



Victorian Bar

Review of Fees Paid by Victoria Legal Aid to Barristers in Criminal Cases

April 2008

PricewaterhouseCoopers

Executive summary

Principles of the criminal justice system

A fair and just society relies on a well functioning and effective criminal justice system. The principles of the rule of law require that all have access to a quality justice system, regardless of their means. Victorian Government policy is focused on protecting the rights of all Victorians, working towards a fairer Victoria by addressing disadvantage and breaking the cycle of re-offending.

Victoria Legal Aid fees paid to criminal barristers

Representation in court is expensive and many Victorians who are charged with criminal offences are unable to afford legal representation. Victoria Legal Aid (VLA) assists those who cannot afford representation in court by funding criminal barristers on their behalf. These barristers are paid for the procedures they perform in court and some preparation time. As illustrated in the table below over the past 15 years, VLA fee increases have failed to keep pace with both:

- The primary measure of inflation, the Consumer Price Index (CPI); and
- The more specific cost index established by tracking the increases in expenses that barristers face in running their practices.

Court jurisdiction	Period	Change in VLA fees	Change in CPI	Change in barristers' costs
Magistrates	1993-2007	16%	44%	56%
County	1993-2007	22%	44%	56%
Supreme	1993-2007	31%	44%	56%

VLA funded barristers' fees have declined in real terms over the past 15 years in all court jurisdictions

These measures indicate that the income received by barristers doing cases for VLA has declined in real terms over these periods. As the majority of criminal cases are funded by VLA, VLA is the main source of work for criminal barristers. This has led to a real decrease in the remuneration of VLA funded barristers over this time.

While some barristers can cross subsidise their income with private or civil work, the majority of criminal barristers have seen their work devalued over this period.

Practitioners who are currently subsidising the criminal justice system may withdraw this support once they feel that their contribution outweighs any potential benefit that they may be receiving

However this cross subsidisation means that these individuals are bearing the cost of providing a public good. This is unsustainable. Barristers, as rational economic actors cannot be expected to continue this practice and will eventually preference away from the lower paid work.

The economic consequences of this are difficult to quantify, however it can be expected that this devaluation will ultimately lead to inefficient outcomes. These outcomes have the potential to include:

- Inadequate legal outcomes, including
 - Incorrect incarceration;
 - A loss of faith in the justice system; and
 - Increases in appeals, aborted trials and retrials.
- A decline in the number of criminal barristers

Barristers who undertake 90% or more criminal work have been declining in number over the last three years

Executive summary (continued)

Comparison of legal professional's income

When the effective annual income of a barrister solely doing VLA work is calculated and compared to the remuneration of other legal professionals of like experience, there is a significant disparity. At all levels of experience VLA funded barristers are being compensated well below the market value, for completing work of similar economic value. Examples of some legal professional's average annual income compared to those of VLA funded barristers are set out below.

Career level	VLA criminal barrister	Public prosecutor	Solicitors at law firm	In house counsel
Junior	\$36,383	\$87,200	\$85,000	\$97,500
Mid- career	\$91,478	\$196,200	\$177,500	\$197,500
Senior	\$110,241	\$287,021	\$210,000	\$ 325,000

In addition there is lack of incentives for new barristers to choose to practise in criminal law. While those already in the profession have generally specialised, new entrants have significantly more options available to them. Currently there are significant economic disincentives to remaining a criminal barrister. In addition without adequate incentives to compete with more highly remunerated alternatives (as set out above), the number of new entrants will decrease. This has already been observed as the number of junior barristers that practise 90% or more criminal work has declined by 59% over the last three years.

VLA funded barristers' real take home pay is the lowest compared to similar professions, at the most 60% of the mean salary, at each experience level. VLA funded barristers' real take home pay has fallen by 20%-32% over the past 10-15 years while other professions have increased 15% during this period

Social costs of current performance constraints

To make their practice economically viable VLA funded barristers are under both time and income pressure. If this situation continues there is a potential increase in the incentive for barristers to take on multiple briefs in a day or to have insufficient time to prepare for cases. As a result the quality of the representation they provide will ultimately suffer. The impact of overstretched, inexperienced or under prepared barristers inflicts a significant social cost by decreasing the efficiency and effectiveness of the court system. Many criminal cases require a high level of specialisation, experience and commitment and thus a public defence system needs to be able to attract and retain the appropriately skilled barristers to perform this work. Without this the result is an inefficient allocation of resources and sub-optimal justice outcomes that do not align with the principles of a fair and high quality justice system.

Deficiencies or unevenness in access to justice result in less than socially optimal outcomes and serves to perpetuate social disparity

Conclusion and recommendations

The case for an increase in VLA fees for barristers providing legal representation is relatively clear cut. The real reduction in income which has occurred over the past 15 years has meant that criminal barristers' incomes have reduced by over 25% in real cost terms. This has occurred in an environment where the wages of competing employment have been increasing considerably. Providing the economic and social benefits associated with an appropriately funded criminal justice system is one of the fundamental roles of the state government. The longer term sustainability of the industry is too important to the Victorian economy and social welfare to risk continued under funding. Continued underfunding has the potential to limit the criminal justice system's ability to attract and retain suitable skilled and experienced practitioners which will lead to an increase in the direct costs associated with aborted trials, appeals and retrials and poorer justice outcomes for victims and defendants.

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Section 1

Background

Legal aid and equality before the law

The criminal justice system

According to the Victorian Government's *Justice Statement* the justice system reveres the rule of law and recognises that equality, fairness, accessibility and effectiveness are essential to the operation of any truly democratic society.

The foundation of Victoria's justice system is the rule of law. This can be defined as the governance of society by laws, to which all citizens, bodies corporate and governments are subject, made with the general concurrence of society and enforced impartially. Implicit in the rule of law and the delivery of the above rights is the principle of equality before the law, including equality of legal representation. These rights are conferred on all people accused of breaking criminal laws enacted by the state of Victoria, and translate to access to legal representation of equal quality for all.

The Victorian Charter of Human Rights and Responsibilities Act 2006 sets out the human rights that Parliament specifically seeks to protect and promote. The Charter identifies equality before the law as one of those rights. The Charter specifically provides the following rights in criminal proceedings:

- *A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees:*
 - *to have adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her and...*
 - *to have legal aid provided if the interests of justice require it, without any costs payable by him or her if he or she meets the eligibility criteria set out in the Legal Aid Act 1978.*

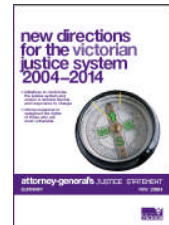
The Victorian Government's overarching policy positions reflect the same commitment to access to justice, equality before the law, and access to legal aid as a means of maintaining and enhancing the rights of Victorian citizens. The key policy statements are:

- Growing Victoria Together which sets out the Victorian Government's vision for Victoria to 2010 and beyond.
- A Fairer Victoria 2007 in which the Victorian Government recognises and commits to focus on access to justice as critical to address disadvantage and increase opportunity.
- New Directions for the Victorian Justice System 2004 – 2014 – The Attorney-General's Justice Statement 2004 which sets out the Victorian Government's vision for the justice portfolio.

