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DELIVERING HIGH QUALITY CRIMINAL TRIALS – LIBERTY VICTORIA SUBMISSION

I. INTRODUCTION

Liberty Victoria (Liberty) is one of Australia's leading human rights and civil liberties organisations. It is concerned with the protection and promotion of civil liberties throughout Australia. As such, Liberty is actively involved in the development and revision of Australia's laws and systems of government. Further information on our activities may be found at www.libertyvictoria.org.au.

Liberty welcomes the opportunity to comment on the issues raised in the Victoria Legal Aid (VLA) consultation and options paper, 'Delivering High Quality Criminal Trials' (the Options Paper).

Liberty wishes to thank VLA for inviting it to participate in the consultation process, including the meeting on 7 November 2013 with Ms Helen Fatouros, Director of Criminal Law Services.

Liberty wishes to comment on the Options Paper for two key reasons:

1. Liberty is concerned about the adverse impact a mismanaged or under-resourced system of legal representation for offenders will likely have on the rights and liberties of members of the general public ; and

2. Liberty has a number of members who work in the area of criminal justice and who have particular concern for the maintenance and reinforcement of a strong adversarial criminal justice system.

II. OBSERVATIONS ON THE OPTIONS PAPER

At the outset, Liberty wishes to make a number of general observations.

A. *Problems facing criminal trials as identified by Victoria Legal Aid*

The Options Paper begins by identifying what it says are current problems facing criminal trials:

- delays in getting cases to trial;
- increasing trial duration;
- the resolution of cases (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.[1]

The Options Paper also states:

[1] Options Paper at paragraph 7, p. 7. The Options can be found on line at http://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-delivering_high_quality_criminal_trials_consultation_paper.pdf (4 February 2014).

> 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 run criminal trials appropriately or competently;
> - 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.[2]

This anecdotal reportage is not supplemented with any further detail regarding the lack of skill or experience of counsel (presumably defence counsel in particular). No examples are provided. No statistical evidence is cited. There are no references to reported cases. No observations or criticisms on the part of the appellate courts are specified.

One must call into question an initiative for reform that is not supported by empirical research, especially one with such wide-ranging potential effects. There is significant danger in creating change for change's sake rather than on the basis of strong evidence and with stated aims and objectives for reform. Without such structured aims and objectives, there is a high risk of unjustified and ill-conceived change, the consequence of which may be prejudice to people exposed to the criminal justice system.

Further, the anecdotal criticisms targeting the defence bar run the danger of presenting a distorted analysis and a disproportionate response. It should not be forgotten that significant problems in the current system are caused by inefficient judges, an overloaded reserve list, and the late briefing, inexperience and/or inefficient conduct of prosecutors.

[2] Options Paper at paragraph 9, p. 7.

Further, there is a problematic disconnection between the cited problem of the minority of "bad apples" at the Bar and a response that would, at significant expense (to be carried by the public and/ or the Bar) result in reforms being introduced that would affect the majority of barristers who run well-prepared and efficient criminal trials.

It is vital that VLA does not lose sight of what we submit should be its primary objective: to promote and protect the legal representation of accused persons using limited and precious public funds. While we acknowledge that VLA is in a difficult position in light its present economic circumstances, that is all the more reason why proposals for change should not lose sight of that foundational principle. While expanding training and accreditation to all members of the Bar may be inviting, if the real issue (albeit only identified anecdotally) is a minority of the Bar, then that minority has to be the focus of any reforms.

Liberty submits that reform should be incremental and not radical, lest the reforms, which are undoubtedly well intentioned, have counter-productive or unexpected outcomes.

B. *Delay in criminal trials*

In order to appreciate the problem of delay in criminal trials it is necessary to keep in mind the various procedural steps and other factors relevant to criminal trials.

