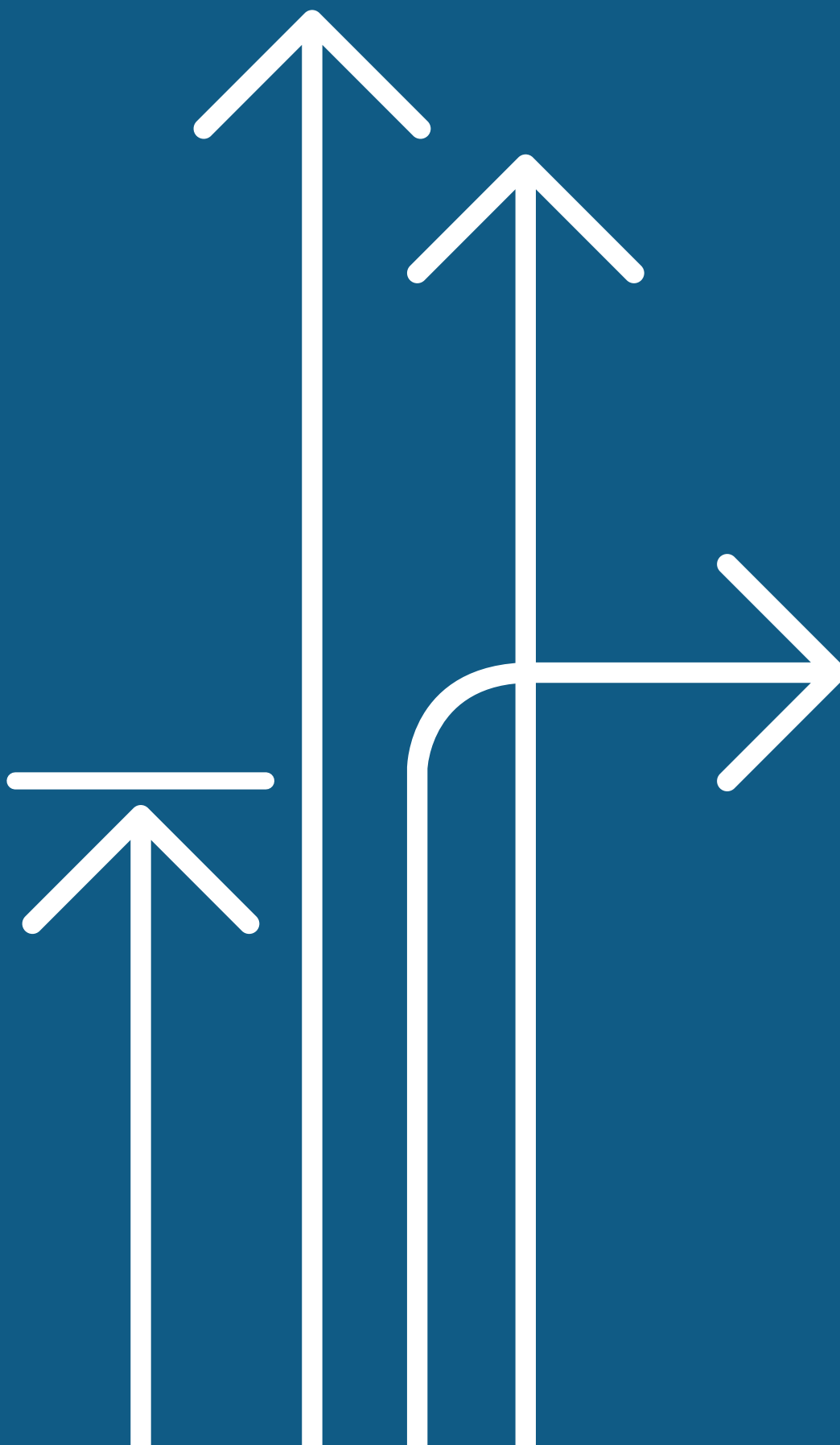


# Committals

ISSUES PAPER JUNE 2019



Victorian  
Law Reform  
Commission





---

**Published by the Victorian Law Reform Commission**

The Victorian Law Reform Commission was established under the *Victorian Law Reform Commission Act 2000* as a central agency for developing law reform in Victoria.

© Victorian Law Reform Commission 2019.

This publication of the Victorian Law Reform Commission follows the Melbourne University Law Review Association *Australian Guide to Legal Citation* (4th ed, 2018).

This report reflects the law as at 23 May 2019.

Committals: Issues Paper

ISBN: 978-0-9943725-2-9

**ACTING CHAIR**

Bruce Gardner PSM

**COMMISSIONERS**

Liana Buchanan

Dr Ian Hardingham QC

Professor Bernadette McSherry

Dan Nicholson

Alison O'Brien

Gemma Varley PSM

The Hon. Frank Vincent AO QC

**CHIEF EXECUTIVE OFFICER**

Merrin Mason

Lindy Smith (Acting CEO 11 February–12 July 2019)

**REFERENCE TEAM**

Michael McKiterick (team leader)

Michael Hepworth (senior research and policy officer)

Dr Emma Larking (senior research and policy officer)

Briana Proud (senior research and policy officer)

**COVER DESIGN**

Letterbox

**TEXT LAYOUT**

GH2 design

# Committals

ISSUES PAPER JUNE 2019



Victorian  
Law Reform  
Commission

Victorian Law  
Reform Commission  
GPO Box 4637  
Melbourne  
Victoria 3001  
Australia  
DX 144, Melbourne

Level 3  
333 Queen Street  
Melbourne  
Victoria 3000  
Australia

**Telephone**  
+61 3 8608 7800  
**Freecall**  
1300 666 555  
*(within Victoria)*  
**Fax**  
+61 3 8608 7888

**Email**  
[law.reform@lawreform.vic.gov.au](mailto:law.reform@lawreform.vic.gov.au)  
**[www.lawreform.vic.gov.au](http://www.lawreform.vic.gov.au)**

---

---

# Contents

<b>Preface</b> .....	<b>v</b>
<b>Call for submissions</b> .....	<b>vii</b>
<b>Terms of reference</b> .....	<b>ix</b>
<b>Glossary</b> .....	<b>x</b>
<b>Questions</b> .....	<b>xiii</b>
<b>1. Introduction</b> .....	<b>2</b>
Referral to the Commission.....	2
Conduct of this reference.....	2
Commission Chair.....	2
Division .....	2
The Commission’s approach.....	2
Issues paper .....	3
Summary of this paper .....	3
<b>2. Committal proceedings</b> .....	<b>6</b>
What are committal proceedings? .....	6
The history and administrative nature of committal proceedings.....	6
Criticisms of, and calls to reform, committal proceedings.....	7
<b>3. Victoria’s committal and pre-trial system</b> .....	<b>10</b>
Introduction .....	10
Summary of significant committal data .....	11
Purpose of committal proceedings.....	11
Charging practices and the decision to prosecute .....	12
Disclosure obligations.....	13
Court events and case management.....	14
Filing hearing .....	15
Compulsory examination hearing.....	15
Special mention .....	15
Committal case conference .....	16
Committal mention .....	16

The test for committal.....	19
Guilty pleas.....	20
Commonwealth offences.....	22
Committal proceedings in the Children’s Court.....	22
Direct indictments.....	24
Pre-trial witness examination.....	25
General (non-sexual offence) cases.....	25
Sexual offences.....	26
Other protections for witnesses.....	27
Time limits.....	28
Access to legal aid.....	30
<b>4. Committal and pre-trial proceedings in other jurisdictions.....</b>	<b>32</b>
Introduction.....	32
Charging practices and the decision to prosecute.....	32
Disclosure obligations.....	34
Disclosure between investigating agencies and the DPP.....	34
The DPP’s disclosure obligations.....	34
Consequences of non-disclosure.....	35
The case management function of courts.....	35
Failure to comply with case management directions.....	36
Case conferencing.....	36
Pre-trial witness examination.....	37
Evidence-in-chief.....	37
Cross-examination prior to trial.....	37
Limits on scope of questioning during witness examination.....	39
Other protections for witnesses.....	40
The test for committal.....	40
Direct indictments.....	41
Guilty pleas.....	41
Data on the timing of guilty pleas.....	41
Sentencing discounts for early guilty pleas.....	42
Delay.....	43
The right to a fair trial.....	44
Access to legal aid.....	45
Resource implications.....	45
<b>5. Objectives and options for reform of committals in Victoria.....</b>	<b>48</b>
Introduction.....	48
Reform objectives.....	48
Reducing trauma experienced by victims and witnesses.....	48
Improving efficiency in the criminal justice system.....	49
Protecting the right to a fair trial.....	50

---

<b>Issues</b> .....	<b>51</b>
Charging practices and the decision to prosecute .....	51
Disclosure obligations .....	53
The case management function of the courts .....	55
Pre-trial witness examination .....	55
The test for committal .....	58
Guilty pleas .....	59
Pre-trial delay .....	62
<b>Implications of reforming pre-trial procedure</b> .....	<b>65</b>
<b>Reform models</b> .....	<b>68</b>
Aims of reform proposals .....	68
Reform model features .....	69
<b>6. Conclusion</b> .....	<b>72</b>
<b>Appendix A: Comparative table of committal proceedings in Australian jurisdictions</b> .....	<b>74</b>
<b>Appendix B: Previous inquiries into committal reforms</b> .....	<b>84</b>
<b>Appendix C: Supreme Court proposal: flexible early case management</b> .....	<b>85</b>

---

# Preface

The Victorian Government has asked the Victorian Law Reform Commission to review and recommend legislative, procedural or administrative changes to Victoria's committal procedure.