The role of Victoria Legal Aid

The large majority of people charged with criminal offences are not able to afford legal representation. To provide adequate protection of the rights of this group the Victorian Government has established Victoria Legal Aid (VLA). VLA is an independent statutory body, jointly funded by the State and Commonwealth Governments, and indeed by the legal profession itself. VLA provides legal aid services to the Victorian community. The focus of VLA is to help and protect the rights of socially and economically disadvantaged Victorians.

VLA provides the funding for barristers on behalf of defendants who cannot afford legal counsel, sourcing them from the Victorian Bar. The support that VLA provides defendants plays an important role in ensuring just and quality legal outcomes and an efficient allocation of court resources.



Legal Aid and equality before the law (continued)

Legal Aid protects the socially and economically disadvantaged

VLA has the responsibility of ensuring that defendants in criminal cases who are unable to afford proper representation are represented by barristers with the skills, experience and deep knowledge of the criminal law needed to mount the best possible defence. People from vulnerable and disadvantaged groups are over-represented in the criminal justice system. Ninety-two per cent of those granted legal aid are unemployed and 69% are receiving government benefits. The large majority of people charged with serious criminal offences are legally aided. VLA's criteria for grants of legal assistance are:

- the applicant's financial means (assessed according to a National Means Test);
- Whether a conviction is likely to result in imprisonment (actual or suspended) or an order requiring more than 200 hours of unpaid community work.

VLA provided legal aid in 24,726 cases in 2006/2007. In 15,232 of those cases, VLA referred the client to private lawyers, both barristers and solicitors. The VLA Annual Report stated that:

"The private profession is our essential partner in the provision of legal aid services and their members are entitled to reasonable remuneration."

Defence barristers play a crucial role in delivering equality before the law

Barristers appear in a very large number of the Magistrates Court criminal cases and in virtually all of the legally aided County Court and Supreme Court criminal cases.

Delivering equality before the law to people charged with crime presents significant policy challenges. The major prosecuting agencies - the Police and the Office of Public Prosecutions - are funded by the State Government. At a minimum, equality before the law demands that barristers representing criminal defendants receive remuneration comparable with prosecutors.

Further, criminal barristers, both prosecution and defence, need to be remunerated on a basis which will enable the criminal justice system to recruit and retain lawyers with ability and experience. The inability to attract and retain appropriately skilled criminal barristers will impose heavy costs through wrong convictions, wrong acquittals, aborted trials, appeals, retrials and wrong sentences.

This Report documents significant threats to equality before the law. In particular:

Fees paid by VLA to barristers in criminal cases fall significantly below increases in the CPI.

Fees paid by VLA to barristers in criminal cases fall significantly below remuneration paid by prosecuting agencies to police prosecutors and Crown Prosecutors.

Fees paid by VLA to barristers in criminal cases fall significantly below remuneration paid to government and private lawyers in other areas of law.

A shrinking pool of able and experienced criminal defence barristers.

Section 2

Movements in cost indices against VLA fees

VLA criminal barristers' fees

VLA funded barristers' fees have declined in real terms over the past 15 years in all court jurisdictions

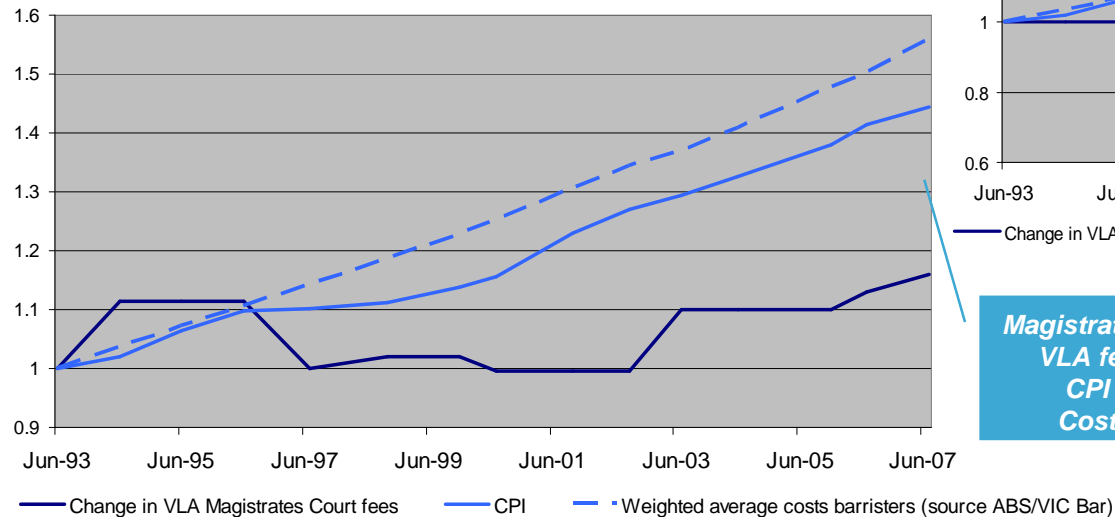
Current fees

Currently VLA criminal barristers are paid fees for the various services they perform in court, conferences and some preparation time (albeit via the various solicitors engaging them). The fees vary for each court jurisdiction and reflect the time allocated for a procedure by VLA and its significance in the legal process.

Change of fees over time compared to inflation

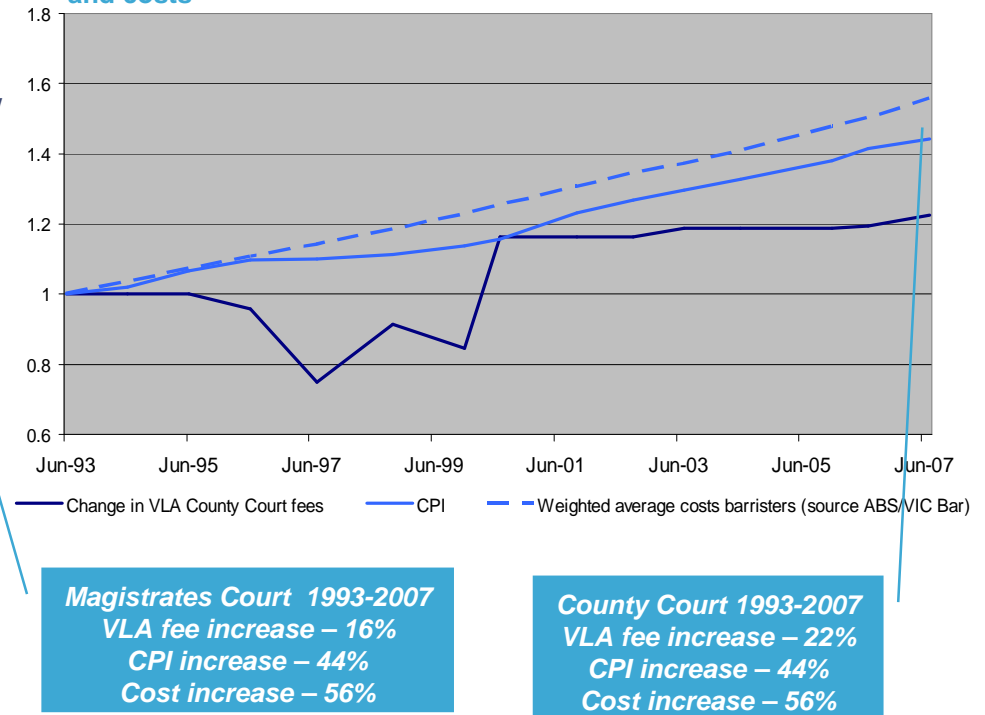
Over recent years the fees paid by VLA to barristers have increased sporadically. Set out below and opposite are comparisons of how these fees have changed over time in relation to inflation during this period as measured by the CPI and the costs incurred by barristers (see end note below). The change in the fees has been weighted according to the size of the fee and how many of each procedures a barrister would normally undertake in a year, according a report compiled by Vic Bar.

