the trial brief should be provided to Victoria Legal Aid for allocation to a public defender (if available), or allocation by Victoria Legal Aid to a member of the private bar.

167. The problem of continuity of representation in circuit courts is much more difficult. Cases in a circuit are brought on at short notice and it is extremely difficult for practitioners in circuit courts to secure the attendance of counsel.

168. The Block Briefing pilot in the La Trobe Valley deals with this problem by providing a barrister for the whole circuit briefed in all matters. The barrister is paid a daily rate and a week's worth of preparation and there is a high degree of certainty that the briefed barrister will be available. This approach also permits a level of control over the quality of counsel briefed. The pilot is currently being evaluated. However, if successful, it provides an option for some or all circuit courts.

169. With the support of the County Court, a form of Block Briefing could be considered in Melbourne. A range of trials could be listed before a particular judge over a period of time and a single barrister briefed to appear.

170. During preliminary consultations, the option of having more public defenders was raised on a number of occasions. This is discussed in greater detail later in this paper but, in the context of Block Briefing, public defenders are also an option.

Option 15: Victoria Legal Aid commit to exploring a pilot of Block Briefing in Melbourne with the County Court.

Effective preparation

171. It is beyond argument that counsel who appears at a trial should be well prepared. Preparation should be sufficient to allow the brief to have been properly considered, legal issues identified and prepared for, issues narrowed and any final opportunities for resolution explored.
172. As has been noted, improving preparation fees for counsel is problematic because of the very high current risk that preparation fees will need to be spent again if the trial does not proceed. Better and earlier identification of guilty pleas, together with the ability to retain counsel once briefed are necessary preconditions to any improved preparation payments. If those preconditions existed then there are major advantages to better resourced preparation for counsel at trial. The first is that it should result in shorter and more focused trials.
173. The question of preparation requires a practical appreciation of what is being done, by whom and when. This again raises the question of the respective roles of barristers and solicitors.
174. At present, solicitors are entitled, in the County Court, to a lump sum preparation fee of \$1,490 for the period after committal. Prior to the committal the solicitor is entitled to a lump sum preparation of \$1,151 plus \$715 in extra preparation if there was a contested committal. In voluminous cases solicitors can also claim for additional preparation.
175. The barrister briefed for a County Court trial currently receives a first day brief fee of \$2,341. The appearance fee for subsequent days is \$1,077. It follows that the allowed preparation component for counsel in a standard trial is \$1,264⁵⁴. This is said in the guidelines to involve an assumption of eight hours work.
176. Additional pre-trial preparation for counsel is only available in accordance with a formula based on the volume of material to be read and audio exhibits to be listened to. In addition, extra preparation may be available for additional 'conferences.' Extra preparation that complies with the formula can be approved by a practitioner for amounts up to \$3,000 but must be referred to Victoria Legal Aid for assessment if they exceed that amount.
177. Under the formula for additional preparation there is no allowance made for legal research because counsel is assumed to 'know the law'. This assumption is contestable because it does not reflect the reality of practice in an increasingly complex legal environment. Legal research and the preparation of legal argument is an essential part of trial preparation. This is a different question to the decline in basic legal knowledge of counsel noted by some judges in preliminary consultations.
178. While a formulaic approach to extra preparation unquestionably saves on back office costs, it is often a poor proxy for the true complexity of a case and the preparation required by counsel. This pulls both ways. Additional preparation for counsel can be underweighted or overweighted. For example, a recent multiple complainant historical sexual offence trial with a large number of charges attracted no additional preparation fee because it did not involve voluminous materials. Yet the case would reasonably take weeks to prepare. Similarly, many paper heavy but non complex drug or fraud cases attract disproportionate preparation fees.

⁵⁴ This is representative of 85% of the solicitor trial preparation fee, and 38% of the total preparation fee for solicitors.

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179. Since January 2011, actual extra preparation granted under the formula has ranged from \$334 to \$99,800 (by individual accused). Many high cost preparation cases also involve multiple accused people with additional preparation available to counsel for each accused. In 2012–13 extra preparation was approved on 119 grants of legal assistance.
180. A move away from the formula necessarily requires resources for administration. Any decision to divert resources into Victoria Legal Aid’s approval or compliance functions needs to be taken with real care for obvious reasons. Nonetheless, the current approach to additional preparation appears to be problematic.
181. If coupled with changes designed to ensure early briefing, continuity of counsel and early identification of guilty pleas, it is open to have a fresh look at the investment in preparation for counsel in the ordinary run of trials.
182. For example, a standard trial in the County Court, with a good brief from the assigned practitioner, and the benefit of preparing the defence response, might be thought to require two days to prepare.
183. If an improved standard allowance was provided, the court would be entitled to expect to have well prepared counsel before it who has been in the case for at least a month and who prepared the defence response. There should then be no reason for time by the defence to be spent in the first few days on tasks that should have been done in advance.
184. There is merit in the view that there needs to be greater flexibility in assessing applications for additional preparation. The challenge is how to determine how much in a particular case. There are a number of ways in which this could be done, but it would appear sensible for any approach to be based on the proposition that standard preparation is required for the majority of legally aided cases and that extra preparation should be justified pre-trial as opposed to running a ‘tab’ of additional preparation as the case unfolds.
185. Underlying the issue of preparation is the question of whose job it is to do what. At the point that a trial brief (see paragraph 187 below) is provided, the solicitor should be well versed in the case, have determined a case strategy from an early stage and have been organising the materials and implementing that strategy.
186. In other words, there should be demonstrable value from the work that the solicitor has done to date. Good practice would ensure that this knowledge and demonstrable work is handed over to trial counsel in a way which minimises the work required. Feedback to Victoria Legal Aid over the past few years has been mixed; sometimes counsel receive well-prepared briefs with thorough case plans from solicitors, while others only receive the brief and court documents. Greater clarity about what is included in the trial brief would improve the situation. Equally, there was a strong view expressed that practitioners on the s29A Panel should be trusted and not have the way in which they brief or choose counsel directed by Victoria Legal Aid, particularly in light of the rigorous s29A Panel entry requirements.
187. The suggested minimum contents of a trial brief could include:
- all materials organised⁵⁵, tabbed and provided in two-ring binders
 - chronology of the procedural history of the case

55 For example, to follow a standard pattern of indictment, crown opening, legal issues etc and to have material for each witness (e.g. statements, committal transcript, relevant exhibits) behind numbered tabs.

- discussion of any attempts at charge negotiation
- case analysis/charts/ theory documents
- written proofs of evidence from defence witnesses, including the accused, as appropriate
- client background material
- some materials (i.e. indictment, depositions) also provided in electronic form.

Option 16: Victoria Legal Aid introduce a minimum standard for trial brief, which sets clear and auditable expectations for the content of the trial brief, including a covering memorandum in order to ensure an orderly handover of file knowledge.

Option 17: Separate counsel's preparation from the first day appearance fee to ensure that preparation is done before trial and to enable payment of preparation in the event that trial resolves.

Option 18: Devise a new model for applications for additional preparation fees in non-standard cases negotiated in advance for both solicitor and counsel, that includes:

1. volume of material
2. complexity of the legal issues
3. complexity of the evidential issues
4. complexity of the client
5. number of co-accused
6. other?

188. Any re-weighting of fees into preparation needs be prudently designed and auditable. Particular issues arise when cases are not reached in the Reserve List or where the trial stops after it has started, for example, because the jury is discharged. Even in very large trials there have been examples of counsel becoming unavailable close to trial with the need to re-brief and an inevitable repayment of significant additional preparation.