The Commission's approach to this reference is guided by the Terms of Reference, which recognise that committals form a major part of Victoria's pre-trial criminal procedure. The Terms also allow for exploring whether committals should be maintained, abolished, replaced or reformed.

In exploring the role of committals in pre-trial proceedings, the principles and goals that the Terms of Reference require the Commission to consider include:

- minimising trauma to victims and witnesses
- identifying at an early stage charges that should proceed summarily
- encouraging appropriate early guilty pleas
- enhancing the efficiency of the criminal justice system
- ensuring the fair trial rights of accused persons
- facilitating the efficient use of court time
- encouraging parties' proper preparation for trial
- improving early disclosure processes
- minimising the need for witnesses to give evidence multiple times
- encouraging best practice for supporting victims.

The Commission is also requested to consider the impacts of its recommendations on all parts of the criminal justice system, including resource implications.

The scope of these terms of reference is such that the Commission, in effect, is asked to recommend the form or design of pre-trial criminal procedure that most efficiently and effectively achieves and upholds the above goals and principles.

This may include the Commission recommending:

- maintaining the present committal system
- reforming the present committal system
- abolishing the present committal system and replacing it with a new pre-trial procedure.

In doing so the Commission will gather all available and relevant data, and undertake a principled, evidence-based comparative assessment of the various possible models and identify which of these models would best uphold the principles and achieve the goals expressed in the terms of reference.

As the issues contemplated by the terms are nuanced and will attract a range of views, I encourage anyone with an interest in them to make a written submission to the Commission by 16 August 2019. The method of making a submission is stated on page vii of this issues paper.

A handwritten signature in black ink, appearing to read 'Bruce Gardner', with a long horizontal flourish extending to the right.

**Bruce Gardner PSM**

Acting Chair  
Victorian Law Reform Commission

June 2019



---

# Call for submissions

The Victorian Law Reform Commission invites your comments on this consultation paper.

## What is a submission?

Submissions are your ideas or opinions about the law under review and how to improve it. This issues paper contains questions, listed on pages xiii and xiv, that seek to guide submissions.

You do not have to address all the questions to make a submission. You may choose to answer some, but not all questions. Alternatively, you may wish to provide a response that does not address individual questions posed throughout the paper, but relates to the issues outlined in the terms of reference.

Submissions can be anything from a personal story about how the law has affected you to a research paper complete with footnotes and bibliography. We want to hear from anyone who has experience with the law under review. Please note that the Commission does not provide legal advice.

## What is my submission used for?

Submissions help us understand different views and experiences about the law we are researching. We use the information we receive in submissions, and from consultations, along with other research, to write our reports and develop recommendations.

## How do I make a submission?

You can make a submission in writing, or verbally to one of the Commission staff if you need assistance. There is no required format for submissions, though we prefer them to be in writing, and we encourage you to answer the questions contained in each chapter and set out at the end of the consultation paper.

## Submissions can be made by:

Completing the online form at [www.lawreform.vic.gov.au](http://www.lawreform.vic.gov.au)

Email: [law.reform@lawreform.vic.gov.au](mailto:law.reform@lawreform.vic.gov.au)

Mail: GPO Box 4637, Melbourne Vic 3001

Fax: (03) 8608 7888

Phone: (03) 8608 7800, 1300 666 557 (TTY) or 1300 666 555 (cost of a local call)

## Assistance

Please contact the Commission if you need an interpreter or other assistance to make a submission.

## Publication of submissions

The Commission is committed to providing open access to information. We publish submissions on our website to encourage discussion and to keep the community informed about our projects.

We will not place on our website, or make available to the public, submissions that contain offensive or defamatory comments, or which are outside the scope of the reference. Before publication, we may remove personally identifying information from submissions that discuss specific cases or the personal circumstances and experiences of people other than the author. Personal addresses and contact details are removed from all submissions before they are published. The name of the submitter is published unless we are asked not to publish it.

The views expressed in the submissions are those of the individuals or organisations who submit them and their publication does not imply any acceptance of, or agreement with, those views by the Commission.

We keep submissions on the website for 12 months following the completion of a reference. A reference is complete on the date the Commission's report is tabled in Parliament. Hard copies of submissions will be archived and sent to the Public Record Office Victoria.

The Commission also accepts submissions made in confidence. Submissions may be confidential because they include personal experiences or other sensitive information. These submissions will not be published on the website or elsewhere. The Commission does not allow external access to confidential submissions. If, however, the Commission receives a request under the *Freedom of Information Act 1982 (Vic)*, the request will be determined in accordance with the Act. The Act has provisions designed to protect personal information and information given in confidence. Further information can be found at [www.foi.vic.gov.au](http://www.foi.vic.gov.au).

## Confidential submissions

When you make a submission, you must decide whether you want your submission to be public or confidential.

**Public submissions** can be referred to in our reports, uploaded to our website and made available to the public to read in our offices. The names of submitters will be listed in the Commission's report. Private addresses and contact details will be removed from submissions before they are made public, but the name of the submitter is published unless we are asked not to publish it.

**Confidential submissions** are not made available to the public. Confidential submissions are considered by the Commission but they are not referred to in our reports as a source of information or opinion other than in exceptional circumstances.

Please let us know your preference when you make your submission. If you do not tell us that you want your submission to be treated as confidential, we will treat it as public.

## Anonymous submissions

If you do not put your name or an organisation's name on your submission, it will be difficult for us to make use of the information you have provided. If you have concerns about your identity being made public, please consider making your submission confidential rather than submitting it anonymously.

More information about the submission process and this reference is available on our website: [www.lawreform.vic.gov.au](http://www.lawreform.vic.gov.au)

**Submission deadline: 16 August 2019.**

---

## Terms of reference

[Referral to the Victorian Law Reform Commission pursuant to section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* (Vic) on 24 October 2018.]

Recognising legislative reforms, public consultation on an early case management model, and other efforts in recent years to address challenges in the committal system, which forms part of pre-trial criminal procedure, the VLRC is asked to review and report on Victoria's committal system.

The Commission is asked to recommend any legislative, procedural or administrative changes to Victoria's committal procedure, which could reduce trauma experienced by victims and witnesses, improve efficiency in the criminal justice system and ensure fair trial rights.

In particular, the Commission should consider:

- whether Victoria should maintain, abolish, replace or reform the present committal system
- opportunities for reform that enable early identification of cases that can be determined summarily, encourage appropriate early guilty pleas, facilitate efficient use of court time and encourage parties' proper preparation for trial
- ways of improving early disclosure processes in criminal prosecutions brought in the indictable stream
- if, when and in what circumstances witnesses or classes of witnesses should be examined prior to trial, including consideration of ways to minimise the need for victims and other vulnerable witnesses to give evidence multiple times
- whether a magistrate should determine if there is sufficient evidence to commit an accused to stand trial and, if so, what test to apply, having regard to the Director of Public Prosecutions' power to directly indict, and
- the impacts of any recommended changes on all parts of the criminal justice system, and what will be needed to ensure the successful implementation and operation of those changes, including resource implications.

The Commission should also consider, in relation to Victoria's committal system or any recommendations made by the Commission:

- best practice for supporting victims, and
- any other matter that the Commission considers necessary to reduce trauma experienced by victims and witnesses and improve efficiency in the criminal justice system, while also ensuring fair trial rights.

The Commission is asked to deliver its report to the Attorney-General by 31 March 2020.