As eloquently put in the commencement of the Australian Institute of Criminology's report 'Criminal Trial Delays in Australia' (the AIC Report):

> The criminal trial is a fundamental component of the Australian criminal justice system. Persons accused of committing criminal offences may elect to challenge those accusations in court before a panel of their peers. The trial affords protections to the accused, such that any case against them must be fair and proven beyond reasonable doubt. Similarly, the trial

affords protections for the community, to ensure that criminal offenders against whom there is sufficient evidence are convicted and sentenced.[3]

This report is referred to extensively by the Options Paper. It is interesting to note that the AIC Report maintains that in Australia the criminal trial is used sparingly:

- the vast majority (approximately 85%) of initiations are resolved through a finding of guilt (plea or verdict); and
- the bulk of Magistrates' Court initiations (75%) are finalised within 13 weeks, while the same proportion of higher court (District and Supreme) trials are finalised within one year.[4]

The AIC Report notes delay is a feature of criminal trials. Its analysis of the data suggests that of every 10 trials listed in the Australian criminal jurisdiction, on average:

- 3 will proceed as scheduled;
- 4 will be finalised without trial, either by way of guilty plea or prosecution withdrawal; and
- 3 will be adjourned and re-listed for another hearing.[5]

This is not on account of delay alone. Finalisation accounts for more than 50 percent of matters that do not proceed, with the figure varying across the courts and jurisdictions from 43 to 81 per cent.[6]

Trials are adjourned for a numbers of reasons. The AIC Report divides these reasons into three categories:

Category 1 – Problems with the court:

[3] Payne, Jason, *Criminal Trial Delays in Australia: Trial Listing Outcomes,* Australian Institute of Criminology Research and Public Policy Series No 74 (AIC Report), Australian Institute of Criminology Australian Government, Canberra, 2007, p. viii. http://www.aic.gov.au/documents/C/6/7/%7BC6708A1E-A29D-45D9-B8D7-0003A3EE379E%7Drpp74.pdf (4 February 2014).
[4] Ibid.
[5] Ibid., p. ix.
[6] Ibid.

- *Over-listing* – where the court lists more trials than it has the capacity to hear in any one week. Over-listing is a practice used in some courts (usually high volume courts) where the court attempts to account for the significant number of matters that do not proceed with a trial list that will generate sufficient utilisation of court resources. Sometimes, as a result, some matters are not reached as scheduled;
- *Limited court facilities* – the court is unable to provide the necessary resources to facilitate the trial as scheduled. This may include limited access to closed circuit television services or court support staff; and
- *Unexpected reductions in court capacity* – for one reason or another the court is unable to provide the capacity it had anticipated. This might be because judicial officers or court personnel are absent. Unexpected last minute changes to capacity may result in matters being adjourned.

Category 2 - Adjournments that include those matters adjourned on request by the defence, prosecution or both. The qualitative consultations identified three primary reasons for this:

- *Matters cannot proceed because one or more of the parties (witnesses, defendants, legal counsel) are unavailable on the day of trial* – this might result from the unexpected non-appearance of the defendant (failure to appear) or because problems of availability were not identified until late in the trial preparation process; and
- *Matters cannot proceed because additional information is required* – this may include the need for additional evidence, clarification of legal funding on behalf of the defendant or simply that one or both parties had not adequately prepared themselves and their case prior to the day of trial.

Category 3 – Additional hearings:

- *Matters that cannot proceed because further judicial processes are required prior to the trial* – this primarily includes additional judicial hearings, such as a *Basha inquiry* or a *voir dire,* both used to test the tenability of the evidence or witnesses in the absence of a jury. Often the need for such inquiries results from

> last minute negotiation and the late identification of issues by the defence or prosecuting counsel.[7] Very often this will include the prosecution determining to rely upon additional evidence shortly before trial.

A focus on the role of defence counsel, decontextualised from the overall mechanics of the criminal justice system, runs the risk of singling out defence counsel and blaming them disproportionately for the short comings of the system as a whole.