Option 19: Where a fee for extra preparation has been granted, require the lawyer undertaking the preparation (solicitor or counsel) to provide a report for the assigned practitioner's file describing the preparation completed to be available for later audit.

189. The Appeal Costs Board is no longer paying on Appeal Costs Certificates in the Reserve List. This means that Victoria Legal Aid is currently bearing the cost of counsel in the Reserve List.

Option 20: Victoria Legal Aid no longer continues to pay counsel a full day brief fees for days in the Reserve List.

Trial duration and associated cost

190. As discussed earlier, trials are getting longer in both the Supreme and County Courts. Every additional day is a significant impost on the Legal Aid Fund. The increased complexity of trials

is a factor, as is the approach taken by counsel for the accused and the prosecution, including the extent to which the trial is well prepared and the issues narrowed.

191. Putting downward pressure on trial cost can be achieved by a combination of creating financial incentives for avoiding unnecessary trial length or containing the standard cost per day of trial.
192. These options need to be seen in the earlier described context of Victoria Legal Aid providing generous legally aided daily trial fees by comparison with other states and territories and internationally.

Fixed fees for counsel

193. Fixed fees have been suggested by some judicial officers in preliminary consultations, although this suggestion was not supported by others.
194. Under this approach, a fixed fee would be allocated for counsel in advance of a trial, no matter how long or short the trial actually was. Counsel would be rewarded for keeping trials short. Counsel would at times end up penalised where trials were lengthened because of matters outside their control but equally, they could benefit from a discontinuance or a successful no-case submission.
195. Developing a model to allocate an appropriate fee to particular types of cases would take some time, and settling the detail of a fixed fee model would need further work and consultation. Such an approach would need to be modelled for its financial impact and carefully piloted in order to ensure that it did not increase costs in an uncontrolled way.
196. In preliminary consultations, this proposal received some criticism on the basis that it created a disincentive for counsel to explore every issue and there was a risk that trials would not be run properly.

Option 21: Develop a model for fixed fees for counsel in some or all trials.

Sliding scale of appearance fees for counsel

197. A sliding scale of appearance fees is used in the United Kingdom. Counsel receives an increasingly lower brief fee either for each day of the trial, or for each day of trial after a certain number of days, depending on the classification of the trial.
198. As with fixed fees, this option would need further development and consultation to ensure that the daily rates were appropriately calibrated.
199. In the preliminary consultations where this was raised, concern focused on the appropriate categorisation of trials and the flexibility that would be needed in administering this fee structure, given the unpredictable nature of litigation.

Option 22: Implement a sliding scale of appearance fees.

Instructing solicitors

200. The interim instructing guidelines allow instructing solicitors to be present as and when required but provide a choice as between junior counsel and an instructor.
201. The model of having counsel and solicitor present during the whole of the trial can deliver a high standard of justice when:

- the trial solicitor has an established relationship with the client
- the trial solicitor is familiar with the trial material as a result of being involved in the conduct of the case pre-trial.
- the trial solicitor is sufficiently able and experienced.
- the case has been well prepared by the trial solicitor and the trial advocate briefed properly and well before the trial starts.

202. In preliminary consultations, there was consistent acknowledgement of the value that is added by instructing solicitors with knowledge of the matter, and some acceptance that the fee should only be paid to such solicitors.

203. Only when these elements are in place can the trial solicitor reasonably be expected to contribute in the ways anticipated by Justice Lasry in *R v Chaouk*⁵⁶ and Justice Forrest in *M K v Victoria Legal Aid*⁵⁷. The trial solicitor would then contribute by facilitating the orderly and effective running of the trial and the ethical obligations owed to the court, the client and prosecution.

204. However, previous arrangements in legally aided trials often did not meet this ideal with either no instructing, instructing by very junior staff, instructing by a person with no prior knowledge of the case/client or instructing by a non-legally qualified person. The occurrence of this practice was acknowledged in preliminary consultations.

205. The traditional instructing model resourced for every day of every trial is an extremely expensive proposition, particularly by comparison with interstate and international legal aid funding. In meeting its statutory objectives, Victoria Legal Aid must consider how to ensure a fair trial within the boundaries currently set by the Court of Appeal while also managing the Legal Aid Fund in a prudent and accountable way.

206. How to design the approach to instructing fees was the subject of much of the preliminary consultations. A repeated theme was that although instructors may not be needed in court all the time, they are 'potentially needed' all the time (or needed on standby all of the time).

Option 23: Fund instructing solicitors on an 'as reasonably necessary' basis relying on assigned practitioners (private and staff practice) to make appropriate decisions about when they are required. The instructor would only be funded where they meet the requirements set out in *R v Chaouk* i.e. the instructing solicitor has a relationship with the client, has been involved in the preparation of the trial and is sufficiently skilled and experienced to provide genuine help to trial counsel.

207. One of the legitimate criticisms of the 'two-half day' cap on instructors was that it provided limited flexibility as to the use of time and did not recognise that the instructor's role during trial may involve work both in and out of court. A more flexible approach could be to provide a 'trial support fee' as a lump sum rather than specifying by reference to time how the money is to be used, or to change the half-day fee to an hourly fee to permit greater flexibility.

56 [2013] VSC 48 at [29] – [31].

57 [2013] VSC 49 at [45].

Option 24: Provide instructing solicitors with an hourly fee to permit greater flexibility than the current half day structure.

Option 25: Provide funding in the form of a 'trial support fee' for the assigned practitioner to support trial counsel in or out of court for the duration of the trial. The fee could be set at a standard amount with the ability to apply for a larger fee depending on the duration of the trial.

208. An alternative would be to expect more of counsel in criminal trials by shifting the role of counsel closer to that of the trial advocate in a fused jurisdiction, and to fund that role accordingly by shifting fees from solicitor payments to barrister payments. Although this is technically possible under the current Victorian Bar rules for direct briefing, it is highly likely that the absence of an instructor would breach the principle in *Chaouk* or at the very least introduce unwanted uncertainty into this area.
209. A modification could be for Victoria Legal Aid's staff practice to provide limited solicitor support in cases, including necessary instructing in trials, with counsel briefed early and paid more to prepare and run the trial. The limited solicitor support provided would not be expected to be at the level currently provided as counsel would be better resourced and have a longer term involvement in cases.

Option 26: Introduce direct briefing to barristers with no involvement from a solicitor.

Option 27: Introduce direct briefing with Victoria Legal Aid to provide a limited solicitor function and to divert resources from solicitor to counsel, allowing counsel to take the lead role in indictable crime cases.

Two counsel and/or Senior/Queen's Counsel

210. Before the interim instructing guideline was introduced, second counsel could be applied for independently of the position of the instructor, in exceptional circumstances based primarily on the volume of material and complexity of the case. Prior to the interim guideline, it was also possible to apply for higher fees for Senior/Queen's Counsel or if they were prepared to accept standard fees then a junior would automatically have been provided. There had been almost no take-up of this second option with a range of views expressed by Senior/Queen's Counsel (separate to this consultation) over the appropriateness of such an arrangement.
211. Stakeholders did not convey any significant issues with the interim guideline, indicating that it in effect reversed the cap on instructing. However one stakeholder expressed concern that the interim guideline undermined the split profession.
212. Stepping back from the current and past arrangements, the issue of extra preparation, second counsel and Senior/Queen's Counsel are related. They each represent additional resources to the defence in response to some feature or combination of features of the case. At a systemic level, opportunities to junior and to instruct also represent important exposure to trial work that is necessary for the development of trial counsel into the future.
213. The real question is when is each justified, for what reason and to what level should they be resourced. All aspects of this issue should be considered open, including the future of Trial Counsel Development Program.