---

# Glossary

<b>Accused</b>	A person charged with a criminal offence or offences who has not yet been found guilty or pleaded guilty.
<b>Brief of evidence</b>	The material relied on by the <b>prosecution</b> in a criminal case.
<b>Children’s Court</b>	A specialist court that hears and determines cases involving children and young people.
<b>Committal</b>	The process by which <b>indictable offences</b> are transferred from a lower court, where the charges are first filed, to a <b>higher court</b> .
<b>Committal mention</b>	A case management hearing in a <b>committal proceeding</b> .
<b>Committal proceeding</b>	A pre-trial proceeding in the <b>Magistrates’ Court</b> , during which a <b>magistrate</b> determines whether the evidence in a case is of sufficient weight to support a conviction.
<b>Complainant</b>	A term used in criminal cases to refer to a <b>victim</b> of crime.
<b>County Court of Victoria</b>	The <b>County Court</b> sits above the <b>Magistrates’ Court</b> and below the <b>Supreme Court</b> in the Victorian court hierarchy. In its criminal jurisdiction it hears <b>indictable</b> criminal cases, except for the most serious. Criminal trials in this court are heard by a judge and jury.
<b>Cross-examination</b>	When a <b>witness</b> for one party (for example the <b>prosecution</b> ) is asked questions in court by the lawyer for the other party (for example the <b>accused</b> ) to test the evidence the <b>witness</b> has already given. See also <b>evidence-in-chief</b> .
<b>Defence</b>	The <b>accused</b> person’s case and the lawyers who represent them.
<b>Defendant</b>	A person who is charged with a criminal offence—also referred to as the <b>accused</b> .
<b>Direct indictment</b>	An <b>indictment</b> filed by the <b>Director of Public Prosecutions</b> against an <b>accused</b> who has not been committed for trial. Known in some jurisdictions as an <b>ex-officio indictment</b> .
<b>Directions hearing</b>	A case management hearing in a <b>higher court</b> .

---

<b>Director of Public Prosecutions (DPP)</b>	The official who makes decisions about whether to prosecute serious criminal matters and is independent of government. The Victorian Director of Public Prosecutions is responsible for prosecuting criminal offences under Victorian law. The <b>Office of Public Prosecutions</b> conducts these prosecutions on behalf of the Director of Public Prosecutions.
<b>Discharge</b>	In relation to committal proceedings, where a <b>magistrate</b> determines there is insufficient evidence to support a conviction of the <b>accused</b> on a particular charge and ends the case.
<b>Disclosure</b>	Providing information or material to a party as required by law.
<b>Discontinue</b>	Where the <b>Director of Public Prosecutions</b> determines not to proceed with charges that have been brought before a court.
<b>Ex-officio Indictment</b>	See <b>Direct Indictment</b> .
<b>Evidence-in-chief</b>	The evidence given by a <b>witness</b> to support his or her case.
<b>Hand-up-brief</b>	A <b>brief of evidence</b> used in indictable criminal proceedings in Victoria.
<b>Higher court</b>	In Victoria, the <b>County Court</b> or the <b>Supreme Court</b> .
<b>Indictable offence</b>	A serious criminal offence that is usually heard in a <b>higher court</b> before a judge and jury.
<b>Indictable offence triable summarily</b>	Less serious <b>indictable offence</b> which can be heard before a <b>magistrate</b> .
<b>Indictment</b>	A formal written accusation charging a person with an <b>indictable offence</b> that is to be tried in a <b>higher court</b> .
<b>Informant</b>	The officer (usually a police officer) responsible for investigating and filing charges against the <b>accused</b> .
<b>Investigating agency</b>	The agency investigating a criminal offence. This is often Victoria Police but can also be other statutory agencies.
<b>Leave</b>	Permission given by a judge or <b>magistrate</b> to a party during a legal proceeding to take a particular course of action.
<b>Legal Aid</b>	Legal assistance provided by the government to people who cannot afford it themselves. In Victoria, Legal Aid provides legal information, advice and representation to people in accordance with the <i>Legal Aid Act 1978</i> (Vic).
<b>Local Court</b>	The equivalent of the <b>Magistrates' Court</b> in some other Australian jurisdictions.
<b>Magistrate</b>	The person who presides over a case in the <b>Magistrates' Court</b> .
<b>Magistrates' Court</b>	A lower court which hears less serious matters without a jury. It is responsible for hearing and determining <b>summary offences</b> and some <b>indictable offences triable summarily</b> , and for conducting <b>committal proceedings</b> .
<b>Mention</b>	A short court hearing to deal with procedural matters.
<b>Offender</b>	A person who has been found guilty or has pleaded guilty to a criminal offence. Until this happens, a person is known as an <b>accused</b> .

<b>Office of Public Prosecutions (OPP)</b>	An independent statutory authority that institutes, prepares and conducts criminal prosecutions on behalf of the <b>Director of Public Prosecutions</b> .
<b>Order</b>	A binding direction by a court or tribunal in a legal proceeding.
<b>Parties</b>	The <b>prosecution</b> and the <b>accused</b> in a criminal proceeding.
<b>Plea</b>	When the <b>accused</b> person tells the court whether he or she is guilty or not guilty of the charge.
<b>Plea brief</b>	A <b>brief of evidence</b> used when the <b>accused</b> indicates an intention to plead guilty before the <b>hand-up brief</b> has been served.
<b>Plea hearing</b>	The hearing in which the <b>prosecution</b> and <b>defence</b> present information that they want the court to take into account when deciding the <b>sentence</b> in the case.
<b>Prosecution</b>	In indictable cases, the lawyers conducting a criminal case before the court on behalf of the <b>investigating agency</b> . 'A prosecution' may also refer to the case against a person accused of a criminal offence.
<b>Sentence</b>	The penalty given to an offender by a court.
<b>Sentencing hearing</b>	See <b>plea hearing</b> .
<b>Summary offence</b>	A less serious criminal offence that may be dealt with by a <b>magistrate</b> .
<b>Supreme Court of Victoria</b>	The highest court in Victoria that deals with the most serious criminal offences. Criminal trials in this court are heard by a judge and jury.
<b>Victim</b>	In this issues paper, a person who has directly suffered harm as a result of the action of the <b>offender</b> . Victim also applies to a person alleged by the <b>prosecution</b> to be a victim prior to a determination of guilt, as well as a victim of an offence for which an <b>offender</b> has been found guilty.
<b>Withdraw</b>	Where a charge against an <b>accused</b> is no longer prosecuted.
<b>Witness</b>	A person who gives evidence in a case.

---

# Questions

- 1 What purposes can or should committal proceedings serve?
- 2 What, if any, measures should be introduced to:
  - (a) reduce the difference between charges that are initially filed and those ultimately prosecuted?
  - (b) ensure appropriate charges are filed at the earliest possible stage in a case?
- 3 Should the OPP be involved in determining appropriate indictable charges at an earlier stage? If so, how?
- 4 What measures can be introduced to improve disclosure in indictable matters:
  - (a) between investigating agencies and the DPP?
  - (b) between prosecutors and the defence?
- 5 To what extent do committal proceedings play a necessary role in ensuring proper and timely disclosure?
- 6 Could appropriate and timely disclosure occur within a pre-trial procedure that does not include committal proceedings?
- 7 To what extent, if at all, is the ability to cross-examine witnesses during a committal hearing necessary to ensuring adequate and timely disclosure of the prosecution case?
- 8 Should some or all of the existing pre-trial opportunities to cross-examine victims and witnesses be retained? If so, why?
- 9 Should cross-examination at a committal hearing be further restricted or abolished? If so, why?
- 10 If cross-examination at a committal hearing is further restricted, how should this occur?
- 11 Are there any additional classes of victims or witnesses who should not be cross-examined pre-trial? If so, who?
- 12 What additional measures could be introduced to reduce trauma for victims or other vulnerable witnesses when giving evidence or being cross-examined at a committal or other pre-trial hearing?
- 13 Should the current test for committal be retained?

- 14 Having regard to the DPP's power to indict directly, is there a need for a test for committal?
- 15 Is there an appropriate alternative process for committing an accused person to stand trial?
- 16 How effectively do committal proceedings ensure:
  - (a) appropriate early resolution of cases
  - (b) efficient use of court time
  - (c) parties are adequately prepared for trial?
- 17 Are there other pre-trial procedures that could equally or more effectively ensure:
  - (a) appropriate early resolution of cases
  - (b) efficient use of court time
  - (c) parties are adequately prepared for trial?
- 18 How should concerns that committal proceedings contribute to inappropriate delay be addressed?
- 19 How should concerns that other pre-trial processes contribute to inappropriate delay be addressed?
- 20 Do committal proceedings contribute to inappropriate delay in the Children's Court?
- 21 What are the resource implications of any proposed reforms to committal or pre-trial proceedings?