C *Disproportionate attribution of blame*

The Option Paper runs this risk of affording disproportionate blame to counsel appearing in criminal trials for the accused. It refers to the Victorian Law Reform Commission's 2009 report "Jury Directions Final Report" (VLRC Report)[8] and asserts, quoting the report, 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."[9] The passage of the VLRC report is somewhat different. It refers to responses given by some judges to criticism raised about the conduct of jury charges:

> During consultations, some trial judges told us that they received inadequate assistance from counsel. They complained that trials frequently commenced with counsel who had little familiarity with the facts in issue or appreciation of the issues concerning admissibility of evidence.[10]

The Option Paper invokes the 2007 AIC Report stating it 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.[11] The AIC Report in fact found, in terms of trial

[7] Ibid., pp. x-xi.
[8] Victorian Law Reform Commission, *Jury Directions, Final Report*, Victorian Law Reform Commission, Melbourne, 2009 (VLRC report). http://www.lawreform.vic.gov.au/sites/default/files/VLRC_JuryDirections_FinalReport.pdf (4 February 2014).
[9] Options Paper at paragraph 105, p. 33.
[10] VLRC report at paragraph 2.46, p. 32.
[11] Options Paper at paragraph 105, p. 33.

length, that the evidence is mixed.[12] It did refer to comments made by Chief Judge Rozenes in 2001 when he noted several reasons criminal trials are increasing in length. According to the Chief Judge, the quality of defence representation was but one reason among many for delay:

- criminal matters appearing before the court are increasing in complexity – fraud and drug crimes were cited as cases of greater sophistication requiring more detailed and sophisticated evidence;
- criminal investigation is becoming more complex for the average case and greater standards of evidence are being required by juries;
- there has been a 'proliferation of procedural and evidentiary rules' that consumes substantial court time; and
- the quality of legal representation for both the Crown and defence has declined, as have the number of judges experienced in trial procedures.[13]

There is no explanation offered for observations about the decline in the perceived quality of legal representation on the part of both the Crown and the defence, although a decline in prestige and remuneration may have played a part. Further, there is the obvious danger of anecdotal accounts by some judges as to declining standards – as the law has been more complex and the process of a criminal trial more demanding, there is obviously a problem with then concluding that defence counsel are not as able as they once were. Equally there are other anecdotal accounts from judges that standards have improved. Further, judges themselves will often be selected from the most capable members of the Bar, and once on the bench they have the capacity to perceive the role and performance of advocates in a manner that they never could at the Bar. Accordingly, any dogmatic assertion of declining standards should be carefully scrutinised.

D. *The absence of accused persons in the consultation process*

[12] AIC report p.12.
[13] Ibid.

Victoria Legal Aid is to be commended for its recognition of the importance of criminal trials both for accused persons and for the community's confidence in the justice system. It notes, for example, that "[i]t is vital in a community that believes in fairness and the rule of law that all people have access to a just process where … significant sanctions are at stake.[14] Further Liberty commends Victoria Legal Aid in its assertion that its project for reform "…is not focused on the reform required in other parts of the criminal justice system but recognises that any changes we make sit within a broader context."[15] Nevertheless Liberty notes that it remains difficult for Victoria Legal Aid to ensure its practices are informed by these complexities.

Victoria Legal Aid represents one component of the criminal justice system. It is susceptible to exaggerating the impact that matters it has control over have upon the system as a whole. Whilst Liberty acknowledges that Victoria Legal Aid has consulted widely, including with professional organisations, the courts, and prosecutorial agencies, this process has been different to a government inquiry where professional rivalries can be resolved through a process of legal reform as established by a government mandate. The process has perhaps failed to fully recognise that not all criticism is constructive. A prosecutorial agency, for example, is unlikely to have the best interests of an accused person foremost in their mind when making observations regarding the conduct of defence counsel in criminal trials. Further, the submissions of the agencies consulted stand alone without the input of elected representatives who represent the community as a whole.

As stated at the beginning to the Options Paper, Victoria Legal Aid's:

> … 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.[16]

[14] Options Paper at paragraph 15, p. 17.
[15] Ibid., at paragraph 21, p. 18.
[16] Ibid., p. 4.

These are people who are not generally represented by professional organisations. In effect the opinions and preferences of accused people have not been heard. This is of significant concern to Liberty given that any changes to come out of this consultation process will impact directly upon accused people.