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214. Second counsel should be required for similar reasons to additional preparation i.e. primarily related to the complexity and duration of the trial including the evidential, legal and procedural issues. The presence of second counsel logically impacts on the requirements of an instructing solicitor. Again, recognising that there are differences, the presence of a junior must nonetheless reduce the work load on the instructor.
215. The question of when Senior/Queen's Counsel is required is more subtle. While the requirement may be related to complexity, the value of Senior/Queen's Counsel is also said to come from the gravitas of the role and the person's standing with the court. This suggests that Senior/Queen's Counsel may be required for cases of particular intensity or difficulty, quite apart from complexity.
216. In the Supreme Court's 2012–13 Annual Report the Chief Justice called for a return to Victoria Legal Aid funding Senior Counsel either universally or more regularly in the Supreme Court.⁵⁸ Her Honour notes the false economy in less experienced counsel appearing, as that negatively impacts on trial duration and increases the risk of mistrial, successful appeals and re-trials. Her Honour also noted the perception of inequality when the Office of Public Prosecutions was able to brief Senior/Queen's Counsel.⁵⁹
217. Providing Senior/Queen's Counsel for all trials in the Supreme Court would represent a 50% increase on brief and appearance fees compared to the briefing of a Senior Junior. Furthermore it was acknowledged during the preliminary consultations by judicial officers, that Senior/Queen's counsel did not always guarantee high quality representation.

Option 28: Reintroduce the ability to apply for second counsel without linkage to instructor funding and with reference to complexity and other criteria.

Option 29: Treat applications for second counsel, Senior/Queen's Counsel and additional preparation as a package in complex trials.

MAJOR TRIALS

218. Major trials make a significant impact on the Legal Aid Fund. In the absence of a formally defined framework for approaching major trials, there is a risk that resources are not allocated in the most cost effective manner and major trials are not conducted at the optimal cost and quality.
219. The first issue is to define a major trial. From a financial perspective, the question is when the trial cost is such as to justify the resources necessary for special management. In line with the Commonwealth's approach to expensive cases,⁶⁰ we propose the criteria to be when a case has total costs of more than \$40,000. This figure necessarily represents an arbitrary threshold,

58 <http://www.supremecourt.vic.gov.au/home/library/supreme+court+of+vic+2012-13+annual+report> at p3.

59 Usually senior Crown prosecutors with statutory appointments not tied to public sector pay scales as public defenders currently are.

60 Victoria Legal Aid and other states' legal aid commissions have an agreement with the Commonwealth to fund expensive cases in Commonwealth matters. The Expensive Commonwealth Criminal Cases Fund was established to assist legal aid commissions to cater for the high costs associated with providing assistance for particular criminal law matters. The Fund enables the Attorney-General's Department to reimburse legal aid commissions for the costs of cases that are likely to exceed \$40,000 for any one criminal trial. Victoria Legal Aid makes regular applications to the Fund and also reports monthly against how these monies are used.

which does not consider the inclusion of cases which may cost less but are significant due to other factors such as consequences for the accused.

220. As noted earlier, the 189 most expensive grants of legal assistance in indictable crime cases opened since 1 July 2009 have so far⁶¹ cost Victoria Legal Aid \$17,219,136.96 or on average \$91,106.54. Approximately 91% of those files were run by private practitioners.
221. On the basis of cost alone, major trials should be treated differently and managed more intensively. However, Victoria Legal Aid has been comparatively non-interventionist in major trials and has not managed the funding of such trials as a separate activity. For example, many jurisdictions have panels for complex and major cases and require case plans to be submitted to the funding division, and in some instances also require meetings with a member of the funding division of the relevant legal aid agency.⁶²
222. There is no equivalent management scheme in Victoria. As outlined in our criminal law eligibility guidelines, if a private practitioner estimates the trial is likely to take less than 60 days, and the practitioner is a member of the s29A Panel, they will apply for a grant of legal assistance via the Simplified Grants Process. The only oversight of trials under 60 days is the after-fact compliance mechanism. If trial is estimated to take longer than 60 days, the practitioner submits a funding application, which is assessed by an Assignments Unit staff member.
223. Victoria Legal Aid's staff practice has a coordinated briefing policy for major trials. Under the policy, the briefing of major trials (Supreme Court matters and County Court trials that are likely to take more than 15 days) are allocated by the Practice and Briefing Manager to a Criminal Trials Committee⁶³ responsible for monitoring major trials and resolving any briefing disagreements. The staff practice is also moving towards implementing a policy of only allocating major trials to practitioners at senior lawyer level or higher. However, this is unlikely to have a significant impact on major trials given that only 9% are currently allocated to the staff practice.
224. This preliminary identification of a major case would permit Victoria Legal Aid to make decisions about how to treat the case. For example, a major case that involves 20 volumes of evidence and five accused people would be managed differently to a case that has a trial estimate of maximum 15 days.

61 110 of these files remain open.

62 In particular United Kingdom, Ontario, Canada and New South Wales. See page 18.

63 The committee includes Chief Counsel, Director of Criminal Law, Practice and Briefing Manager, relevant criminal law program managers and a regional managing lawyer.

Option 30: Victoria Legal Aid treats major cases as a separate category of trial, and defines a major case as a matter that:

- has one accused and is likely to require at least 15 days of trial time
- involves two legally aided accused and is likely to require at least 10 days of trial time in the County Court
- involves three or more accused regardless of the likely duration of the trial; or
- for any other reason (e.g. volume of material, complexity) is likely to cost Victoria Legal Aid more than \$40,000.

Greater scrutiny of costs in major trials

225. Once a case is identified as a major trial there would be a greater level of scrutiny in funding. In addition to greater management by our Assignment Unit, courts could play a vital role in partnership with Victoria Legal Aid to ensure that major trials run smoothly and efficiently. Mechanisms could be developed for courts to provide early warning notifications to Victoria Legal Aid where they identify contentious use of Victoria Legal Aid funding in major trials.

Option 31: Victoria Legal Aid to intensively manage major cases. Case management could include requiring the submission of case plans or introducing obligations to report on case progress.

Option 32: Establish a process to enable the courts to advise Victoria Legal Aid of problematic defence conduct in legally aided major trials.

Different funding models

226. The United Kingdom in particular has used tendering in major trials. Under this model, firms on the s29A Panel would tender for a major trial and put together a costs proposal to run it.

227. Similarly, funding packages could be negotiated for certain types of trials including, for example, payments for certain stages of the matter on a pre-agreed schedule.

228. For very long trials, fixed fees for appearances could be negotiated.

Option 33: Victoria Legal Aid to decide how to fund individual major trials, either through tendering, funding packages, fixed fees for appearances at trial or funded as an ordinary trial.

Who does the work?

229. One of the primary tools to ensure effective and efficient use of public funds on major trials is the choice of who should conduct them. This includes the solicitor assigned the file and the barrister briefed to appear in it.

230. A number of participants in the preliminary consultations suggested that the best way to ensure quality and value for money was to allocate more trials to the Victoria Legal Aid staff practice. This would require the re-introduction of an in-house allocation of work guideline, at least in relation to major trials.