# Introduction

- 2 Referral to the Commission
- 2 Conduct of this reference
- 3 Summary of this paper

---

# 1. Introduction

## Referral to the Commission

- 1.1 On 24 October 2018, the Attorney-General, the Hon. Martin Pakula MP, asked the Victorian Law Reform Commission, under section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* (Vic), to review and report on legislative, procedural or administrative changes to Victoria's committal procedure which could reduce trauma experienced by victims and witnesses, improve efficiency in the criminal justice system and ensure fair trial rights. The terms of reference appear on page ix.
- 1.2 The Commission is to report by 31 March 2020.

## Conduct of this reference

### Commission Chair

- 1.3 This reference was commenced under the leadership of the Hon. Philip Cummins AM, who was Chair of the Commission from 1 September 2012 until his death on 24 February 2019.
- 1.4 On 4 March 2019 Mr Bruce Gardner PSM was appointed Acting Chair of the Commission. Mr Gardner continued to lead the conduct of the reference and the preparation of this issues paper.

### Division

- 1.5 At the time of receiving this reference the then Chair of the Commission exercised his powers under section 13(1)(b) of the *Victorian Law Reform Commission Act 2000* (Vic) to constitute a Division to guide and oversee the conduct of this reference. The members of the Commission who joined the Chair on the Division are Ms Liana Buchanan, Mr Bruce Gardner PSM (now Acting Chair), Mr Dan Nicholson and the Hon. Frank Vincent AO QC.

### The Commission's approach

- 1.6 The Commission's approach is guided by the terms of reference and focuses on the underlying objectives set out there—namely, to reduce trauma experienced by victims and witnesses, improve efficiency in the criminal justice system and ensure fair trial rights.
- 1.7 The Commission recognises that achieving these objectives may require reform of committal or other pre-trial procedures. Whether or not a particular pre-trial procedure is a component of the current committal system is less important than the role it plays, or might potentially play, in reducing trauma for victims and witnesses, improving efficiency, and ensuring fair trial rights.

- 1.8 Reforms in comparable jurisdictions demonstrate that regardless of what elements of committal proceedings have changed, or even whether or not the language of 'committals' has been retained, a mix of pre-trial procedures is required to ensure that indictable offences are dealt with as fairly and efficiently as possible, and do not impose unnecessary stress or trauma on victims and witnesses.
- 1.9 As part of its review of committal proceedings, the Commission is therefore interested in considering the relative costs or benefits of other pre-trial procedures, as well as the role they can or should play in Victoria's criminal justice system.

### **Issues paper**

- 1.10 This issues paper draws on existing research and commentary in Victoria and other jurisdictions on the role of committal and pre-trial proceedings. Its publication marks the beginning of the Commission's consultation period.
- 1.11 The Commission is seeking written submissions in response to the questions in this paper or that otherwise address the terms of reference.
- 1.12 The deadline for submissions is 16 August 2019. Information about how to make a submission is set out on page vii.
- 1.13 The Commission will also consult with stakeholders after publication of this issues paper.

### **Summary of this paper**

- 1.14 The chapters that follow describe what committal proceedings are, the committal and pre-trial system in Victoria, and how committal and pre-trial procedures have been reformed in other jurisdictions. For the purpose of informing submissions, the paper then identifies and discusses several significant issues, and considers a selection of reform options and proposals.
- 1.15 A table appended to the issues paper provides a comparative overview of committal and pre-trial procedures in other Australian jurisdictions. A list of previous reports about committal reform is also appended.



# Committal proceedings

6 What are committal proceedings?

---

## 2. Committal proceedings

### What are committal proceedings?

- 2.1 A committal proceeding is the process by which indictable criminal charges are transferred from a lower court, where the charges are first filed, to the jurisdiction of a higher court. In Victoria, they require an assessment by a magistrate of the evidence to determine if it is of sufficient weight for the charges to proceed to trial.
- 2.2 The proceedings commonly involve several steps or court events, such as filing and mention hearings, and cross-examination of witnesses.
- 2.3 While all jurisdictions in Australia and comparable common law jurisdictions overseas have some form of committal proceeding, the specific elements vary, and some jurisdictions have dispensed with procedures that historically formed part of the process.

### The history and administrative nature of committal proceedings

- 2.4 The original purpose of committal proceedings was to act as a filter, ensuring that unfounded criminal charges were not pursued to trial. The rationale was that an accused person should not have to go through the expense and stress of a criminal trial in relation to charges that were 'wanton and misconceived'.<sup>1</sup>
- 2.5 Committal proceedings have a long common law history, pre-dating the creation of organised police forces and independent prosecution services.<sup>2</sup> They date from a time when criminal complaints were brought by private citizens. Before putting an accused person on trial, the complaint was considered by a 'grand jury' of citizens whose role was to prevent frivolous or malicious prosecutions. The grand jury decided if the alleged conduct constituted a criminal offence, and if there was enough evidence to justify requiring the accused to stand trial for that offence.<sup>3</sup>
- 2.6 Ultimately, the role of the grand jury was taken on by magistrates who now have the responsibility of assessing the evidence to determine if it is of sufficient weight to require the accused to stand trial for an indictable offence.
- 2.7 Despite the involvement of magistrates, committal proceedings are characterised as administrative rather than judicial.<sup>4</sup> Committal to stand trial is not a factor that is considered when assessing the guilt or innocence of an accused person at trial.

---

1 John Coldrey QC, 'Committal Proceedings: the Victorian Perspective' (Conference Paper, Australian Institute of Criminology, The Future of Committals, 1-2 May 1990) 2, citing Lord Devlin, 1960.

2 *Grassby v The Queen* (1989) 168 CLR 1, 11-12.

3 See Nicolee Dixon, 'Committal Proceedings Reforms: The Civil and Criminal Jurisdiction Reform and Modernisation Amendment Bill 2010 (Qld)' (Research Brief 2010/14, Queensland Parliamentary Library, May 2010) 183; Martin Moynihan, *Review of the Civil and Criminal Justice System in Queensland* (Report, 2008) 163-164; New South Wales Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas* (Report No 141, December 2014).

4 *Grassby v The Queen* (1989) 168 CLR 1, 11.

- 2.8 In addition to their primary purpose of ensuring unfounded cases do not proceed to trial, committal proceedings came to be viewed as serving additional important purposes, including to inform an accused person of the nature of the case alleged against him or her, and to allow 'the accused an opportunity to test the evidence of the prosecution witnesses.'<sup>5</sup> Many of these purposes are now enshrined in the *Criminal Procedure Act 2009* (Vic) (CPA), the primary legislation governing committals in Victoria. These purposes are set out in Chapter 3 of this issues paper.

### Criticisms of, and calls to reform, committal proceedings

- 2.9 The role, benefits and costs of committal proceedings have been debated within Australia and overseas for decades.<sup>6</sup> It has been suggested that the call to reform committal proceedings arises 'almost as a tradition' every few years.<sup>7</sup>
- 2.10 While historically courts and commentators emphasised the importance of committal proceedings for protecting the right of an accused person to a fair trial,<sup>8</sup> the Victorian Court of Appeal found recently that 'a trial without an antecedent committal will not necessarily be unfair.'<sup>9</sup>
- 2.11 Committal proceedings have been criticised for being used by the defence as a 'fishing exercise' and a means of gaining a tactical advantage.<sup>10</sup> There is also concern that committal proceedings unduly inflate the costs of criminal justice and contribute to delays in finalising prosecutions.<sup>11</sup> Another concern is that they are stressful or traumatic for victims and witnesses.<sup>12</sup>
- 2.12 On the other hand, some commentators and criminal justice practitioners continue to defend the importance of committal proceedings for ensuring a fair trial.<sup>13</sup> They point to other benefits, including assisting with the early resolution of matters.<sup>14</sup>
- 2.13 These issues are discussed further in Chapter 5.

---

5 Kerry Stephens, 'Committals in Victoria—a Police Perspective' (Conference Paper, Australian Institute of Criminology, The Future of Committals, 1–2 May 1990) 158, citing Victorian Parliamentary Debates 1986.