E. *Concluding remarks*

Liberty would like to make the following three concluding remarks.

First, it is important to remember that a criminal trial is set up to test an accusation made against an accused person by the state. It is for the state to discharge the burden of proof. A plea of guilty can represent a speedy resolution of a criminal matter but ultimately there are cases that cannot and should not be resolved in such a way. Those cases represent a conflict between the state and an individual that must be resolved through an adversarial contest, a conflict where one party prevails over the other as determined by the community represented by the jury and decided upon by the evidence. In these rare cases there is no middle ground, and there can be no point of resolution. Of course it will always be more efficient for matters to resolve, and when managing limited public funds it is always temping to add further incentives to encourage accused persons to plead guilty. However, there is a tipping point where the pressure placed upon accused persons and their legal representatives creates a significant risk that accused persons with defences at law are not being adequately resourced and protected.

Second, in a criminal trial the state has its role to play, as do the courts and funding bodies such as Victoria Legal Aid. However, it must not be forgotten that the accused person too has a role. The voice of the accused in a criminal trial is given by the legal representative appointed by the accused. Structural changes that place pressure upon the forensic decisions of defence counsel and impact upon the relationship between legal representative and client strike at the rights afforded an accused in a criminal trial. It must also be recognised that counsel is required to follow the instructions of the accused person subject, of course, to standards of professional conduct and forensic judgment. Where an accused person is of the opinion that counsel engaged is not acting in accordance with his or her instructions, he or she can dismiss the legal representative and

engage new representation. Where the conduct of trials is run exclusively in-house or the pool of counsel available to an accused to choose from is narrowed, the accused person's right to select a legal representative of her or his choice is also inhibited. There is a danger here of introducing a form of paternalism which is potentially at variance with the rights of accused persons.

Third, in a review of criminal trials it is important to recognise that by focusing on the role of defence counsel alone, there is a real danger of a disproportionate allocation of blame for the perceived short-comings of the system as a whole. Drawing on the observations of traditional rivals is unlikely to ameliorate this. This is of particular concern to Liberty given defence counsel's role in representing accused persons and challenging the accusations levelled by the state. It also raises questions as to the utility of reforming the fee structure in tackling the problem systemic to the criminal justice system as a whole.

Responses to the 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.*

Liberty is broadly in favour of option 1. Liberty is of the view that greater scrutiny and accountability can improve the quality of representation provided that the mechanisms put in place to achieve this are not unduly arduous.

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).*

A properly run committal is an asset to the criminal justice system. It provides a basis to test the strength of the Crown case and to narrow the issues in dispute at trial. As has been often observed, to abolish committals is to save the time of magistrates at the expense of judges.

Committals often lead to resolution, either by the accused recognising the strength of the Crown case and/or the Crown recognising its weaknesses. That is obviously in the interests of justice, including the interests of victims, and saves trials resolving "at the door of the Court" at far greater public expense.

As stated Liberty is not averse to mechanisms that provide for greater scrutiny and accountability, provided such mechanisms are not unduly arduous. Nevertheless Liberty opposes measures that impact adversely upon the independent forensic decision making by an accused person's legal representative. The decision making of an accused person's legal representative should strive to achieve the best possible outcome for her or his client, consistent with instructions given, without this being inhibited by unrelated institutional priorities.

Liberty, in principle, supports measures that encourage continuity of Counsel between committal and trial, while recognising the reality that this is not always possible.

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.*

Counsel should be appropriately paid for work done. Further, properly conducted sentencing indication hearings have a role in providing accused persons with information that may assist in resolution. It may also assist in providing legal practitioners with certainty that the matter is properly one to be funded by Victoria Legal Aid given the recent reforms to the merits test. Such matters require proper preparation, can be of great benefit to accused persons and the justice system more broadly, and the case has not been made as to why it should not be funded.

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.*

Liberty's position for option 6 is the same as its position for 1, 2 and 3.

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.*

Liberty has no position as to option 7.