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231. The use of a fixed cost staff practice to run major trials would insulate the Legal Aid Fund from the significant financial impact that major trials allocated to private practitioners can cause. As noted previously, the most significant cost component in major trials is the cost of counsel. This would be significantly reduced by the use of salaried public defenders. Public defenders can also be allocated to the legal team at an early stage, ensuring continuity of representation.
232. However, if cases are to continue to be allocated without an in-house allocation of work guideline then there is a case to be made for a specialist subset of the s29A Panel of firms to be created to run major trials given the experience, logistics and staffing requirements necessary to manage large cases.

Option 34: All major trials to be allocated to Victoria Legal Aid's staff practice, subject to conflict of interest check and staff capacity.

Option 35: A major trial panel to be created as a subset of the s29A Panel.

Option 36: All major trials (in-house or privately assigned) to be briefed to a public defender, subject to conflict of interest check and staff capacity.

Option 37: Victoria Legal Aid conducts a mandatory file review at the end of all major trials.

ALLOCATION OF INDICTABLE CRIME WORK

233. As discussed throughout this paper, Victoria Legal Aid removed the in-house allocation of work guideline some years ago. The staff practice currently conducts approximately 30% of all indictable crime files, with private practitioners holding the remainder.
234. Victoria Legal Aid is committed to the mixed model of legal aid service delivery and to the continued involvement of both arms of the private profession in legally aided work. However, this does not mean that we should not consider the proportional allocation of work, nor the types of work that are done and by whom.
235. This paper has already discussed the option of prioritising major trials to the staff practice. Similarly, sexual offence trials could also be prioritised given how highly specialised they have become. This would result in a change in the work mix between the staff practice and private practitioners.
236. A number of responses in the preliminary consultations suggested that Victoria Legal Aid should take on a substantially increased proportion of indictable crime work to the staff practice. The benefits of such an approach were said to lie in the consistency of the quality of the work and an ability to more directly control expenditure. Counter to these benefits, and repeated in preliminary consultations, lies the strongly held belief amongst some lawyers that accused people are entitled to choose their publicly funded lawyer.
237. Finally, as noted in respect of major trials, Victoria Legal Aid's public defender service could be expanded and staff practitioners and private practitioners required to brief public defenders subject to conflict of interest check and staff capacity.

Option 38: Retain the current market approach to the allocation of work between Victoria Legal Aid's staff practice and private practitioners.

Option 39: Allocate sexual offence cases to Victoria Legal Aid's staff practice, subject to conflict of interest check and staff capacity.

QUALITY ASSURANCE AND COMPLIANCE

238. Victoria Legal Aid has a statutory obligation to ensure that the Legal Aid Fund is used in the most effective, economic and efficient manner.

239. As well as designing fee structures to incentivise good practice, this also requires Victoria Legal Aid in the indictable crime context to have:

- processes to ensure that those who do legally aided work are appropriately skilled to do so
- processes for the approval of grants of legal assistance and extensions of grants of legal assistance that are robust and cost effective
- the capacity to promptly identify when things go wrong and to learn from these experiences.

240. The following discussion and options are primarily focused on 'ordinary' cases, as opposed to the major trials referred to above.

Quality of legally aided indictable crime work

241. Arrangements for access to legally aided work in many ways reflects the history of legal aid in Victoria. Both arms of the private legal profession were responsible for much of the early availability of legal aid. Throughout the development of the modern legal aid commission, the private legal profession has remained intimately involved in the legal aid scheme.

242. This history helps to explain why the procurement of legal services from private providers operates differently from other public sector legal services procurement arrangements. Private legal providers have seen themselves as more than simply service providers competing for publicly funded work, but as integral contributors to a scheme that assists disadvantaged clients to exercise their legal rights.

243. This level and intensity of involvement in legal aid is plainly a good thing. The fact that the private legal profession is committed to access to justice through the delivery of legal aid services can only exert a positive influence on the justice system. It also helps to explain resistance within both arms of the profession to suggestions of increased Victoria Legal Aid control over who is eligible to do legally aided work, particularly in indictable crime.

244. This issue is also intimately connected to the split nature of the profession. While Victoria Legal Aid has in recent decades regulated access to indictable crime cases for solicitors, it has not done so for barristers. This approach presumably reflects the view that the solicitor ought to have an absolute discretion to decide who should be briefed.

245. The influence of this approach was so profound that until relatively recently, Victoria Legal Aid's own staff lawyers were not limited in who they could brief. This has changed with the

introduction of a coordinated briefing function, albeit one that values solicitor input. For private practitioners it remains the case that they have absolute discretion as to who to brief.

246. This issue was the subject of sharply differing views in preliminary consultations. Judicial officers and prosecution agencies tended to strongly favour regulation of who could be briefed, while the two arms of the profession saw choice of counsel as being one of the core functions of a solicitor and that any derogation from an absolute discretion should be resisted.

Solicitors

247. Access to indictable crime legal aid work for private solicitors is regulated through panels under section 29A of the Legal Aid Act. Following a period of extensive consultation and design, a new approach to the indictable crime panel has been implemented⁶⁴. The new approach focuses on quality, skills and supervisory arrangements. Over time, it will require all firms on the panel to have at least one Law Institute of Victoria Accredited Specialist in Criminal Law. It is not proposed to make any changes to the recently implemented process.
248. Victoria Legal Aid's staff practice is organised so as to ensure that it at least meets the standards required for panel entry. In particular, Victoria Legal Aid currently has 35 Accredited Specialists in Criminal Law.
249. Victoria Legal Aid's staff lawyers are required to use a series of checklists at different stages of indictable crime cases with a specialised checklist for sexual offence cases. As well as prompting lawyers on required tasks, the checklist has a focus on the development and articulation of case strategy. Annexed to the checklists is a template to guide an analysis of the elements of the offence. The completed checklists remain on the file and are available for review by managers or senior staff. In preliminary consultations, strong interest was expressed in the use of checklists.
250. There would, of course, be no difficulty in the sharing of checklists. The real question is whether the use of such checklists should be mandatory for private practitioners. This is based on the proposition that if they work to improve the quality of work done, then there is no good reason not to use them in every case. Input from private practitioners into the design and maintenance of the checklists would be welcomed.

Option 40: Mandate the use of checklists by all practitioners for indictable crime cases.

Barristers

251. As discussed, there are currently no barriers for barristers to conduct legally aided trials. A private practitioner can brief any counsel to appear in a trial. Briefing of counsel by Victoria Legal Aid staff practitioners is now regulated through a coordinated briefing function.
252. In preliminary consultations, private practitioners expressed the strong view that they should be trusted to make the judgement as to who should be briefed. Many noted that this was a task they take very seriously. By contrast, other stakeholders expressed genuine surprise that there were no barriers to entry and that private practitioners had absolute choice in relation to the allocation of large amounts of taxpayer funds.