Figure 1. Comparison of change in VLA Magistrates Court fees with CPI and costs



The VLA fees paid to barristers in the County Court saw a significant increase in some fees in 2000. However, when tracked back to 1993 and compared to inflation this can be seen to be a correction in the fee levels that had fallen well below inflation in the previous years. Moreover, decreases in fees for long trials have offset the fee increases for more serious cases. In recent years the fees have stagnated again falling below CPI.

Figure 2. Comparison of change in VLA County Court fees with CPI and costs



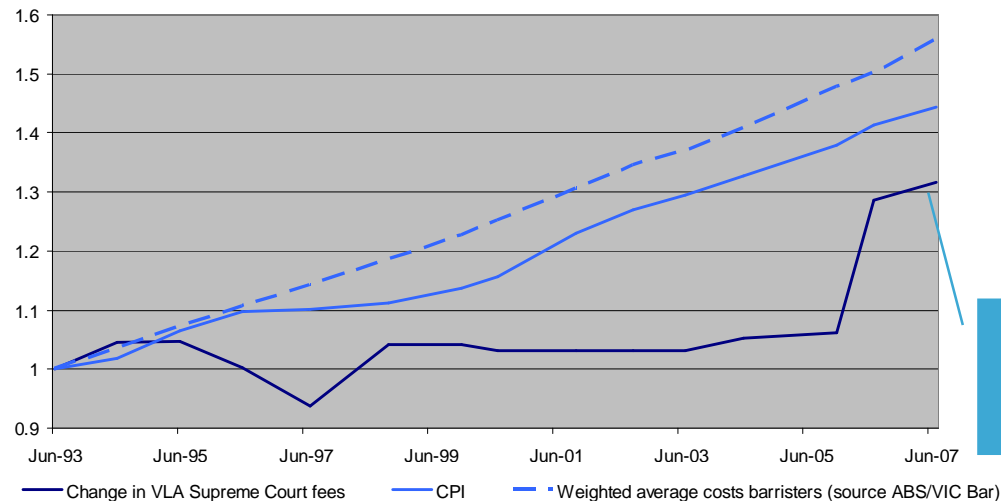
VLA criminal barristers' fees (continued)

The annual income shown for the County Court assumes a barrister who does 30 trials per annum (of which 10 resolve as a guilty plea on the first day), plus a variety of other matters (pleas, appeals, sentences, applications etc.) This represents a particularly high number of first day fees and as such potentially over estimates the average revenue associated with each trial as it suggests a high number of first days which are higher in value than all other days. Some members of the barristers' reference group regarded this number of trials as unrealistically high. If so, the figures shown are very much at the upper limit of income.

It was also suggested that the average trial takes 9 days rather than the 5 days assumed in Figure 9. But assuming a 9-day average would reduce the amount of annual income because a barrister would not be able to do as many trials per year. Reducing the number of trials from 30 to say 20 would reduce the number of first day fees which the barrister could earn. Hence, if anything, the annual income shown overstates rather than understates the position.

From 2006, VLA fees in all courts were increased by reference to CPI. Additionally, in 2006, VLA removed the penalty fee for fifth and subsequent days of trials (the fee dropped from \$825 for days 2 – 4, to \$512 for days 5 and subsequent) in County and Supreme Court trials. The trend line reflects these increases.

Figure 3. Comparison of change in VLA Supreme Court fees with CPI



It can be observed that over a 15 year period the increase in VLA funded barristers' fees, in all courts, has fallen short of inflation. Therefore the fees have declined in real value during these periods. It should be noted that inflation is a conservative comparison for the change in barristers' fees, as real wages in the professional services sector have grown over this period at a higher rate than inflation. In addition this measurement does not include the change in barristers' costs over this period.

Figures, 1 through 3 highlight the differences between the movement in the weighted average cost index and the fees paid to barristers by VLA. These figures illustrates that barristers' fees have not kept pace with the expenses that they face in running their practice. Therefore during the past 15 years VLA funded barristers' net income (after expenses have been deducted) has declined. If barristers' fees and costs both continue on their current trajectories the gap will continue to widen and barristers' real earnings will continue to decline.

Across the court jurisdiction barristers' real take home pay has declined:

- 40% over the past 15 years in the Magistrates Court
- 34% over the past 15 years in the County Court
- 25% over the past 15 years in the Supreme Court

When this is compared to other professionals, whose average real take has increased by around 15% (per ABS) over the least 10 years, the disparity is significant.

VLA funded barristers' real take home pay has fallen by 25% to 40% over the past 15 years while other professions real take home pay has increased by around 15% over the same period

Supreme Court 1997-2007
VLA fee increase – 31%
CPI increase – 44%
Cost increase – 56%

NOTE: To establish the differential between the movements in the costs of providing criminal legal services over the past 10 or 15 years versus the actual movement in the amount paid to criminal barristers by VLA and the CPI over this same period, the weighted average cost index for barristers was developed. The index was built up using the movements in the various expenses that barristers incur with each expense given the weight relating relative to its contribution to total expenses. Barristers' remuneration is represented by ABS data for professionals' salaries over this period. All other cost data is from the ABS except for barristers' chambers rent that was provided by the Vic Bar.

Section 3

Comparison of rates of pay

Calculation of effective annual salaries

Introduction

Barristers operate as sole traders, and therefore pass on 10% GST from the gross fees they receive and deduct the operating expenses of their practice, to arrive at their income before tax. To compare the earnings of a barrister doing legal aid cases with those of comparable professions Vic Bar compiled a report which calculated the effective annual salary of criminal barristers, working exclusively for VLA, using the methodology summarised below.

Methodology to calculate legal aid funded barristers effective salaries

Work undertaken assumptions

Vic Bar surveyed three representative groups of barristers, who regularly practice in each court jurisdiction, to establish how many of each of the standard procedures they would expect to undertake in one year.

The representative group considered the mix of procedures which might be undertaken in the various courts and the maximum number of days on which the courts were open. Generally, it was assumed that only one major procedure per day would be undertaken, but allowance was made for an additional short procedure on a given number of days. (In Magistrates Court practice, it is possible to do two pleas in one day and some barristers would regularly do so. This is not so in the other courts.)

The figures for the County and Supreme Court allow for time out of court for preparation, some of which is paid for separately. The figures for the Magistrates Court do not allow for that. The VLA fee for contests (\$420) and pleas (\$301) includes up to eight hours preparation. In practice, that preparation is done outside court hours because the low level of the fees makes it uneconomic to take time out of court.

The annual income was calculated by multiplying the fee for each procedure by the number of procedures per annum. A 20% reduction was applied to account for the reality that a barrister could not be in court for the maximum number of days that court was open (eg court availability, timetable clashes, witness availability, etc).

Work mix assumptions

For the purpose of the analysis Vic Bar have calculated separate effective annual salaries for a barrister working in each court jurisdiction. In practice barristers would generally do work in various courts, according to their level of expertise. However, this calculation allows for comparison with the salaries paid to other lawyers at the same level of experience.