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.*

Liberty's position for option 8 is the same as its position for 1, 2, 3 and 6.

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.*

Liberty's position for option 9 is the same as its position for 1, 2, 3, 6 and 8.

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.*

Liberty is in favour of on going communication and accountability between Victoria Legal Aid and the assigned lawyer or counsel. However, a live issue remains as to the consequences of an accused person refusing to make a "reasonable" concession. Reasonable minds can differ about such things, and it is vital that accountability mechanisms do not result in harming the relationship between trial Counsel and the accused. If accused persons terminate the retainer of their legal representatives (in

particular mid-trial), that obviously comes at a huge cost to the legal system, including the public purse.

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).*

Liberty has no opinion as to option 11, other than to emphasise that continuity of Counsel is desirable in criminal proceedings.

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).*

Liberty's position for option 12 is the same as its position for 1, 2, 3, 6, 8 and 9.

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.*

With respect to options 13 and 14 Liberty is in favour of measures that encourage continuity of legal representation wherever possible.

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

Liberty has no opinion as to option 15.

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.*

Liberty has no opinion as to option 16.

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.*

Liberty has no opinion as to option 17, other than to observe that it is obviously in the interests of the criminal justice system that matters be prepared at an early stage.

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**?***

Liberty has no opinion as to option 18, other than to observe than in complex cases it has been regularly the case that a great deal of preparatory work has been unfunded. Counsel should be paid for the work they do properly preparing a matter.

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.*

Liberty has no opinion as to option 19, other than to note that if funding is granted for preparation it is appropriate that legal representatives for an accused be accountable for their time.

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

Liberty opposes this option. Whilst counsel is engaged they should be paid. Counsel is engaged to represent an accused person in a criminal trial and is required to remain available regardless of whether or not the matter is reached or waits in the reserve list. Counsel is unavailable to take on any other work or earn an income by any other means. Counsel has to be ready the minute a judge becomes available. It is worth noting that appearances in the reserve list are regularly covered by the Appeals Cost Fund. Counsel should not be penalized because the court lacks capacity to accommodate the trial.

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.*

Liberty does not support a funding model for fixed or sliding fees for counsel. The work required of counsel in order to ensure the fair trial of the accused is different from case to case, and a fixed fee funding model is unlikely to properly reflect this. The prospect of defence counsel acting on financial incentives to reduce trial length, over and above their existing ethical and professional obligations, does create the real possibility the right to a fair trial would be compromised. Further, it would exacerbate the inequality of arms between prosecution and defence where prosecution counsel's fees are not similarly restricted.

The approach taken by defence counsel to preparing and running a trial is only one of the factors which determine the length of a trial. There are many factors outside of defence counsel's control, including the volume and complexity of evidence, complexity of the law, the way in which the prosecution case is run.

In option 21 and 22 there is no suggestion of how defence counsel can influence trial length without adversely impacting on their client's interests other than through adequate preparation and identifying the real issues in dispute.

Assuming that the right to a fair trial entails legal representation that is adequate to avoid improper conviction, a reduction in trial length should only be a by-product of adequate preparation and proper narrowing of issues by counsel. Liberty Victoria supports a funding model which incentivises adequate preparation by counsel. However, a reduction in trial length ought not to be a goal in and of itself, and a funding model which directly or indirectly makes it so is not supported by Liberty Victoria.

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 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.*

Liberty does not object to a funding model for instructing solicitors on an 'as necessary' basis or in the form of a 'trial support fee' provided it satisfies the requirements for a fair trial as set out in R v Chaouk [2013] VSC 48 and MK v Victoria Legal Aid [2013] VSC 49.

The consultation paper somewhat misstates or misinterprets the decision in Chaouk. The requirement set out in Chaouk at [46] and [47] is that the accused should not be deprived of the valuable resource of an instructing solicitor in circumstances where it carries a risk of improper conviction, which would render the trial likely to be unfair. This would occur where the absence of an instructing solicitor increases counsel's workload to an extent that it increases the likelihood of errors being made or important matters overlooked by counsel – a risk that will not confront the prosecution which is always armed with an instructing solicitor.