64 <http://www.legalaid.vic.gov.au/information-for-lawyers/doing-legal-aid-work/panels/opening-of-indictable-crime-panel>

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253. As discussed earlier, judicial comment about the quality of counsel in trials continues to be critical. The criticism is directed to a small group of barristers who continue to be briefed in legally aided cases and who are thought to be inappropriate either because they do not have the required skills or experience or because they unnecessarily prolong trials. Unsurprisingly, those counsel are rarely named and when they are named it is almost always done in confidence. This places limits on what action Victoria Legal Aid can take to address the concerns.
254. It was noted during preliminary consultations that some of the counsel subject to the abovementioned judicial concerns are perceived by solicitors to get good results for clients by using approaches that can serve to prolong trials.
255. In addition to concerns about the poor quality representation provided by a small number of counsel, there is obviously a systemic interest in assuring the quality of counsel in legally aided trials is high, and in continuing to lift standards. This interest has been present for some years⁶⁵.
256. Balancing these issues, it would appear that the acute problem is that Victoria Legal Aid under its current arrangements cannot exclude inappropriate counsel from legally aided trial work. The longer term issue is to ensure that appropriate quality standards are met before any counsel is considered appropriately skilled to do legally aided trials. This properly reflects the specialised and difficult nature of trial work and the interests which are at stake
257. There is a range of options for limiting which counsel can conduct legally aided trials, many of which are used (or have been tried) elsewhere. One option is a fully administered panel similar to the s29A Panel for solicitors. This would have both entry criteria and processes for removal. Such a panel could be designed to put the accreditation process being developed by the Victorian Bar at its centre, subject to appropriate transitional arrangements. It could create the circumstances to allow for future consideration of differential fees for differently accredited counsel as occurs in some other jurisdictions. As with the s29A Indictable Crime Panel for solicitors, it could be designed to include sub-panels, for example, sexual offence trials or major trials. It would also have processes for quality assurance and removal. The potential downside of such an approach is the costs associated with implementing and maintaining it.
258. During the preliminary consultations and for some time in recent years there has been unanimous support by the courts for Victoria Legal Aid to maintain a list of counsel it deems appropriate to undertake legally aided work. A list with specific entry requirements, for example, a current practising certificate, a declaration as to character and a number of years of practice experience would be relatively straightforward to implement and would meet valid concerns raised in preliminary consultations about introducing onerous requirements for people to conduct legally aided trials. Victoria Legal Aid, as an independent statutory agency, has both the authority and more importantly the obligation to determine who undertakes taxpayer funded legal work.

65 D L Cooper, *Review of the delivery of legal aid services in Victoria*, November 1994 at p138.

Option 41: Require Victoria Legal Aid-endorsed counsel be briefed in all legally-aided trials.

Option 42: Establish a panel of barristers for trial work with quality based criteria for entry. Victoria Legal Aid would have the ability to remove barristers from the panel.

Option 43: Establish a list of barristers for trial work with simple criteria for entry. Victoria Legal Aid would have the ability to remove barristers from the list.

259. The Office of Public Prosecutions has recently introduced a set of Advocacy Competencies⁶⁶ which set out the skills and behaviours expected of advocates who appear on behalf of the Director of Public Prosecutions. The Victorian Bar has been considering a similar set of competencies.
260. There may be value in articulating of a set of advocacy competencies for those appearing for accused people in criminal trials. There would likely be overlap with the Office of Public Prosecution's competencies and there are advantages if the two largest briefers in the criminal justice system have a consistent approach.
261. The competencies could then form the basis for skills development and training, as well as assessment and review by Victoria Legal Aid, possibly in partnership with the Office of Public Prosecutions and the judiciary.

Option 44: Develop a set of core competencies for advocates that must be met to receive briefs in legally aided criminal trials (or for the membership of a panel or list, if one is established).

Option 45: Develop a peer review model that enables the provision of feedback to counsel from the judiciary and other senior members of the profession including Victoria Legal Aid and Crown representatives

Public defenders

262. Over the past five years Victoria Legal Aid has employed public defenders. There are currently 18 staff classified variously as senior public defenders, public defenders and associate public defenders.⁶⁷ Senior public defenders and some public defenders appear in criminal trials. These staff are the first port of call for trials briefed by the staff practice.
263. Because the public defenders are located within Victoria Legal Aid, they are able to be allocated to major trials at a very early stage in the proceedings to provide strategic advice and support to the solicitor. In addition, public defenders are heavily involved in mentoring, legal education and advocacy training for the staff practice. This has a tangible impact on the quality of the work performed by the whole of the in-house practice.
264. Two public defenders are permanently located in regional centres and two associate public defenders in our suburban offices. These staff operate within Victoria Legal Aid Chambers, which also includes specialist civil law and family law advocates.

66 <http://www.opp.vic.gov.au/Home/Resources/Advocacy-Key-Competencies>

67 Referred to throughout the paper in the collective 'public defenders'.

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265. Most (approximately 70%) of the senior public defenders and public defenders are also members of the Victorian Bar who are entered on the roll specifically as public defenders. The non-barristers either have interstate/international trial experience or have been developed and trained through the staff practice. A number of public defenders are employed on a contract basis in order to ensure vitality and regeneration.
266. A financial performance model is in place for Victoria Legal Aid Chambers to monitor cost recovery.
267. In large part, our ability to be cost effective reflects the fact that salaries for public defenders are by no measure commensurate to the salaries that come with statutory appointments of Crown prosecutors. This impacts on our capacity to recruit at senior levels from the Bar, although the quality of the work available is becoming a demonstrable drawcard.
268. By contrast, New South Wales has a statutory Public Defenders Scheme that sits separately to the legal aid commission. Statutory appointments lead to salaries commensurate with Crown prosecutors. As a result, it attracts very senior barristers who appear in many legally aided trials, particularly in the Supreme Court.
269. Victoria Legal Aid Chambers has focussed attention on quality assurance with regular advocacy training in place and formal performance review processes being implemented. Judicial feedback about the quality of the performance of public defenders has been generally positive.
270. Although in preliminary consultations a number of parties advocated for an expansion of Victoria Legal Aid Chambers, there are no current plans to increase the public defender service. However, one of the major advantages of public defenders is that their diaries can be managed to better ensure that they will be available for trials on listed dates. Managing issues of quality is also easier for Victoria Legal Aid when it is through an employment relationship with the relevant advocate.
271. In addition, because costs of public defenders are fixed, they provide a way for Victoria Legal Aid to limit the financial impact of brief fees in long trials. For example, a three month trial in the Supreme Court will cost \$105,428 in counsel appearance fees alone. Given that this represents only a quarter of a year, it is markedly less expensive to have a salaried public defender appear in a case of this duration than to brief it privately.

Option 46: Increase the number of public defenders employed in Victoria Legal Aid Chambers.

Option 47: Require preferential briefing of public defenders by private practitioners.

Option 48: Victoria Legal Aid to advocate for a New South Wales-style Public Defenders Scheme, noting that this would require resourcing and legislative amendments.

Approval, compliance and review

272. As discussed earlier, Victoria Legal Aid relies much more heavily on the judgement of the assigned lawyer, than any other comparable jurisdiction, in the approval and extension of a grant of legal assistance. However, in indictable crime cases – given their duration and cost – it is at least arguable that Victoria Legal Aid should require more applications for assistance to be reviewed by an Assignments Unit staff member rather than through self assessment.