For the purpose of this analysis the criminal justice system should be considered as a stand alone industry that should be able to adequately compensate those who work in the sector. Therefore the object has been to calculate the effective annual salary of a barrister who undertakes criminal work exclusively for VLA. This is an appropriate measure of the adequacy of system to sustain itself under the current VLA fee structure as it measures a barrister's ability to meet all their business obligations assuming that they were totally reliant on VLA work.

Calculation of effective annual salaries (continued)

Employee benefits assumptions

While barristers as sole traders are not obliged to contribute to superannuation, it assumed that they could contribute the equivalent 9% before tax and receive the same benefits from superannuation as someone whose employer contributes on their behalf. Therefore their net income before tax is considered to notionally include superannuation and is comparable with a salary including superannuation.

For comparison with salaried professionals it was assumed that net income also includes standard benefits (20 days paid leave, 10 days public holiday and the average days of sick leave). As the court does not hear cases year round, any leave has been assumed to be taken in these periods of inactivity. Other benefits that salaried professionals receive have been included where possible, e.g. leave loading, FBT exempt benefits. Other benefits that for complexity reason have not been included are listed here, although the list is not exhaustive. It is therefore noted that barristers would have to self fund these benefits:

- Parental leave
- Carer leave
- Long-service leave
- Extended sick leave

Utility for work type

It is acknowledged that many barristers who undertake VLA work gain a positive utility from this work and the social contribution that they are making. This utility however is not necessarily specific to these barristers and it should be considered that those working in comparable professions would also be gaining utility from their work. Therefore it is not considered as an influencing factor in the salary comparison analysis.

Expenses assumptions

The Vic Bar obtained estimates of operating expenses from reference group of barristers, working across the courts. These ranged from 30% and 40% of their fees and therefore they adopted 37% for the calculating of the effective annual salaries. The ABS in their Legal Practitioners Survey 2001/02 show barristers' expenses to average 33.5% and range from 27.9% for senior counsel and 35.2% for junior counsel.

This rate is has been applied to the ABS salary data, whilst 37% has been used by Vic Bar in their calculation of VLA funded barristers effective annual income.

To account for the risk that barristers undertake as being sole traders and the sole source of their income, compared to those working salaried for a company it is assumed that income protection insurance is included in their expenses.

Net Income calculation

Therefore the effective annual salary of a barrister working exclusively for VLA and in only one court jurisdiction was calculated using the following equations:

$$\begin{aligned} &\text{Annual mix of procedures} \times \text{fees for those procedures} \\ &\quad \text{Less } 20\% \text{ contingency} \\ &\quad \text{Less } 10\% \text{ GST} \\ &\quad \text{Less operating expenses} \\ &= \text{Net annual income before tax} \end{aligned}$$

Effective annual income of VLA funded barristers 2007

Magistrates Court			
Procedure	No. of procedures p.a.	Fee per procedure	Total
Mention	4	\$116	\$464
Adjournment	20	\$200	\$4,000
Contest mention	10	\$208	\$2,080
Contest mention-resolved as a plea	15	\$408	\$6,120
Consolidated contest mention	15	\$436	\$6,540
Plea	90	\$301	\$7,090
Consolidated plea	15	\$360	\$5,400
Bail application	25	\$301	\$7,525
Sentence	3	\$200	\$600
Contest	10	\$420	\$4,200
Contest - resolved as pleas	10	\$368	\$3,680
Committal mention	3	\$286	\$858
Committal - day 1	10	\$665	\$6,650
Committal - subsequent day(s)	7	\$600	\$4,200
Total procedures	237		\$79,407
Total days in court	220		
Less 20% contingency			\$15,881
Less GST			\$5,775
Gross income			\$57,751
Less 37% operating expenses			\$21,368
Nett income			\$36,383

County Court			
Procedure	No. of procedures p.a.	Fee per procedure	Total
Trial - day 1	30	\$1,240	\$37,200
Trial- subsequent day(s)	80	\$845	\$67,600
Plea - day 1	30	\$676	\$20,280
Plea -subsequent day(s)	20	\$396	\$7,920
Bail application	2	\$615	\$1,230
Appeal	12	\$615	\$7,380
Breach	5	\$615	\$3,075
Directions/ mentions/ callovers	40	\$203	\$8,120
Case conference	25	\$354	\$8,850
Sentence	40	\$248	\$9,920
Conference - 5 hours	30	\$720	\$21,600
Conference - 3 hours	15	\$432	\$6,480
Total procedures	329		\$199,655
Total days in court	220		
Less 20% contingency			\$39,931
Less GST			\$14,520
Gross income			\$145,204
Less 37% operating expenses			\$53,725
Nett income			\$91,479

Supreme Court			
Procedure	No. of procedures p.a.	Fee per procedure	Total
Trial - day 1	12	\$1,690	\$20,280
Trial - subsequent day(s)	126	\$1,352	\$170,352
Plea - day 1	12	\$958	\$11,496
Plea - subsequent day(s)	1	\$620	\$620
Bail application	5	\$620	\$3,100
Section 5 hearing	9	\$502	\$4,518
Directions/ mentions	24	\$271	\$6,504
Sentence	12	\$338	\$4,056
Conferences- 5 hours	12	\$1,435	\$17,220
Conference - 3 hours	4	\$615	\$2,460
Total procedures	217		\$240,606
Total days in court	175		
Less 20% contingency			\$48,121
Less GST			\$17,499
Gross income			\$174,986
Less 37% operating expenses			\$64,745
Nett income			\$110,241