6 See, eg, New South Wales Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas* (December 2014); Martin Moynihan, *Review of the Civil and Criminal Justice System in Queensland* (Report, 2008); Standing Committee of Attorneys-General, *Report of the Deliberative Forum on Criminal Trial Reform* (June 2000).

7 Criminal Law Committee of the Magistrates' Court of Victoria, *Magistrates' Court Response to the DPP's Proposed Reforms of the Committal Process* (10 April 2019), 1.

8 *Barton v The Queen* (1980) 147 CLR 75, 100.

9 *Cook v The Queen* [2019] VSCA 87, [23].

10 Kerry Stephens, 'Committals in Victoria—a Police Perspective' (Conference Paper, Australian Institute of Criminology, The Future of Committals, 1–2 May 1990) 158.

11 Department of Justice and Attorney-General, Queensland Government, *Reform of the Committal Proceedings Process* (Discussion Paper, 2008) 6 [5].

12 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August, 2016), 207.

13 See 'The right to a fair trial' in Chapter 5.

14 Criminal Law Committee of the Magistrates' Court of Victoria, *Magistrates' Court Response to the DPP's Proposed Reforms of the Committal Process* (10 April 2019) 1–2.





# Victoria's committal and pre-trial system

- 10** Introduction
- 11** Purpose of committal proceedings
- 12** Charging practices and the decision to prosecute
- 13** Disclosure obligations
- 14** Court events and case management
- 22** Commonwealth offences
- 22** Committal proceedings in the Children's Court
- 24** Direct indictments
- 25** Pre-trial witness examination
- 28** Time limits
- 30** Access to legal aid

---

## 3. Victoria's committal and pre-trial system

### Introduction

- 3.1 This chapter describes Victoria's committal and pre-trial system. A summary of significant data is provided after this introduction and illustrative data is set out where relevant throughout the chapter.
- 3.2 In Victoria, criminal offences are categorised as:
- summary offences—generally less serious charges that are heard and determined by a magistrate alone<sup>1</sup>
  - indictable offences—serious offences that are heard and determined in either the County or Supreme Courts before a judge and jury
  - indictable offences that may be heard and determined 'summarily' (in the same way as summary offences).<sup>2</sup>
- 3.3 All offences, regardless of category, start in the Magistrates' Court. Summary offences, and most indictable offences that may be heard and determined summarily, are dealt with in the Magistrates' Court.
- 3.4 Indictable offences are heard either by guilty plea, or trial before a jury, in the County or Supreme Court.<sup>3</sup> Before an indictable offence is transferred to a higher court, the case goes through a committal proceeding in the Magistrates' Court.<sup>4</sup>
- 3.5 The only indictable offences that do not go through a committal proceeding are cases where either:<sup>5</sup>
- the Director of Public Prosecutions (the DPP) files a 'direct indictment'<sup>6</sup>
  - the charge is appropriate to be heard and determined summarily and the accused person consents to this.<sup>7</sup>

---

1 See *Criminal Procedure Act 2009* (Vic) ch 3.

2 Ibid s 28. Schedule 2 contains a list of indictable offences that may be heard and determined summarily.

3 The County Court has jurisdiction to hear and determine all indictable offences except for serious offences such as treason, murder and attempted murder: *County Court Act 1958* (Vic) s 36A.

4 Cases in this category are often referred to as being in the 'committal stream' of the Magistrates' Court.

5 *Criminal Procedure Act 2009* (Vic) s 96.

6 Ibid ss 3, 161. The power to file a direct indictment, and the different circumstances in which a direct indictment can be filed, are discussed later in this chapter.

7 Ibid s 125(1)(b).

## Summary of significant committal data

3.6 In 2017–18:

- 3426 cases commenced in the committal stream of the Magistrates' Court<sup>8</sup>
- approximately one-third of committal stream cases were either dealt with summarily or withdrawn by the prosecution<sup>9</sup>
- of the cases dealt with summarily, 44 per cent resolved summarily at a committal mention, and 42 per cent resolved summarily at a committal hearing<sup>10</sup>
- around two-thirds of all committal stream cases, including those dealt with summarily and those committed to higher courts, involved a guilty plea prior to committal<sup>11</sup>
- 71 per cent of committal stream cases were committed to a higher court, either for trial or sentence<sup>12</sup>
- of the cases committed to a higher court, 46 per cent were committed on the basis of a guilty plea<sup>13</sup>
- when cases are committed to a higher court at a committal hearing, the median number of days they spend in the Magistrates' Court is 228<sup>14</sup>
- when cases are committed to a higher court at a committal mention, the median number of days they spend in the Magistrates' Court is 107<sup>15</sup>
- there were ten committal stream cases where a magistrate discharged all charges (so none were committed to a higher court) and 57 cases where some charges were discharged and some were committed to a higher court<sup>16</sup>
- the Director of Public Prosecutions (DPP) filed 19 direct indictments.<sup>17</sup>

## Purpose of committal proceedings

3.7 Section 97 of the *Criminal Procedure Act 2009* (Vic) (CPA) outlines the purposes of committal proceedings:

- to determine whether a charge for an offence is appropriate to be heard and determined summarily<sup>18</sup>
- to determine whether there is evidence of sufficient weight to support a conviction for the offence charged<sup>19</sup>
- to determine how the accused proposes to plead to the charge<sup>20</sup>
- to ensure the prosecution case against the accused is adequately disclosed<sup>21</sup>
- to enable the accused to hear or read the evidence against them and to cross-examine prosecution witnesses<sup>22</sup>
- to enable the accused to adequately prepare and present a case at an early stage<sup>23</sup>
- to enable the issues in contention to be adequately defined.<sup>24</sup>

8 Magistrates' Court of Victoria, *Committal Data Requested by the VLRC* (24 April 2019). See Table 1.

9 Ibid. See Table 1.

10 Ibid. See Table 3.

11 Criminal Law Committee of the Magistrates' Court of Victoria, *Magistrates' Court Response to the DPP's Proposed Reforms of the Committal Process* (10 April 2019).

12 Magistrates' Court of Victoria, *Committal Data Requested by the VLRC* (24 April 2019). See Table 1.

13 Ibid. See Table 6.

14 Ibid. See Table 10.

15 Ibid. See Table 11.

16 Ibid. See Table 4.

17 Office of Public Prosecutions Victoria, Response to the VLRC Request for Statistics, *Victorian Law Reform Commission Committals Reference* (24 April 2019).

18 *Criminal Procedure Act 2009* (Vic) s 97(a).

19 Ibid s 97(b).

20 Ibid s 97(c).

21 Ibid s 97(d)(i).

22 Ibid s 97(d)(ii).

23 Ibid ss 97(d)(iii)–(iv).

24 Ibid (Vic) s 97(d)(v).

- 3.8 These statutory purposes are broadly consistent with the common law characterisation of the purposes of committal proceedings as ‘an important element in the protection which the criminal process gives to an accused person’.<sup>25</sup>

## Charging practices and the decision to prosecute

- 3.9 Initial responsibility for investigating most criminal offences, and for filing charges, lies with Victoria Police.<sup>26</sup> The police officer who investigates and charges a person with a criminal offence, known as the ‘informant’, must comply with statutory requirements imposed by the CPA.<sup>27</sup> In addition, the *Victoria Police Manual* (VPM) requires the informant to:
- Ensure there is sufficient admissible evidence to cover all points of proof relevant to each charge and that there is a reasonable prospect of a conviction being secured.<sup>28</sup>
- 3.10 Once charges are filed, most cases involving indictable offences are prosecuted by the Office of Public Prosecutions (OPP) on behalf of the DPP.<sup>29</sup> Summary offences and most indictable offences able to be heard and determined summarily are prosecuted by Victoria Police.<sup>30</sup>
- 3.11 Decisions relating to the prosecution of an indictable case, such as which charges proceed and what evidence is relied on, are guided by the *Policy of the Director of Public Prosecutions for Victoria* (the Director’s Policy).<sup>31</sup> The Director’s Policy states that a prosecution must not proceed unless both of the following apply:
- there is a reasonable prospect of conviction
  - the prosecution is in the public interest.<sup>32</sup>
- 3.12 To determine whether there is a reasonable prospect of conviction, a range of factors are considered, including:
- all the admissible evidence
  - the reliability and credibility of the evidence
  - the possibility of evidence being excluded
  - any possible defence
  - whether the prosecution witnesses are available, competent and compellable
  - how the witnesses are likely to present in court.<sup>33</sup>
- 3.13 The Director’s Policy prescribes that charges that do not have a reasonable prospect of conviction must be abandoned at the earliest possible stage.<sup>34</sup>

25 *Barton v The Queen* (1980) 147 CLR 75, 99.