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273. A number of the options in this paper would require the assigned practitioner to demonstrate that the preconditions for next stage of work have been made out. For example, the option that aid for trial be contingent on an articulated case strategy and merit assessment. The issue raised in this part of the paper is whether aid for stages of an indictable crime case should continue to be self assessed with a documentary trail required for later compliance checking, whether Victoria Legal Aid should itself consider the application and make its own assessment of the articulated ground, or whether Victoria Legal Aid should strengthen its compliance and enforcement mechanisms.
274. Any move away from self-assessment would likely have resource implications. There are, of course, a range of options within this proposal. For example, practitioners could self assess eligibility initially but Victoria Legal Aid could assess all applications for an extension of assistance to cover the trial itself, including applications for additional preparation, two counsel or senior counsel.
275. In the indictable crime area Victoria Legal Aid has tended not to focus on substantive or strategic issues. When this is allied with a strong reliance on practitioner assessed eligibility under the Simplified Grants Process, there is a strong argument that Victoria Legal Aid is not active enough in the assessment of quality.
276. More compliance checking of indictable crime trials could see a greater number of cases reviewed, for example, for documentation articulating case strategy, an appropriately thorough memorandum to trial counsel, a defence response that is not pro forma, or reasoned advice on prospects of appeal.
277. If this sort of a process is adopted then it would likely require some additional resources into Victoria Legal Aid's compliance function.

Option 49: Victoria Legal Aid to play a more interventionist role in the approval of applications for grants of legal assistance in indictable crime matters, including consideration of whether the Simplified Grants Process is available for indictable crime matters

Option 50: Strengthen Victoria Legal Aid's compliance and enforcement processes.

Option 51: Victoria Legal Aid to exercise the ability to refuse payment for legal services if we consider that the expenditure was unnecessary.

278. There are a number of 'flags' that get raised in criminal trials to indicate that something may have gone wrong. Where they arise, a well functioning system would identify the relevant cases and review them to see what lessons can be learnt or what other steps need to be taken.
279. The following are the sort of flags that may indicate that something has gone wrong in a criminal trial and which Victoria Legal Aid should take an interest in:
- case resolved on or after date listed for trial.
 - jury discharged.
 - appeal against conviction allowed.
 - concern raised by trial judge.
 - concern raised by prosecutor.

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- brief returned within seven days of trial.
 - trial duration estimate under by 30% or more.

280. Recently, it has become increasingly common for Victoria Legal Aid to be informally advised of serious concerns about the conduct of a trial, for example, where the conduct of the defence is unnecessarily lengthening the trial without apparent purpose, or where a basic error results in a jury being discharged necessitating the trial being funded again. There was surprise in some preliminary consultations that there were no consequences for the responsible practitioners.

281. Similarly, a successful appeal against conviction may have something to say about the way in which the case was conducted or the skills and knowledge of those acting for the accused.

282. A systemic culture of reviewing cases which exhibit these features and learning from them appears to have value. Again, it would require some level of resourcing, although Victoria Legal Aid already has a complaints and investigations process that could be used for this purpose.

283. Victoria Legal Aid is already conducting file reviews of in-house cases.

Option 52: That Victoria Legal Aid routinely identify and review cases that have any or some of the following features:

- Case resolved on or after date listed for trial.
- Jury discharged.
- Appeal against conviction allowed.
- Concern raised by trial judge.
- Concern raised by prosecutor.
- Trial duration estimate under by 30% or more.

Option 53: That Victoria Legal Aid seek explanation from the practitioner/s involved in the relevant cases (as described in Option 52) and that there is a consequence (warning, non-payment, removal from list or panel) for an unsatisfactory explanation.

Appendix 1 – Summary of the *Legal Aid Act 1978 (Vic)*

PURPOSE

To outline the basic structure of Victoria Legal Aid's statutory scheme under the *Legal Aid Act 1978 (Vic)* (Legal Aid Act).

WHAT IS VICTORIA LEGAL AID?

Victoria Legal Aid is an independent statutory authority. Victoria Legal Aid is a body corporate with perpetual succession and a common seal and is capable of doing, and being liable for, all acts and things that a body corporate can do (section 3 of the Legal Aid Act).

Victoria Legal Aid can provide legal assistance to people whose interests are adverse to the interests of the State or of the Commonwealth (section 25). Under section 5, Victoria Legal Aid does not represent the Crown.

WHAT IS LEGAL AID?

Section 2 of the Legal Aid Act sets out a number of definitions of terms commonly used, such as 'legal aid' and 'legal assistance.' Often these terms are used interchangeably, but a reading of the Act highlights the difference between the two:

Legal aid means:

- education, advice or information in or about the law
- any legal services that may be provided by a law practice or an Australian lawyer, and
- any other matter within the above functions, powers and duties, including alternative dispute resolution programs, duty lawyer services, legal advice and legal assistance.

Legal assistance means legal services provided under the Act *other than* by way of duty lawyer services (appearing on behalf of a person or giving legal advice to a person at a court without prior arrangement with that person), or legal advice.

VICTORIA LEGAL AID'S OBJECTIVES, FUNCTIONS, AND DUTIES

Victoria Legal Aid has four **statutory objectives** set out in section 4 of the Legal Aid Act:

- To provide legal aid in the most effective, economic and efficient manner.
- To manage its resources to make legal aid available at a reasonable cost to the community and on an equitable basis throughout Victoria.
- To provide improved access to justice and legal remedies to the community.
- To pursue innovative means of providing legal aid directed at minimising the need for individual legal services in the community.

Victoria Legal Aid has two primary **functions** set out in section 6 of the Legal Aid Act:

- To provide legal aid in accordance with this Act.
- To control and administer the Legal Aid Fund.

Victoria Legal Aid has a number of **duties** set out in section 7 of the Legal Aid Act, including to:

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- ensure that legal aid is provided in the most effective, efficient and economic manner and in a manner which dispels fear and distrust
 - establish any local offices that it considers appropriate and generally use its best endeavours to make legal aid available throughout the State
 - determine or vary priorities in the provision of legal aid as between classes of persons and classes of matters or both
 - determine the matters or classes of matters in respect of which legal services may be performed on behalf of assisted persons by way of legal aid
 - liaise with professional associations in order to facilitate the use, in appropriate circumstances, of services provided by private legal practitioners
 - make maximum use of services which private legal practitioners offer to provide on a voluntary basis
 - endeavour to secure the services of interpreters, marriage counsellors, welfare officers and other appropriate persons to assist in connection with matters in respect of which legal aid is provided
 - inform the public of the services provided by Victoria Legal Aid and the conditions on which those services are provided; encourage and permit law students to participate, so far as Victoria Legal Aid considers it practicable and proper to do so, on a voluntary basis and under professional supervision in the provision of legal aid.

Importantly, section 7(1)(c) of the Legal Aid Act means that when determining the priorities for legal aid as between classes of persons and classes of matters Victoria Legal Aid must operate 'subject to and in accordance with' an arrangement between the Commonwealth and the State under section 49 of the Legal Aid Act. The National Partnership Agreement on Legal Assistance Services is an agreement under section 49 of the Legal Aid Act.

Victoria Legal Aid has a number of specific **powers** set out in section 6(2) of the Legal Aid Act, including:

- in co-operation with a government department or body concerned with social service or social welfare, arrange measures and take steps that may be conducive to meeting the need for legal aid in the community
- enter into arrangements from time to time with a body or person with respect to any investigation, study or research that, in the opinion of Victoria Legal Aid, is necessary or desirable for the purposes of this Act
- make recommendations to or through the Attorney-General with respect to any reforms of the law the desirability for which has come to it attention in the course of performing its functions
- initiate and carry out educational programs designed to promote an understanding by the public, and by sections of the public who have special needs in this respect, of their rights, powers, privileges and duties under the laws in force in the State
- undertake research into all aspects of legal aid including new methods of financing and providing legal aid.