Comparable Professionals

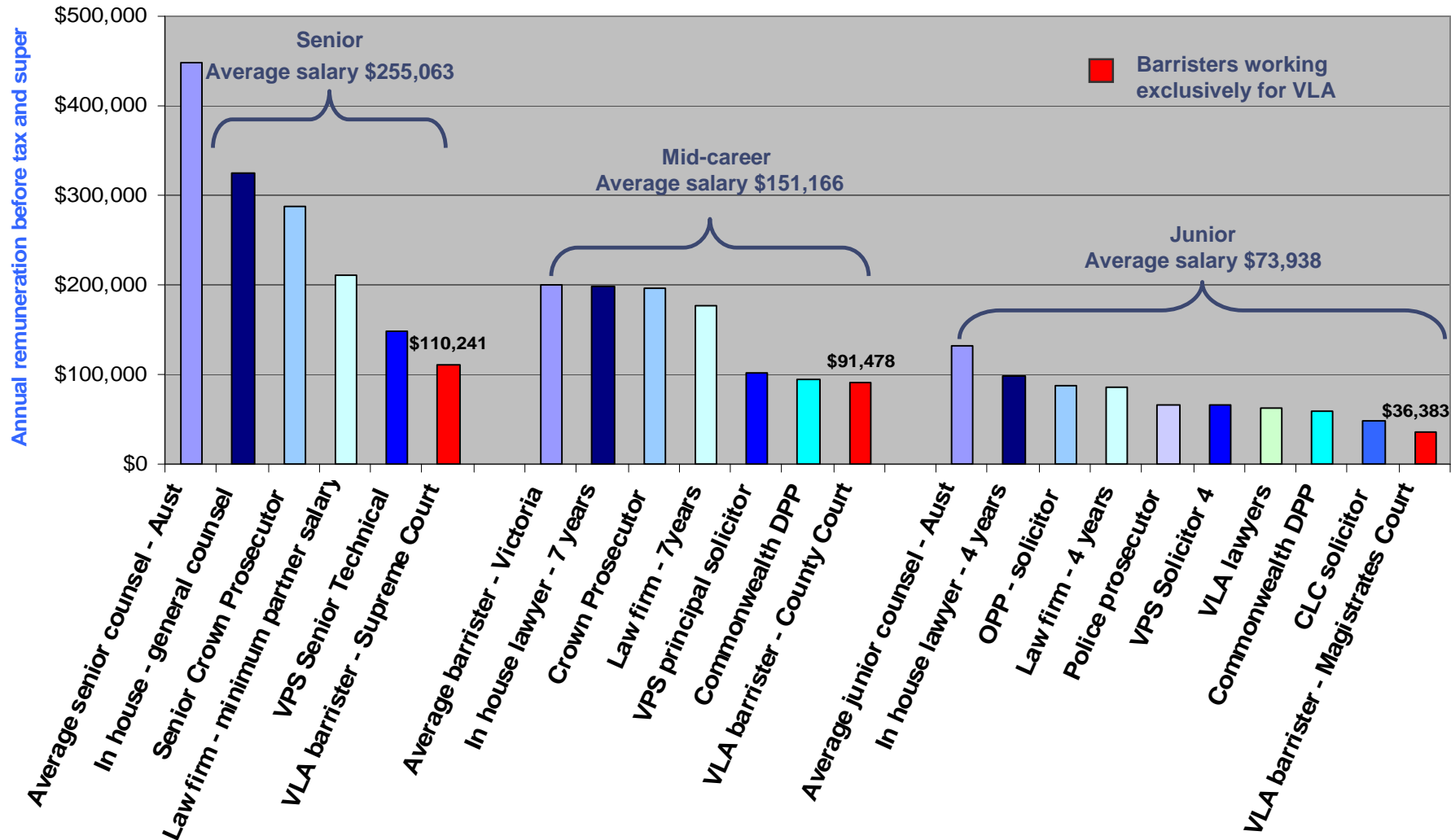
Introduction

The employment groups detailed below can be considered as providing economic services of less or equal economic benefit to VLA funded barristers. The groups have been considered comparable based on years experience, that is, the various positions listed below also represent the choice of career paths at the beginning of a solicitor's legal career. For the purpose of the analysis the mid-point in salary ranges has been taken.

Comparable Professions			Source of income data
VLA funded barrister working in exclusively in the Magistrates Court	VLA funded barrister working exclusively in the County Court	VLA funded barrister working exclusively in the Supreme Court	Victorian Bar calculation
Police prosecutor			Police
Office of Public Prosecutions (OPP) solicitor	Crown Prosecutor	Senior Crown Prosecutor	OPP
Commonwealth Director of Public Prosecutions (DPP) Legal Officers 1 & 2	Commonwealth Director of Public Prosecutions (DPP) Senior and Principal Legal Officers		Commonwealth DPP
Lawyer employed by VLA			VLA
Community Legal Centre (CLC) solicitor			VLA
Public service agreement, Solicitor 3, level 4.1.1	Public service agreement, Principal Solicitor, level 6.1.1	Public service agreement, Senior Technical Specialist	Legislated – Victoria Public Service Act
Average of junior counsel working, across all areas of law in Australia	Average of barristers working across all areas of law in Victoria	Average of Senior counsel working across all areas of law in Australia	ABS Legal Practitioners Surveys 2001-02. Inflated to 2007 dollar
Private law firm - 4 years experience	Private law firm - 7 plus years experience	Private law firm - minimum salaried partner	Hudson Legal Salaries Survey 2007
In house counsel – 4 years experience	In house counsel – 7 plus years experience	In house - general counsel	Hudson Legal Salaries Survey 2007

Pay comparisons

Figure 4. Comparison of effective annual earnings (total value of packages) between legal professionals



Comparison of rates of pay

Discussion of comparison of pay

As can be observed in Figure 4 there is a marked disparity between the effective annual remuneration of barristers undertaking legal aid work and other legal professionals. On average, barristers undertaking legal aid work are paid approximately 50% below the median salary of their contemporaries. In each group, VLA funded barristers' effective incomes are ranked lowest compared to other legal professionals. VLA funded barristers earn less than a third of the top earners in the Supreme and Magistrates Courts comparison groups and less than half of the top earners in the County Court category.

OPP External Counsel

Additional barristers briefed by the OPP are in fact being paid at similar, or lower rates to VLA funded barristers. However, these rates have been increased to match or better VLA rates in 2008.

Other barristers

Estimates of the average annual income of a criminal barrister who undertakes only criminal defence work, but no legal aid work, is around \$150,000. This is considerably more than the Vic Bar calculation of the earnings of a barrister who undertakes only VLA funded work, ranging from \$36,383 to \$110,241. The work undertaken by criminal barristers, be it legal aid or private, would be expected to be of comparative economic value.

Vic Bar has explained that criminal barristers who do entirely private work would be a minority. Most criminal barristers do not have the option to preference private work over VLA funded work as there is simply not the volume of private work to sustain them on a full time basis. However, a comparison between fees and earnings illustrate the variance between how the market values these services compared with the level at which barristers, undertaking like work for VLA, are compensated.

VLA funded barristers real take home pay is the lowest compared to similar professions. At each level of experience they are paid no more than 60% of the average salary of other professionals.

Work that is provided for reduced or no fees

Barristers who undertake legally aided criminal cases are subsidising the publicly funded legal aid system to a significant extent. As the Australian Law Reform Commission explained in its 2000 Report, Managing Justice:

“Some lawyers equate work done at legal aid rates as “pro bono” because of the low level of remuneration.”

TNS Social Research Consultants found that the Commonwealth Attorney-General's Department had calculated the value of the work of family lawyers at \$120 per hour. This Report has found that hourly rates paid to criminal barristers by VLA fall significantly below this rate.

The ABS Legal Practitioners Survey 2001-02 found that in Australia 78.4% of barristers undertook pro bono work during the year, totalling 614,100 hours. Of this work 47% was legal aid cases undertaken at reduced rates or without expectation of a fee.

During 2001-02 Australian barristers undertook 289,100 hours of legal aid work at reduced or no fees, personally bearing part of the cost of providing access to justice

The Victorian Bar Legal Assistance Scheme received in excess of 10,700 hours of pro bono support worth \$3.4 million from barristers in 2004/5. However, economic imperatives will place a limit on this. Some barristers are able to supplement their income from criminal cases by better paying work from privately funded criminal cases, family law cases, or other areas of practice. Others are not. Although many barristers obtain personal satisfaction from doing legal aid cases, there is a significant problem in relying on charity as a substitute for publicly funded services in such an important policy area. The number of criminal lawyers exiting the system – and the absence of replacements indicate that the levels of legal aid are reaching breaking point.

Practitioners who are currently subsidising the criminal justice system may withdraw this support once they feel that their contribution outweighs any potential benefit they may be receiving

The hourly rates paid by VLA to barristers in criminal cases ranges from a low of \$19.33 in the Magistrates Court, to a maximum of \$135 per hour for murder trials in the Supreme Court. The rates for serious trials in the County Court - for cases involving serious drug offences, sexual offences, robbery, etc. - are \$88.57 per hour. The difference between these amounts and \$120 per hour gives some idea of the extent of the cross-subsidy. Those who cannot afford legal counsel are also assisted by barristers who undertake to work on a reduced or no fee basis.