In Chaouk at paragraphs [29] to [34], Justice Lasry sets out the tasks expected of a solicitor before and during a trial. The benefits identified in Chaouk of having an instructing solicitor are not limited to the circumstances identified in paragraph [201] of the consultation paper, and importantly include the benefit of the solicitor attending to administrative tasks.

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

Given that what is necessary to ensure a fair trial may vary from cases to case, Liberty does not object to a reasonable hourly fee to permit greater flexibility than the 'two-half day' cap. This needs to be sufficiently flexible to meet the varying complexity of different trials.

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.*

Liberty has no opinion as to options 26 to 27, except to say that barristers are required to comply with the Direct Access Rules and that instructing solicitors may be required to ensure a fair trial in accordance with Chaouk.

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.*

Liberty has no opinion as to options 28 to 29.

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*
- *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.*

Liberty has no objection in principle to this option, unless it is envisaged that it is only in such cases that instructing solicitors will be funded to attend during the trial, or that is it only in such cases that two Counsel can be briefed.

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.*

In principle, Liberty does not oppose Victoria Legal Aid managing or overseeing a long trial where a large amount of money will be spent. However, Liberty queries whether "intensive management" is justified from a cost/efficiency perspective. If Victoria Legal Aid has to devote resources to manage and monitor this could become bureaucratic and costly. Those who conduct such oversight would obviously have to have significant

practical experience in running major trials. The cost of such oversight, and opportunity cost of such oversight, is likely to be very high.

Liberty does not oppose the introduction of reporting on the progress of major trials, provided it does not become unduly onerous or compromise the independence of criminal defence practitioners. Caution should be exercised against external reviewing mechanisms, which are unlikely to operate with as great an appreciation of the case as the legal representative briefed, and therefore may be susceptible to second guessing counsel.

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

Liberty does not object in principle to this option but it does have a number of concerns. What constitutes a "problematic defence conduct" is subjective. One judge's view of a "problematic defence conduct" could be the result of a personal interaction with a legal practitioner. On the other hand, it is maintained that there are minority of practitioners whose conduct remains problematic. Having some form of complaints process may be an appropriate way to give feedback. It is recommended that complaints be handled by an independent body potentially comprising members of Victoria Legal Aid and the profession with provision to require and provide specified training.

Different funding model

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.*

Liberty opposes this option. It is not in the interests of the client for funding to be constrained in this way. It is not healthy for the criminal justice system for there to be a financial disincentive for a trial to continue. It has significant potential to undermine an accused's prospect of receiving a fair trial by potentially placing financial considerations

before a client's instructions.

Liberty rejects the premise underlying this option, that Counsel, as officers of the Court acting in the best interests of their clients, will response to financial incentives created by "fixed fee" trials in order to conduct trials more efficiently. If there are Counsel who respond to such incentives, then the focus needs to be on addressing their understanding of their duties as opposed to introducing a system of "fixed fees" that will effect the whole profession.

Who does the work and Allocation of indictable crime 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 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 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.*

Liberty Victoria does not support any proposal for all major trials or indictable or sexual offence cases to be allocated to VLA's staff practice and public defenders, as it would be an undue limitation on the accused's right to legal representation of their choice. In many cases this would also deny an accused person access to the most appropriate and skilled solicitor or counsel otherwise willing and available to take on their case, including members of the independent bar.

It should be noted that the accused's right to choose is already limited to the pool of solicitors and barristers willing to accept VLA rates, and in-house VLA practitioners will not always be the most skilled or appropriate practitioners to work on a particular case. Further, in some cases, the independence of a barrister may be highly beneficial.

Provided that the solicitor and counsel chosen by the accused are appropriately skilled and willing to accept VLA rates, any further limitation on the accused's choice is undesirable, particularly if it raises the prospect of the accused being denied the most skilled and appropriate legal representative for their case.

Individuals facing trial for serious criminal offences are at their most vulnerable vis-à-vis the state, and further restrictions on their choice of legal representative would unjustifiably exacerbate the real and perceived power imbalance between the state the accused.