VICTORIA LEGAL AID RATIONS A FIXED LEGAL AID FUND

Victoria Legal Aid operates under a capped fund. The Legal Aid Fund is established under section 41 of the Legal Aid Act. All moneys made available by the State and Commonwealth and other sources are paid into the Legal Aid Fund and from which all of the administrative costs and

expenses, including the provision of legal assistance are paid. The Legal Aid Fund is limited by the moneys provided by the State and Commonwealth, which unlike other government funded schemes, such as social security, is capped annually.

This means that Victoria Legal Aid must prioritise moneys from the Legal Aid Fund in a manner that best meets its objectives including providing legal aid in the most effective, economic and efficient manner.

The importance of rationing as a primary function of Victoria Legal Aid is made explicit in ss 4(c), 8(2)(e), 9 and 41 of the Legal Aid Act.

As the Court of Appeal recently put it in *Slaveski v Smith* [2012] VSCA 25, the Legal Aid Act empowers Victoria Legal Aid '... to determine as a matter of discretion its priorities for the application of a limited fund between competing demands for legal assistance.'

The Court of Appeal also noted that ' [t]here is nothing in terms that requires the State to provide any amount, still less to provide whatever amount may be necessary to meet all just claims for legal assistance.'

VICTORIA LEGAL AID ISSUES GUIDELINES TO DETERMINE ELIGIBILITY FOR HIGH INTENSITY LEGAL AID SERVICES

Where legal aid is to be delivered through the highest intensity legal representation services i.e. legal assistance it is regulated through a formal grant of legal assistance.

Section 24 of the Legal Aid Act sets out the circumstances in which legal assistance may be provided. It is drafted in discretionary terms and essentially requires consideration of both means (section 24(1)(a)) and reasonableness (section 24(1)(b)). It is not possible to determine whether a person is eligible for legal assistance by reading the Act. Instead, section 9 of the Legal Aid Act requires Victoria Legal Aid to promulgate guidelines to be applied in determining whether legal assistance will be provided under section 24.

Under section 8(1) of the Legal Aid Act, Victoria Legal Aid can deliver services under grants of legal assistance through its own officers or through private practitioners. The allocation of work between private practitioners and Victoria Legal Aid is guided by the factors listed in section 8(2) which include:

- the need for legal assistance services to be readily available and easily accessible to disadvantaged people
- the requirements (if any) of any legal aid arrangement
- the desirability of an assisted person being entitled to select a legal practitioner of his or her choice
- the need for appropriate use to be made of the services capable of being provided by officers of Victoria Legal Aid
- the importance of maintaining the independence of the private legal profession;
- the need for the Legal Aid Fund to be used effectively and efficiently.

THE BOARD AND DELEGATIONS

The Board of Directors is created by section 11 of the Legal Aid Act. Under section 12 the Board is responsible for the management of the affairs of Victoria Legal Aid and ensuring it is meeting its

statutory objectives. It is also required to determine the policies, priorities and strategies of Victoria Legal Aid. Under section 10 the Board can delegate most of its powers to officers of Victoria Legal Aid. Significantly, it cannot delegate the power to make guidelines under section 9.

OTHER RELEVANT LEGISLATION

A number of pieces of legislation restrict Victoria Legal Aid's discretion in certain circumstances and give courts the power to order Victoria Legal Aid to provide legal assistance to a person. They are:

- Sections 197 and 357 *Criminal Procedure Act 2009* (Vic)
- Section 143 *Confiscation Act 1997* (Vic)
- Sections 71 and 72 *Family Violence Protection Act 2008* (Vic)

Section 197 of the *Criminal Procedure Act 2009* (Vic) is the most significant. This section allows a court to order Victoria Legal Aid to fund the defence of an accused person in a criminal jury trial. The existence of section 197 reduces Victoria Legal Aid's ability to control demand in its highest cost activity. Recently, the Court of Appeal confirmed that a trial would be stayed (i.e. not proceeded with) where Victoria Legal Aid had funded a barrister for the trial but where payment for the solicitor's attendance was capped. This has the effect of also limiting Victoria Legal Aid's ability to control unit cost in relation to trials.

Section 143 of the *Confiscation Act 1997* (Vic) allows a court to order Victoria Legal Aid to fund the entire defence of an accused person if satisfied that a restraining order or civil forfeiture restraining order is in force and the accused person is indigent.

Appendix 2 – Tables of fees for criminal trials

Magistrates' Court stage of an indictable crime matter

Service/proceeding	Hours	Fee payable
<p>The lump sum general preparation fee covers the work involved in:</p> <ul style="list-style-type: none"> obtaining instructions advising about defence negotiating with the prosecution perusing the hand-up brief preparing the Form 32 (Case Directions Notice). 	8	\$1,151
<p>Additional preparation (contested committal/negotiations):</p> <ul style="list-style-type: none"> payable where a contested committal is aided includes preparing the Form 32 (Case Directions Notice). 	5	\$715
<p>Appearance committal mention/case conference/summary jurisdiction application/application for leave to cross-examine witnesses</p> <p>Victoria Legal Aid will pay for subsequent committal mention only if, either:</p> <ul style="list-style-type: none"> the lawyer has applied (if appropriate) for an Appeal Costs Certificate the lawyer satisfies Victoria Legal Aid that substantial negotiation took place. 	2.5	\$357
Special mention	1	\$143
Appearance on contested committal: day 1		
Where a plea is heard at committal no additional fee is payable		\$1009
Appearance on contested committal: day 2		
Where a plea is heard at committal no additional fee is payable		\$910
Jail conference		
Plea fee except where a plea on day of committal contest		\$148
Committal which resolves as a plea in the Magistrates' Court, and which is heard on a day other than the committal contest (this can be the same day as the committal mention)		\$425

Superior Court stage - General fees

Service/proceeding	County Court hours	Fee payable	Supreme Court hours	Fee payable
Counsel – post-committal negotiations	3	\$570	3	\$777
First directions hearing	2	\$380	2	\$518
Directions hearing/mention/call over	1.25	\$237	1.25	\$323
Defence response – first directions hearing	2	\$380	2	\$518
Application for discontinuance or proceedings	2.5	\$475	2.5	\$647
Application for s.143 order	n/a	\$375	n/a	\$500

Plea fees

Service/proceeding	County Court hours	Fee payable	Supreme Court hours	Fee payable
Preparation	3	\$447	8.5	\$2,014
Appearance fee – first day (includes conferences)	n/a	\$1,440	n/a	\$1,964
Appearance fee – subsequent day(s)	n/a	\$504	n/a	\$789
Sentence	n/a	\$284	n/a	\$389
Advice on appeal	1	\$259	1	\$259

Special hearing

Service/proceeding	County Court hours	Fee payable	Supreme Court hours	Fee payable
Preparation	1	\$149	1	\$237
Appearance fee – first day (includes conferences)	n/a	\$1,961	n/a	\$2,674
Appearance fee – subsequent day(s)	n/a	\$1,077	n/a	\$1,724

Sentence indication

Service/proceeding	County Court hours	Fee payable	Supreme Court hours	Fee payable
Appearance fee (includes conferences)	n/a	\$1060	n/a	\$1,444

Trial

Service/proceeding	County Court hours	Fee payable	Supreme Court hours	Fee payable
Preparation	10	\$1,490	15	\$3,555
Defence response – final directions hearing	2	\$380	2	\$518
Appearance fee – first day (includes conferences)	n/a	\$2,341	n/a	\$3,712
Appearance fee – first day where 20% uplift applicable (includes conferences)	n/a	\$2,809	n/a	\$4,454
Appearance fee – subsequent day(s)	n/a	\$1,077	n/a	\$1,724
Instructing – per half day	n/a	\$336	n/a	\$593
Plea hearing	n/a	\$870	n/a	\$1,185
Sentence	n/a	\$284	n/a	\$389
Advice on appeal	3	\$777	3	\$777

Appendix 3 – Examples of funding under the current eligibility guidelines

Case A: average County Court trial

Fred is charged with armed robbery. The duty lawyer appears for him at the filing hearing. The file is allocated to a private solicitor. The solicitor has a jail conference (**\$148**) with Fred, and reads the brief, speaks with the prosecution and prepares a Form 32 (**\$1,151**). The solicitor appears at the committal mention (**\$357**) and the matter is listed for a committal. The solicitor is paid an additional preparation fee for the committal (**\$715**). Counsel is briefed for the committal (**\$1,009**) which goes for half a day.