These statistics demonstrate the degree to which the current system is not meeting the requirement of providing access to justice for all. This shortfall is being subsidised by the personal altruistic commitment of barristers.

Cross subsidisation results in an inefficient allocation of resources throughout the legal system as there is a distortion of the price signals which results in either under or over investment in particular markets. In the example of other areas of work subsidising VLA criminal work, the price for this work is depressed to the point that it becomes unattractive for new entrants to enter the market and those already engaged in the profession have greater incentive to exit the market. The consequential impacts on productive, dynamic and allocative efficiency have the potential to result in inappropriate economic investment and an artificial limit on economic growth.

As noted in the Lord Carter review of the British Legal Aid system, fair pricing in all categories of the legal profession is required rather than cross subsidies. Without appropriate compensation for a days work the situation becomes untenable. In the parliamentary hearings associated with Lord Carter's review he stated that there will be a tipping point where legal practitioners will cease to bear these costs personally and move away from the underpaid work. A more appropriate response would be to adequately fund the services provided by criminal barristers.

Description of service need

Underlying performance constraints

Barristers who specialise in criminal law will predominantly represent legally aided clients. This is especially true in the County and Supreme Courts where majority of cases are funded by VLA. There is a small pool of privately funded cases, but these cases will predominantly be dealt with by a small group of highly specialised barristers.

According to the Legal Practitioners Liability Committee, of the 1,600 barristers in Victoria approximately 216 do more than 90% criminal work. This cohort can therefore be assumed to do predominantly legal aid work as this is the source of majority of the work available to them. However, many barristers who undertake legal aid work combine this with family law, or other areas of the law, and therefore would not be included in the 216, which are primarily criminal barristers. Importantly the decision to diversify legal practices is primarily based on the economic reality that in order to support the legal aid system there is a degree of cross subsidisation which is required as the returns are simply not sufficient in criminal law.

As can be seen in Table 1 opposite the number of barristers that do 90% criminal work has been declining steadily over the last three years, and has declined by 26% overall. A small part of this can be attributed to an increase in fees and therefore some barristers have moved up the bracket. However as Section 3 investigates, the fee increase has been minimal over this period and could only account for a negligible portion of the movement. The decline in criminal barrister numbers is particularly evident in the three lower income sectors of the market, who make up 73% of the total and would do predominantly legal aided cases. The average fees collected by these lower sectors of the market have been less than \$80,000 per annum, assuming average expense of 33.5% (per the ABS), this translates to an income of less than \$53,200. Despite being charged with the responsibility of upholding the criminal justice system, these barristers are expected to achieve an economic return equivalent to the average wage.

Table 1. Change in barristers undertaking 90% or more criminal work 2005-2008

Annual Fees	2005/06	2006/07	2007/08	Total % change
\$0 - 50,000	95	61	39	-59%
\$50,000 - \$100,000	104	90	81	-22%
\$100,000 - \$150,000	70	65	56	-20%
\$150,000- \$200,000	29	33	30	3%
\$200,000 +	50	47	52	4%
	348	296	258	-26%

Source: Legal Practitioners Liability Committee

As demonstrated in Table 1, the pool from which VLA can employ criminal barristers has been declining markedly over the last three years. This has been confirmed by other research as part of a study of private legal practitioners in the provision of legal aid services in Australia conducted by TNS for the Commonwealth Attorney General's Department. This could be attributed to barristers moving away from wholly criminal practices, or diversifying their practice and therefore undertaking fewer criminal cases. This decline could also indicate that those joining the Bar are not choosing a criminal specialisation. As junior barristers are the future pool of resources for legal aid, a drop in numbers now results in ongoing shortages at all levels of experience well into the future. This is a significant issue for the future of the criminal justice system generally. To the extent that the criminal law declines as an area of specialisation and the financial rewards associated with the criminal process decline, the problem will increase.

Barristers who undertake 90% or more criminal work have been declining in number over the last three years

Section 4

Social benefits of the criminal justice system

Social benefits of criminal justice system

Crime has a huge economic cost to society and the criminal justice system plays a critical role in addressing this by providing a vast range of economic and social benefits. These include playing a role in;

- Determining the guilt or innocence of those accused of crimes
- Deterrence of crime through
 - Promoting accountability for criminal acts
 - Handing down appropriate punishment for crimes
- Addressing recidivism

The diagram opposite sets out the principles that the criminal justice system must maintain to ensure it is able to deliver benefits to society efficiently and equitably. Integral to achieving these goals is an appropriately resourced public defence system.



Legitimacy of the justice system

The legitimacy of the justice system is integral to maintain the support of its participants and the broader society. The public's belief that the system is fair and reasonable is essential for long-term support. When those accused of a crime confront a fair justice system they receive a message that the public values the law. Further, this system extends to increasing the incentives to remain a law abiding citizen.

Integrity of the justice system

It is argued that a strong public defence system is the first line of defence against corruption of the justice system. Protecting the economically disadvantaged against abuses of the system assists in controlling crime within the justice system.

Efficiency of justice system

A well prepared and competent defence results in courts that run smoothly and efficiently. Government initiatives to streamline the operation of the criminal justice system depend on able and experienced criminal barristers to facilitate their success. For example, recent initiatives to promote early pleas of guilty and to identify core issues at trial depend on experienced criminal barristers who can prepare properly, confidently and reliably identify the key issues, advise their clients and negotiate with the prosecution. More generally, the smooth running of cases depends on able and experienced barristers who will deal with issues expeditiously and minimise legal errors which lead to aborted trials or appeals. Able, prepared counsel, who are acting in cases that are matched to their experience, can present appropriate motions and argument and make the best use of the court's time, allowing courts to respond to case loads. Further, this reduces the number of matters heard before a court on multiple occasions.

Court time in all Victorian Courts is in high demand and is an expensive resource. Wasting of court time owing to under prepared or disorganised cases represents a cost to society. According to data in the Productivity Commissions' *Report of Government Services 2007*, at June 2006 the Victorian courts had the following backlogs in relation to criminal cases (ie the percentage of cases that have been in the system for certain periods of time, not including appeals). These proportions are set out in Table 2 below.

Table 2. Age of criminal cases in Victorian Courts

Time elapsed	Magistrates Court	County Court	Supreme Court
Cases > 6 months	12.5%	-	-
Cases > 12 months	1.6%	17.3%	19.9%
Cases > 24 months	0%	2.3%	8.4%

Source: Productivity Commission *Report of Government Services 2007*

Social benefits of criminal justice system (continued)

Effectiveness of the justice system

Achieving goals of the justice system

A well resourced and competent defence can ensure that a case proceeds correctly through the court system and minimises the risks of an aborted trial, appeals and retrials. Anecdotal comments from Magistrates and Judges suggests that the more adequately prepared and experienced a barrister the higher the likelihood that they will bring forth defence evidence and the perspective necessary to resolve cases fairly. This assists the judiciary in making better quality decisions. Prepared counsel can also explain the hard choices that a defendant may face in deciding to plead or go to trial.