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

Liberty does not oppose the creation of a major trial panel as a subset of the s29A panel.

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

Liberty does not oppose the proposal for VLA to conduct mandatory file reviews at the end of all major trials.

Quality of legally aided indictable crime work

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

Liberty Victoria does not oppose mandating the use of checklists in indictable matters by all practitioners provided that the checklists genuinely enhance preparation, are not unduly onerous and do not impinge upon independent forensic decision making.

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.*

Liberty is not opposed to the establishment of a panel or recognised list of barrister to undertake trials funded by Victoria Legal Aid. That such a panel or list requires core competencies for advocates makes good sense. Peer review mechanism could enhance the skill base of such a group although Liberty remains guarded about the composition of such a peer review. Independence and objectivity is encouraged. It must also be recognised, for example, that bodies such as the Crown have priorities traditionally at variance with a successful defence.

Any training must be made available to all members of the bar – it cannot be the case, and would be most unfair, if only a small proportion of the bar were able to undertake the training required which became a pre-requisite to undertaking legally aided work. The question of who should pay for such training is obviously a live issue.

Liberty would recommend the exercise of caution with regard to a strict accreditation model, in that it would likely lock junior members of counsel out of opportunities for experience and learning, therefore limiting the usual 'succession' of members the bar.

Further, any decisions to remove barristers from a list or panel should be subject to independent review.

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.*

Liberty does not have an opinion as to the internal workings of the public defenders employed by Victoria Legal Aid. It does raise concerns, however, about moves towards a monopoly of representation.

Defence advocates are charged with the responsibility of defending an accused person. An accused person instructs her or his legal representative. If the accused person does not feel her or his instructions are being properly adhered to she or he has the ability to sack her or his legal representative and engage fresh representation. Restricting the pool from which an accused person can select representation which she or he has confidence in circumscribes the agency of an accused person within the already restrictive criminal trial process. It introduces a paternalism potentially at variance with the rights of accused person.

Further, there is obviously the issue of potential conflicts if more matters are kept in-house, and consideration would have to be given as to how such conflicts are managed.

Liberty would query the justification for the expense involved in establishing a statutory body like the New South Wales Public Defenders Office.

Further, the economic case needs to be properly made to increase the number of public defenders employed at Victoria Legal Aid and/or to engage in any system of preferential briefing. There are limited public funds. It needs to be established, through a proper, independent and objective audit, that it is more efficient for Victoria Legal Aid to retain matters in-house than to brief the private bar. With respect, it is not sufficient for Victoria Legal Aid to merely assert this is so without a thorough analysis of the costings.

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.*

Liberty has no opinion as to option 49.

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

Liberty has no opinion as to option 50 other than to observe that Victoria Legal Aid's compliance and enforcement processes are already robust.

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

Liberty opposes the refusal to pay for work done unless such work has been conducted in contravention of clearly understood requirements in existence prior to the commission of such work.

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.*

As with peer review, Liberty would stress here the need for independence of case review. There is a danger of bias, real or perceived. Those who review such cases need themselves to have sufficient practical experience in the conduct of trials.

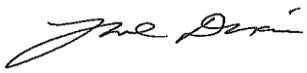
Option 53: *That Victoria Legal Aid seek explanation from the practitioner/s involved in the relevant cases, (as described in Option 52) and that there is a consequence (warning, non-payment, removal from list or panel) for an unsatisfactory explanation.*

As previously stated Liberty favours accountability. However, Liberty is concerned that a punitive regime, if unnecessarily harsh (given the introductions of other measures mooted in the Options Paper), could undermine strong independent advocacy in favour of a cautious orthodoxy that may not be in the interest of accused persons.

Liberty Victoria wishes to thank Daniel McGlone and Angie Wong for their assistance in preparing this submission.

Please contact the President of Liberty Victoria, Jane Dixon SC or the Vice-President of Liberty Victoria, Michael Stanton, or Stewart Bayles if we can provide any further information or assistance.

Yours sincerely



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