Fred's solicitor appears at the initial directions hearing (**\$380**). Solicitor and counsel draft a discontinuance application (**\$475**), which after some months is rejected by the Crown. Prior to trial, counsel prepares the defence response (**\$380**) for the final directions hearing and appears at the final directions hearing (**\$237**). The solicitor has continued to conference with the client and counsel and generally assist in preparing the matter for trial (**\$1,490**). As counsel also did the committal, she is eligible to a 20% uplift fee for the trial brief (**\$468**).

Fred's trial is listed in the Reserve List on the first day (**\$2,341**), and does not get on that day due to unavailability of a trial judge. On the subsequent day (**\$1,077**) in the Reserve List, the trial again does not get a start. On the next day (**\$1,077**) again a trial judge is unavailable and the trial is put off for five months.

Counsel is unfortunately unable to continue in the trial, and new counsel is briefed (**\$2,341**). When the trial is listed in four months time, due to the length of time since the trial was originally listed, the solicitor claims the full preparation fee again (**\$1,490**). Once the trial begins, a judge and a jury is empanelled on the afternoon of the first day. The solicitor instructs for three half days during the trial (**\$1,008**). The trial runs for five subsequent days (**\$5,385**) to verdict. Fred is acquitted of armed robbery.

Total cost of trial \$21,529

Case B: major trial

Adam and six co-accused are facing multiple drug charges, including trafficking in commercial quantity of heroin and conspiracy to import. Adam's solicitor prepares his matter (**\$1,151**), visits him in prison (**\$148**) and appears at the first committal mention (**\$357**). The police require an additional six weeks to transcribe and translate some of the telephone intercept and listening device evidence, so the matter is adjourned. The materials arrive two days prior to the committal mention (**\$357**) at which Adam and all co-accused apply for additional time to review the new evidence and allow for client conferences. At the third committal mention (**\$357**), all co-accused indicate that they are contesting the charges and a three-day committal is listed.

The brief is 12 volumes and an application by counsel for additional preparation is approved (**\$6,400**). The solicitor receives additional preparation for the contested committal hearing (**\$715**) and appears for three days in the committal (**\$2,829**). Adam and all co-accused are committed to stand trial. Counsel appears at an initial directions hearing the next day (**\$380**) and conducts post-committal negotiations (**\$570**) the following week.

Counsel is unavailable for the listed trial date which is 11 months away, and so new counsel is briefed. New counsel also received the fee for additional preparation (**\$6,400**).

In the lead up to the trial, the solicitor conferences with Adam and assists counsel to draft the final defence response (\$380). Counsel appears for Adam at the final directions hearing (\$237). At this hearing counsel for two co-accused indicate that resolution may be possible. The matter is set down for a further mention in two weeks time to monitor progress of negotiations. At the further mention (\$237), counsel for the co-accused indicate that it is unlikely that the matter will resolve, and orders are made in relation to pre-trial legal argument.

On the first day of trial (\$2,341), counsel for Adam's co-accused proceed with legal argument for a separate trial. Legal argument concludes at 3:30pm. The judge lists the trial for the next day to commence at 2pm to allow time to consider the arguments and prepare reasons. The following three days of trial (\$3,231) are occupied with a ruling refusing severance, argument about cross admissibility of telephone intercepts, discussion about record of interview edits, and numerous client conferences resulting in one co-accused pleading. On the fifth day (\$1,077) a jury was empanelled and the Crown commenced its opening. On the sixth day (\$1,077), the Crown continues to open its case. During lunchtime, another co-accused instructed that he wished to plead guilty. The judge discharged the jury and indicated that she will not sit the next day to allow the five remaining accused to consider their position. On the seventh day of trial (\$1,077), the five remaining accused choose to proceed and a new jury is empanelled. Adam's jury trial continues for a subsequent 21 days (\$22,617), including one day that was lost as the video of the record of interview was still being edited. The solicitor instructed for 17 half-days in total (\$5,712). The jury takes three subsequent days (\$3,231) to deliberate, and finds Adam guilty. Guilty verdicts are also returned against three co-accused, and one co-accused is acquitted.

Counsel conducts Adam's plea hearing (\$870) and attends the plea hearing for Adam's co-accused (\$870). The solicitor attends the sentence (\$284), and counsel prepares an advice on appeal (\$777).

Total \$63,682

The private practitioners for three co-accused who proceeded to verdict were also legally aided. Including Adam, Victoria Legal Aid would have paid approximately \$250,000 for this matter.

Case C: Supreme Court trial

Joseph is charged with the murder of his girlfriend. The solicitor does preliminary preparation (\$1,151), has a jail conference (\$148) with Joseph and appears at the committal mention (\$357) to list a committal hearing. The solicitor gets an additional fee to prepare for the committal (\$715). Counsel is briefed to the committal which goes for two days (\$1,919). Joseph is committed.

Counsel appears at the initial directions hearing (\$518). The prosecution opening details a circumstantial case, reliant on DNA, travel records, and relationship evidence. The matter is listed for trial in five months time, and for a directions hearing in two months time to deal with the issue of tendency evidence. The solicitor prepares (\$3,555) the matter by assisting counsel, reading materials and conferencing with the client.

Counsel appear for the first day of pre-trial argument about tendency evidence (\$3,712). As counsel also appeared in the committal, he is eligible for the 20% uplift fee (\$742). A few weeks later, counsel appears for the ruling on tendency evidence (\$323).

On the day the trial is listed to commence (\$1,724), there are outstanding issues with the record of interview that are argued and resolved. The trial is adjourned to the next day for jury empanelment. On the next day of trial, a jury is empanelled, and the Crown closes its case at the end of the seventh day (\$12,068). On the next day of trial, defence counsel notifies the Court he seeks to lead expert evidence. Although counsel has not given any prior notice of this intention, the judge allows

counsel to obtain expert evidence so as to not prejudice the accused. The trial is aborted and jury discharged (without the issue of an Appeal Costs Fund Certificate). The solicitor had instructed for every day of trial (**\$4,744**). The trial is listed again in 5 months time. Due to the length of time since the trial was originally listed, the solicitor claims the full preparation fee again (**\$3,555**). The accused is remanded in custody. The trial commences again after 5 months, and runs for 11 days (**\$18,964**) with the solicitor instructing everyday (**\$6,523**) to verdict. The accused is found not guilty.

Total \$60,718

Including \$18,536 for the aborted trial