A well functioning effective criminal justice system also hands down appropriate sentences. Defence barristers play an important role as advocates for the convicted through the sentencing process, particularly in ensuring that the sentence imposed reflects the nature and severity of the crime and takes into account the individual's reasons for committing the crime and their circumstances. In addition, defence barristers act as an important intermediary to facilitate access to special programs that divert offenders from incarceration and ensure that they receive services, such as counselling and drug and alcohol rehabilitation, that address the causes of their offending behaviour.

Diversion programs have had a demonstrable positive effect on offenders involved, for example participants in the pilot drug court at the Dandenong Magistrates Court who undertook treatment as part of their sentences were found to commit 23% less offences than those who did not.

As an example the Evaluation of the Pilot Drug Court at the Dandenong Magistrates Court found participants that undertook treatment as part of their sentences were found to commit 23% less offences than those who did not

Reducing recidivism and therefore contact with the criminal and correctional systems represents a significant cost saving to individuals and society. Access to adequate and effective defence counsel play an important role in achieving this outcome.

Minimising mistakes in the justice process

It is assumed that people in society care about the criminal justice system in the terms of fairness and deterrence. It is important to only punish those who are guilty. There are two main types of errors that can occur in the criminal justice system. A type 1 error is when someone is guilty of crime is found not to be, and type 2 is when an individual is mistakenly found guilty of committing a crime. Both errors have economic and social costs. If a type 2 error occurs the falsely convicted is likely to suffer a huge loss from the conviction. In addition society also suffers a cost as it can be assumed that the falsely convicted was contributing to society as law abiding individual and the person actually guilty of the crime has not been convicted or punished.

Louis Kaplow in his 1994 article in the Journal of Legal Studies *The Value of Accuracy in Adjudication: An Economic Analysis* argues that a reduction of both types of errors results in important social benefits. Therefore expenditure, including an appropriately funded public defence, to reduce these errors is socially beneficial.

Criminal Barristers play an important role in ensuring that these outcomes are achieved

Social benefits of criminal justice system (continued)

Social utility

Many in society gain utility from the presence of a publicly funded legal aid system's contribution to the criminal justice system, even if they never use its services. The knowledge that there is legal assistance available should they need it, and that they will be given a free and fair trial if they are accused of a crime, gives people important peace of mind and promotes faith in the legal system. For this important social utility to be maintained there must be confidence that the assistance that legal aid offers is effective and of a high standard. The following is case study of the potential impacts of under funding a criminal justice system to extent that defendants are not provided with adequate representation.

An example of under funding of public defence in the USA

In 2004 in Washington State in the USA a class action was taken out against Grant County over its felony public-defence system. The plaintiffs alleged that the county had systematically deprived indigent felony defendants of effective assistance of counsel in violation of both the United States and Washington State Constitutions. The case found there were well-grounded fear that deficiencies in the system had deprived them of effective assistance of counsel and as a result the county undertook various measures to improve the quality of the defence services it provided including limiting case loads and increasing fees to be in-line with prosecution attorneys and ensuring the fees paid better reflect the complexity of a case. Comment was made if such cases continue it would be more expensive for the county than simply providing a good public-defence system and avoiding litigation in the first place, thus, good public defence is not just constitutionally required — it is fiscally responsible.

There are many lessons to be drawn from this example, however, the most pressing is the impact that the differential between prosecution and defence. This sets up an inherently unfair legal system which is contrary to the Victorian Charter of Human Rights and Responsibilities Act.

Source: Washington State Bar Association - *Making Gideon Real: Washington Counties and the Duty to Provide Effective Assistance of Counsel*

Avoided costs and likely benefits

Introduction

Many of the social benefits that flow from the criminal justice system are difficult to quantify. However, an attempt can be made to place dollar value on the potential benefits, in the form of costs that are avoided, when the criminal justice system is appropriately funded and functioning well. In this section a selection of unit costs have been identified to illustrate the costs that could be avoided, and the efficiency gains that could be achieved, from increased investment in the system.

Other avoided costs/ likely benefits from a well functioning criminal justice system not addressed here include the costs of a miscarriage of justice, including false convictions and inappropriate sentencing. These are potentially significant costs to the individuals involved, and to the society that bears these costs and the costs of correctional services.

The effects are most immediately identifiable on the victims of crime, their family and friends. However, there is also an impact on the accused and their families. By the time the matter has reached court there are considerable externalities that need to be considered over and above the direct costs of the case.

Court disruption and delay

VLA funded barristers state that they are under pressure and time constraints in relation to their preparations for appearing in court. This is particularly prevalent for those working in the Magistrates Court. Further, the low level of fees imposes pressure to take multiple briefs each day to ensure they earn sufficient income. These constraints can cause disruption to the efficient running of the court. Under prepared or overstretched barristers have the potential to contribute to delays, inefficiencies, adjournments and waiting times in court.

Set out in Table 3 opposite are indicative costs for an hour of the courts' time. It includes the costs of the time of the Magistrate or Judge, a registrar, prosecution, defence counsel and a notional rent of the court space. It does not include other costs such as defendant and witness time, travel expenses, or other court administration costs and overheads.

Table 3. Estimated cost for court time per hour

Input	Magistrates Court	County Court	Supreme Court	Source
Magistrate or Judge	\$157	\$162	\$194	Judicial Salaries Act & Magistrates Court info
Prosecutor	\$48	\$134	\$195	VPS Agreement
VLA criminal barrister	\$35	\$64	\$108	Vic Bar calculation – weighted average of hourly rate for procedures
Registrar	\$39	\$48	\$48	Magistrates Court data
Court room	\$100	\$100	\$100	Magistrates Court data
Total -per hour	\$389	\$ 507	\$645	

Delays and disruptions in court proceedings represent a real cost to society as they are an inefficient use of court time, preventing it from moving onto other matters. This is a particular concern as delays in hearing cases continue to grow and waiting lists lengthen. See Table 2.

Adjournments, aborted trials, appeals and retrials

In 2007 the Victorian Department of Justice undertook a study to examine the cost of appeals met by the Appeals Costs Board in Victoria. If a party to a civil or criminal action has to pay costs because of a judicial or administrative error, they can apply to have the Board pay the costs of appeals and failed proceedings. The study's findings can give an indication of the costs of having to abort a trial because of an error, that could have been related to inexperienced, under resourced or under prepared defence counsel. The study also estimates the direct costs of an adjournment that could also have occurred for these same reasons.

Aborted criminal trial = \$7,419

Criminal adjournment = \$935

Avoided costs and likely benefits (continued)

Cost of retrials - cost of cases in Victorian Courts

The Productivity Commission's Report of Government Services 2007 measures the costs of finalising cases in the various courts in Victoria. The average costs per case in Victoria for 2007 was calculated by dividing the total cost of criminal cases in each court by the number of cases finalised, in 2005/06 and inflated to 2007 prices. This is set out in Table 4.

Table 4. Average court administrative cost per criminal case in Victorian Courts 2007

	Magistrates Court	County Court	Supreme Court
Total cost of cases	45,589,000	42,296,133	13,911,000
No. of cases finalised	134,789	4,323	608
Cost per case (\$2007)	\$349	\$10,097	\$23,612

Source: Productivity Commission 2007

These costs represent the cost to the courts of administering cases, they do not include the costs of the prosecution or the defence, nor do they include any external costs relating to the case including witness time and other expenses not borne by the court system. The difference in the cost of cases between the courts reflects the complexity of cases and the length of time to finalise them. Once the cost of prosecution, defence, jury time, witness time, and victim costs are included, the total indicative cost for a case that goes for a week the Supreme Court is likely to increase to approximately \$47,572 (approximately \$17,000 in the County Court).