26 A number of statutory authorities, such as WorkSafe Victoria and the Environmental Protection Authority, also have the power to investigate, charge and prosecute offences under relevant legislation.

27 See *Criminal Procedure Act 2009* (Vic) pt 2. This sets out, among other things, how criminal proceedings are commenced (including by filing a charge-sheet), relevant time limits and the requirement that matters are listed for a mention or filing hearing in the Magistrates’ Court. Similar requirements specific to accused children are found in *Children, Youth and Families Act 2005* (Vic) pt 5.1A.

28 *Barton v The Queen* 147 CLR 75, 1.

29 *Public Prosecutions Act 1994* (Vic) ss 22(1), 41. Commonwealth offences, prosecuted by the Commonwealth Director of Public Prosecutions, are discussed later in this chapter.

30 See Director of Public Prosecutions for Victoria, *Policy of the Director of Public Prosecutions for Victoria* (27 March 2019) ch 8 <<http://www.opp.vic.gov.au/getattachment/b5d48af4-3bef-4650-84fa-6b9befc776e0/DPP-Policy.aspx>>.

31 Ibid.

32 Ibid [1].

33 Ibid [2].

34 Ibid [3].

## Disclosure obligations

- 3.14 The *Charter of Human Rights and Responsibilities Act 2006* (Vic) recognises that a person charged with a criminal offence in Victoria is entitled to be ‘informed promptly and in detail of the nature and reason for the charge’.<sup>35</sup>
- 3.15 A ‘brief of evidence’ is prepared by the informant. This contains the evidence relied on by the prosecution.
- 3.16 The brief of evidence is crucial to the committal process, not just for the parties but also for the magistrate, as the decision whether to commit the accused for trial is based on the information it contains.<sup>36</sup>
- 3.17 Depending on the case, the informant either prepares a ‘hand-up brief’<sup>37</sup> or a ‘plea brief’.<sup>38</sup> A hand-up brief must include any information, document or thing that is relevant to the alleged offending.<sup>39</sup> This includes items such as a copy of any witness statements made,<sup>40</sup> a list of any things the prosecution intends to tender as exhibits,<sup>41</sup> any record of the accused’s interview with police,<sup>42</sup> and a description of any forensic procedure, examination or test that has not yet been completed and on which the prosecution intends to rely as tending to establish the guilt of the accused.<sup>43</sup>
- 3.18 A plea brief, however, is prepared if the accused indicates an intention to plead guilty before the hand-up brief has been served. Less substantial than the hand-up brief, a plea brief need not contain all relevant material (as a hand-up brief does) so it can be compiled in a shorter timeframe.<sup>44</sup>
- 3.19 The informant’s disclosure obligations under the CPA are ongoing. Any material required to be included in the hand-up brief which comes into the informant’s possession after service of the hand-up brief must still be provided to the accused, the DPP and the court.<sup>45</sup>
- 3.20 While section 111 of the CPA makes specific reference to the informant’s ongoing disclosure obligations, the prosecution’s statutory disclosure obligations commence only once an accused has been committed for trial or a direct indictment is filed.<sup>46</sup> At common law, however, ‘there is no distinction for disclosure purposes to be drawn between the prosecution ... and the police informant’.<sup>47</sup>
- 3.21 There are no corresponding disclosure obligations on an accused prior to committal. Once a matter has been committed to a higher court for trial, however, the accused must comply with disclosure obligations prescribed by the higher court’s practice directions,<sup>48</sup> as well as a variety of notice requirements in the CPA<sup>49</sup> and under the *Evidence Act 2008* (Vic).

35 Section 25(2)(a).

36 See *Criminal Procedure Act 2009* (Vic) s 141.

37 Ibid ss 3, 110.

38 Ibid ss 116–17.

39 Ibid s 110(d).

40 Ibid ss 110(d)(iv), 110(e)(ii).

41 Ibid s 110(d)(viii).

42 Ibid s 110(d)(i).

43 Ibid s 110(d)(x).

44 For specific items that must be included in a plea brief, see *ibid* s 117.

45 Ibid s 111.

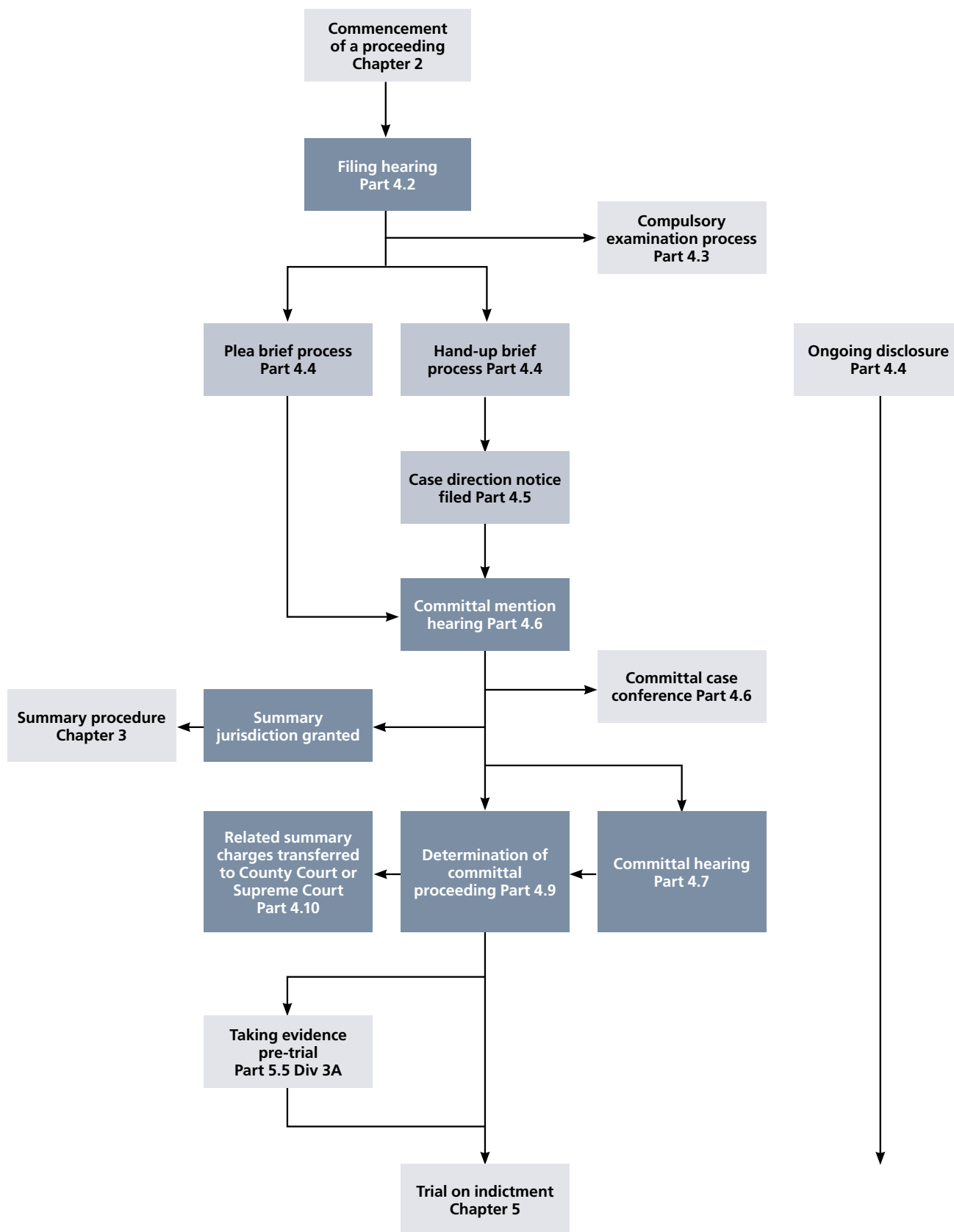
46 Ibid s 111.

47 *R v Farquharson* (2009) 26 VR 410, 464.

48 See County Court of Victoria, *Practice Note PNCR 1-2015: Criminal Division Practice Note* (13 November 2018); Supreme Court of Victoria, *Practice Note SC CR 8: Case Management Procedure for Criminal Trials* (1 January 2019); Supreme Court of Victoria, *Practice Note SC CR 8: Case Management Procedure for Criminal Trials* (1 January 2019).