Assuming that a case is aborted in the Supreme Court the total associated costs are likely to be greater than \$100,000, once the cost of two trials and payment of appeals costs are factored into the equation (\$47,572 x 2 plus \$7,419). This estimate can be assumed to be at the lower end of the scale as it ignores secondary impacts and externalities.

These costs give an indication of the potential avoided costs/ benefits, that could arise from reducing retrials as a result of aborted trials.

Conclusion

Administering criminal justice is expensive. As Table 4 sets out, in one year the direct costs of administering the three courts alone totals approximately \$105 million. The unit costs set out in this section give an indication of the significant savings, or benefits that could be realised from a well functioning and funded criminal justice system. Adequate funding to the justice system can be expected to result in increased benefits to the economy, in the form of these avoided costs. The value of this benefit is at least equal to the direct costs to the courts plus other indirect costs and multiplying impacts, associated with these costs. The result is a consequential gain of economic efficiency and allocation of resources.

Calculation of total Supreme Court costs:

Cost per case	\$23,612
Senior crown prosecutor	\$5,400
Defence Barrister	\$2,120
Direct Victim (1 Person)	\$1,096
Defendant (1 Person)	\$1,096
Witnesses (5 people 1 day each)	\$1,096
Jury (12 People)	\$13,152
Total	\$47,572

Assuming a one week hearing and an average forgone wage equal to approx \$57,000 per annum (ABS data)

Section 5

Implications of 'no action'

Consideration of incentives

Introduction

Throughout this paper we have made repeated reference to the importance of the successful operation of the criminal justice system and the appropriate level of funding of both the prosecution and defence elements. The consequential economic benefits stem from the protection of personal and property rights and the rule of law. Without the protection of these elements it is difficult to consider the economic benefits which would be potentially lost to the Victorian economy. Adam Smith noted that the provision of a just society free of oppression was the second of only three primary duties to be performed by the state.

Within this context it is important to consider the potential impacts of continued under funding of the criminal justice system, irrespective of which element is under funded. In this Review we have noted the additional costs associated with inadequate representation in terms of costs to the courts through an increase in aborted trials, appeals and retrials. While difficult to quantify it is important to consider the various incentives that would exist if the quality of the criminal justice system was to be eroded beyond a certain point.

Is the threat of this occurring real?

The current situation described in Figure 4 demonstrates that there is potentially a considerable wage arbitrage opportunity available to legal practitioners. While this is not necessarily an issue in terms of those who are somewhat captured by the industry due to experience and career aspirations, it does provide a disincentive for new practitioners entering the profession. This is particularly evident when considered against alternative opportunities available to new graduates which provide potential for considerably more remuneration.

The criminal justice system needs appropriate funding to attract and retain criminal barristers with the necessary commitment and experience

This potential drift away from the criminal practice has a number of wide ranging consequences. Notably it has the potential to result in a considerable back log of cases due to a lack of skilled professionals able to ensure that there is representation for an adequate defence.

Impact of cross subsidisation

Continued pressure on individual barristers to effectively cross subsidise the criminal justice system from other areas of their practices will result in a gradual shift away from criminal law as this cross subsidy becomes too great to bear and more profitable areas of the practice take precedence over the criminal cases.

Impact of continued under funding

The continued under funding of the criminal justice system calls into question the equity and equality of the criminal justice system, not just in terms of those directly impacted but also those that rely on the successful operation of the system to protect their interests. Appropriate funding of the criminal justice system for both prosecution and defence is fundamental to efficient operation of the law. Without adequate funding of the defence counsel there is the potential for the erosion of confidence and therefore increased costs throughout the economy. These costs are relatively dynamic in nature and difficult to quantify. However, the reduction in dynamic efficiency which arises from a lack of certainty in the strength of the legal process can lead to significant economic impacts. Further, an adequately funded defence counsel will help in achieving the state government's objectives of delivering just outcomes consistent with the Victorian Charter of Human Rights and Responsibilities and providing opportunities for people to exit the justice system through intervention and diversion programs.

The criminal justice system needs appropriate funding to attract and retain defence barristers with the necessary commitment and experience to ensure that the system functions effectively and efficiently. This delivers a net benefit to society by providing access to justice for all and better quality justice outcomes.

Section 6

Conclusion and recommendations

Conclusion and Recommendations

It has been made apparent throughout this review that criminal barristers in Victoria, undertaking work for VLA are paid at the lower end of the spectrum when compared to other similar professionals. The effective annual income of VLA criminal barrister ranges from \$36,383 to \$110,241 over the course of their career and is considerably lower than the range of other similarly qualified professionals within the legal profession, performing work of similar economic value.

During the last 10 to 15 years wages in comparable professions have been increasing at a rate higher than the CPI measure of inflation. At the same time fees paid by VLA to criminal barristers have not kept pace with inflation and therefore declined in real terms.

Concurrently barristers' operating costs have increased at a greater rate than CPI. If this trend continues it will further widen the gap between the remuneration of barristers paid by VLA and other legal professionals. The potential impact of this includes:

- An increase in the number of existing barristers refusing to work on criminal cases funded by VLA;
- A decrease in the number of new entrants into the market segment, particularly as other segments offer higher returns;
- A decrease in the efficiency of the courts;
- An increase in the direct costs associated with aborted trials, appeals and retrials; and
- Poorer justice outcomes for victims and defendants.

Although secondary impacts associated with a loss of confidence in the legal system are more difficult to quantify they are important considerations in relation to the level fees paid to barristers.

The case for an increase in VLA fees for barristers providing legal representation is relatively clear cut. The economic benefits of doing so would be expected to exceed the cost of the increases. The longer term sustainability of the industry is too important to the Victorian economy and the Government's ability to achieve the goal of creating a fairer Victoria for all, to risk continued under funding. Without an increase in funding the ability of the bar to attract and retain appropriately skilled professionals, that provide VLA with the necessary services to support the criminal justice system, will diminish.

However, more work is required to assess the exact quantum of this increase. In addition, the question for how the increase should be funded is also important. We have considered that there are potentially four independent sources of revenue which should be considered:

- Any surplus revenue from VLA;
- Additional funding of VLA from the public purpose fund administered by the legal services board;
- Increased State Government funding; and
- Increased Federal Government funding.

It is of vital importance that this funding is forthcoming due in part to the segment of the community that is most likely to be affected by the increased services. The importance of providing adequate defence of the rule of law is imperative irrespective of the status of individual VLA recipients. VLA criminal barristers need to be compensated for the work they perform at a level that ensures that as rational economic actors they can continue to provide these services at the high standard required. Continuation of the current situation will only result in an erosion of confidence in the legal system which ultimately leads to increased costs to the courts, and more broadly to the economy and society.

This report has been prepared solely for the Victorian Bar for the purpose set out in the letter of engagement . We do not accept any responsibility for losses occasioned to the Victorian Bar or to any other party as a result of the circulation, reproduction or use of our final or draft report contrary to the provisions of this paragraph.

The report is based on information supplied by Victorian Bar and PwC has made no attempt to audit this information. This information has not been independently verified by us and we therefore do not provide any assurance as to its completeness or accuracy.. Where appropriate PwC has used external data sources which have been clearly outlined throughout this report.