49 For example, the requirement to provide notice of expert evidence and of any alibi evidence to be relied upon: *Criminal Procedure Act 2009* (Vic) ss 189–90.

Figure 1: Court events and case management<sup>50</sup>



Source: Department of Justice, Victoria. This is an updated version of a flowchart that appeared in Criminal Procedure Act 2009—Legislative Guide, February 2010. (chapter 4, p118).

- 3.22 This section discusses the variety of court events that make up the entire committal proceeding, including data relevant to each stage. The term ‘committal proceeding’ is used to refer to this process as a whole, whereas the term ‘committal hearing’ refers to the final court event, which often involves cross-examination of witnesses and a magistrate deciding whether to commit an accused person for trial.
- 3.23 All cases involving indictable offences, as well as some more serious cases involving indictable offences that can be heard and determined summarily, start in the ‘committal stream’ of the Magistrates’ Court.
- 3.24 Table 1 shows the number of cases that commence in the committal stream each year, and how many of these cases are committed to a higher court or finalised summarily.

**Table 1: Determination of committal stream cases<sup>51</sup>**

	Committed to higher courts		Finalised summarily <sup>52</sup>		Total no. of committal stream cases
	No. of cases	% of cases	No. of cases	% of cases	
<b>2013–14</b>	2,263	72%	871	28%	3,134
<b>2014–15</b>	1,979	69%	880	31%	2,859
<b>2015–16</b>	2,029	71%	825	29%	2,854
<b>2016–17</b>	2,253	71%	929	29%	3,182
<b>2017–18</b>	2,432	71%	994	29%	3,426

## Filing hearing

- 3.25 A committal proceeding commences at a filing hearing in the Magistrates’ Court.<sup>53</sup> This administrative hearing sets dates for service of the hand-up brief and a committal mention hearing, along with any other appropriate orders or directions.<sup>54</sup>

## Compulsory examination hearing

- 3.26 At any stage after filing a charge against an accused, but before a committal hearing,<sup>55</sup> the informant may seek an order requiring a person to attend court for examination, or to produce a document or some other thing.<sup>56</sup> A compulsory examination hearing can occur after the committal mention hearing only if the magistrate is satisfied that it is in the interests of justice.<sup>57</sup>
- 3.27 Compulsory examination hearings are most commonly used when a prosecution witness has refused to provide a written statement. The transcript of the compulsory examination hearing then constitutes the evidence of that witness and forms part of the brief of evidence.

## Special mention

- 3.28 A special mention may be held at any time during committal proceedings to allow a magistrate to amend the date of any hearing, conduct a committal mention, determine a committal proceeding, or make other orders or directions as appropriate.<sup>58</sup>

51 Magistrates’ Court of Victoria, *Committal Data Requested by the VLRC* (24 April 2019).

52 The number of cases dealt with summarily includes cases where an indictable charge that cannot be determined summarily is withdrawn by the prosecution and there are no other charges that are required to be determined by the higher court, as well as cases where all charges (indictable and summary) are withdrawn by the prosecution: *ibid.*

53 *Criminal Procedure Act 2009* (Vic) s 98.

54 *Ibid* s 101.

55 *Ibid* s 103.

56 *Ibid* s 103.

57 *Ibid* s 103(3).

58 *Ibid* s 153.

## Committal case conference

- 3.29 A magistrate may direct the accused and the prosecution to participate in a committal case conference. Committal case conferences should be held on the committal mention date wherever practicable.<sup>59</sup>
- 3.30 Committal case conferences aim to reduce the number of committal proceedings which resolve at the door of the court<sup>60</sup> by providing 'a more informal opportunity for the prosecution, the defence and the court to discuss the case and attempt to identify the key issues to be resolved'.<sup>61</sup>
- 3.31 Evidence of anything said or done in the course of a committal case conference is not admissible in any later proceeding unless all parties to the conference agree.<sup>62</sup>
- 3.32 The Magistrates' Court *Practice Direction 7 of 2013* currently restricts the use of committal case conferences to cases involving offences against the person, as well as armed robbery and aggravated burglary.<sup>63</sup>

## Committal mention

- 3.33 The committal mention is the central case management hearing in committal proceedings.<sup>64</sup> At this hearing, the magistrate may commit the accused for trial in a higher court, offer a summary hearing, determine an application for leave to cross-examine a witness, or make other appropriate orders or directions.<sup>65</sup>

## Case direction notice

- 3.34 A case direction notice, often referred to as a 'Form 32', is a document filed jointly by the parties with the Magistrates' Court. Its purpose, among other things, is to indicate to the court how the case is to proceed.<sup>66</sup>
- 3.35 Requiring the parties to jointly file this notice ensures the legal practitioners involved in a case will engage in discussion prior to the committal mention hearing. The purpose of this discussion is to lead to resolution of the case or identification of relevant issues.<sup>67</sup>
- 3.36 The case direction notice must be filed seven days prior to the committal mention hearing<sup>68</sup> and must include:
- the procedure proposed for dealing with the matter<sup>69</sup>
  - if the parties have not reached agreement, details of the issues which have prevented the case from resolving<sup>70</sup>
  - the names of any witnesses the accused seeks to cross-examine, and for each witness:
    - the issue which will be the subject of cross-examination
    - the reason the evidence is relevant to that issue
    - the reason cross-examination on that issue is justified<sup>71</sup>
    - whether the informant consents to or opposes the proposed cross-examination, and if the informant opposes it, his or her reason for doing so.<sup>72</sup>

59 *Criminal Procedure Act 2009* (Vic) s 127 (2).

60 Magistrates' Court of Victoria, *Practice Direction No 7 of 2013: Committal Case Conference*, 10 October 2013.

61 Judicial College of Victoria, 'Chapter 4.1—Preliminary Hearings', *Victorian Criminal Proceedings Manual* (Web Page, 19 July 2010) [30].

62 *Criminal Procedure Act 2009* (Vic) s 127(3).

63 Magistrates' Court of Victoria, *Practice Direction No 7 of 2013: Committal Case Conference*, 10 October 2013.

64 Explanatory Memorandum, *Criminal Procedure Bill 2009* (Vic) 48.

65 *Criminal Procedure Act 2009* (Vic) s 125.

66 *Ibid* s 119.

67 Magistrates' Court of Victoria, *Practice Direction No 6 of 2013: Directions Concerning the Case Direction Notice*, 10 October 2013.

68 *Criminal Procedure Act 2009* (Vic) s 118.

69 *Ibid* s 119(b).

70 Magistrates' Court of Victoria, *Practice Direction No 6 of 2013: Directions Concerning the Case Direction Notice*, 10 October 2013.

71 *Criminal Procedure Act 2009* (Vic) s 119(c).

72 *Ibid* s 119(d).



- 3.37 The case direction notice can also be used by the accused to request further disclosure, including of any document or thing the accused considers ought to have been included in the hand-up brief, or the particulars of previous convictions of any witness on whose evidence the prosecution intends to rely in the committal proceeding.<sup>73</sup>

### Straight hand-up brief and election to stand trial

- 3.38 As part of the case direction notice, the parties may ask that the court determine the committal proceeding at the committal mention hearing without the need for witnesses to be called. The accused must indicate whether they will agree to be committed for trial.<sup>74</sup> This process is referred to as a 'straight hand-up brief' and is the Victorian equivalent of a 'paper committal'.
- 3.39 Alternatively, an accused may elect to stand trial without a committal proceeding.<sup>75</sup> As soon as practicable after advising the court of this election, the accused must be brought before the court and the magistrate must commit the accused for trial in accordance with section 144 of the CPA.<sup>76</sup> In practice, however, election is rarely used in place of the straight hand-up brief procedure.

### Application for leave to cross-examine witnesses

- 3.40 If the case direction notice indicates that cross-examination of a witness or witnesses is sought, those witnesses cannot be cross-examined unless the court grants leave.<sup>77</sup> An application for leave to cross-examine witnesses is determined at a committal mention hearing.<sup>78</sup>
- 3.41 A magistrate must not grant leave to cross-examine a witness unless all of the following are satisfied:
- the accused has identified an issue to which the proposed questioning relates<sup>79</sup>
  - the accused has provided a reason the evidence of the witness is relevant to that issue<sup>80</sup>
  - cross-examination of the witness on that issue is justified.<sup>81</sup>
- 3.42 If leave is granted, the scope of the permitted cross-examination is limited to the issues identified.<sup>82</sup>
- 3.43 In sexual offence cases where the complainant is a child or cognitively impaired, the court cannot grant leave to cross-examine any witness during a committal proceeding.<sup>83</sup> In all other sexual offence cases, the general rules relating to cross-examination of witnesses apply.
- 3.44 Table 2 outlines how many applications for leave to cross-examine witnesses at committal hearings were made in the last five years. This is based on number of applications, not on individual witnesses.<sup>84</sup>

73 *Criminal Procedure Act 2009* (Vic) s 119(e).

74 See *Magistrates' Court Criminal Procedure Rules 2009* (Vic) Form 32.

75 *Criminal Procedure Act 2009* (Vic) s 143.

76 *Ibid* s 143(4).

77 *Ibid* s 124(1).

78 *Ibid* s 125(1)(c).

79 *Ibid* s 124(3)(a).

80 *Ibid* s 124(3)(a).

81 *Ibid* s 124(3)(b).

82 *Ibid* ss 132, 132A.

83 *Ibid* s 123.

84 Magistrates' Court of Victoria, *Committal Data Requested by the VLRC* (24 April 2019).

**Table 2: Number and outcome of applications for leave to cross-examine witnesses at committal hearing<sup>85</sup>**

	Granted <sup>86</sup>		Struckout <sup>87</sup>		Refused		Total no. of applications
	No. of applications	% of total no. of applications	No. of applications	% of total no. of applications	No. of applications	% of total no. of applications	
<b>2013–14</b>	1,290	90.0%	137	9.6%	6	0.4%	1433
<b>2014–15</b>	1,233	90.5%	120	8.8%	9	0.7%	1362
<b>2015–16</b>	1,205	89.0%	138	10.0%	11	1.0%	1354
<b>2016–17</b>	1,410	86.9%	197	12.1%	16	1.0%	1623
<b>2017–18</b>	1,569	90.5%	147	8.5%	18	1.0%	1734

### Applications for summary jurisdiction

- 3.45 A case can be dealt with summarily in the Magistrates' Court if the only charges remaining are either summary charges or indictable charges able to be determined summarily. This means that all other indictable charges have been withdrawn or discharged.
- 3.46 If this occurs, the accused can make an application for summary jurisdiction.<sup>88</sup> If granted, the case is removed from the committal stream and is dealt with summarily in accordance with section 30 of the CPA. This may be for a plea hearing, or if the accused pleads not guilty to the remaining offences, for a summary hearing where the magistrate hears the evidence and determines whether the accused is guilty or not guilty.
- 3.47 Of committal stream cases dealt with summarily, Table 3 shows at which stage of the committal process those cases were finalised.

**Table 3: Stage when committal stream cases were finalised summarily<sup>89</sup>**

	Filing hearing <sup>90</sup>		Committal mention		Committal case conference <sup>91</sup>		Committal hearing <sup>92</sup>		Committal hearing (sexual offence) <sup>93</sup>		No. of cases finalised summarily
	No. of cases	% of cases	No. of cases	% of cases	No. of cases	% of cases	No. of cases	% of cases	No. of cases	% of cases	
<b>2013–14</b>	61	7.0%	464	53.3%	13	1.5%	310	35.6%	23	2.6%	871
<b>2014–15</b>	108	12.3%	408	46.4%	97	11.0%	237	27.0%	29	3.3%	880
<b>2015–16</b>	86	10.4%	402	48.7%	59	7.2%	250	30.3%	28	3.4%	825
<b>2016–17</b>	68	7.3%	419	45.1%	91	9.8%	326	35.1%	25	2.7%	929
<b>2017–18</b>	65	6.5%	433	43.6%	69	7.0%	413	41.5%	14	1.4%	994

<sup>85</sup> Magistrates' Court of Victoria, *Committal Data Requested by the VLRC* (24 April 2019).

<sup>86</sup> If a magistrate determines that one or more of the witnesses listed in the application are not to be cross-examined, but one or more other witnesses are to be cross-examined, the application is reflected in this data as granted: *ibid.*

<sup>87</sup> This involves situations where the same application has been listed twice, or when the parties have resolved the matter in a different way than indicated on their case direction notice meaning the application no longer requires determination: *ibid.*

<sup>88</sup> *Criminal Procedure Act 2009* (Vic) ss 30, 125(1)(b).

<sup>89</sup> Magistrates' Court of Victoria, *Committal Data Requested by the VLRC* (24 April 2019).

<sup>90</sup> It is likely that cases determined summarily at filing hearing have come before the court as a result of an executed warrant to arrest where a brief has previously been served or where indictable charges are withdrawn at the filing hearing stage, leaving only summary charges: *ibid.*

<sup>91</sup> All committal stream cases must be listed for a filing hearing and a committal mention but not every case will be listed for a committal case conference or a committal hearing: *ibid.*

<sup>92</sup> See note 90 above.

<sup>93</sup> During the filing hearing and committal mention phase, sexual offence cases are not separated from other types of cases. Once a case is listed for committal hearing, some sexual offence cases are listed under a separate 'Committal hearing (sexual offence)' type, and some are listed under the general committal hearing type: Magistrates' Court of Victoria, *Committal Data Requested by the VLRC* (24 April 2019).

## The committal hearing

- 3.48 At the committal hearing, a magistrate considers whether to commit the accused to stand trial based on the material in the hand-up brief, together with any other evidence given during the hearing.<sup>94</sup> The court relies on the hand-up brief as the evidence in the case, along with any oral evidence.<sup>95</sup>
- 3.49 During the hearing, the magistrate hears the evidence for the prosecution and, if the defence wishes to give evidence, for the defence.<sup>96</sup>
- 3.50 Over the last ten years, the average duration of committal hearings was 1.47 days.<sup>97</sup>

## Cross-examination of witnesses at the committal hearing

- 3.51 If leave has been granted to cross-examine a witness, this occurs at the committal hearing. The ability to cross-examine prosecution witnesses during a committal hearing gives the accused an opportunity to explore and test the prosecution case.<sup>98</sup> The transcript of this evidence, as well as any statements admitted into evidence during the committal proceeding, are called the 'depositions' in a case.<sup>99</sup> The depositions are important if the accused is committed for trial, as they are relied upon by parties to prepare the case for trial, as well as by the higher court hearing the case.
- 3.52 If a witness fails to appear at the committal hearing, the magistrate may adjourn the hearing, issue a summons or warrant of arrest for the witness or continue with the committal in the absence of the witness.<sup>100</sup> If the committal hearing proceeds in the absence of the witness, any statement previously made by the witness is inadmissible as evidence in the committal hearing.<sup>101</sup>

## The test for committal

- 3.53 Following a committal hearing, the magistrate must determine whether the evidence is of sufficient weight to support a conviction.<sup>102</sup> If so satisfied, the magistrate must commit the accused for trial.<sup>103</sup> The DPP may then file an indictment in either the Supreme or County Court, depending on the seriousness of the charge, complexity of the case and any other factors the DPP considers relevant.<sup>104</sup>
- 3.54 If the magistrate decides the evidence is not of sufficient weight to support a conviction for any indictable offence, the accused must be discharged.<sup>105</sup>
- 3.55 Table 4 shows the number of committal stream cases which are discharged each year.

**Table 4: Outcome of committal hearings<sup>106</sup>**

	2013–14	2014–15	2015–16	2016–17	2017–18
Cases with at least one charge discharged, none committed <sup>107</sup>	17	7	7	8	10
Cases with some charges discharged, some committed	91	57	54	61	57

94 *Criminal Procedure Act 2009* (Vic) s 141(4).

95 *Ibid* s 139.

96 *Ibid* s 141.

97 Office of Public Prosecutions Victoria, Response to VLRC Request for Statistics, *Victorian Law Reform Commission Committals Reference* (24 April 2019). This average includes committal hearings with all types of outcomes including adjournments and pleas of guilty without any evidence being taken.

98 *Tural v Potter* (2000) 110 A Crim R 475, 484.

99 *Criminal Procedure Act 2009* (Vic) s 3.

100 *Ibid* s 129.

101 *Ibid* s 134.

102 *Criminal Procedure Act 2009* (Vic) s 128.

103 *Ibid* s 141(4)(b).

104 *Ibid* s 160.

105 *Ibid* s 141(4)(a).

106 Magistrates' Court of Victoria, *Committal Data Requested by the VLRC* (24 April 2019).

107 This includes cases that may have had charges determined summarily in the Magistrates' Court: *ibid*.

3.56 By comparison, Table 5, based on data provided by the OPP, breaks down the outcomes of committal hearings over the past five years.<sup>108</sup> The number of cases reported differs slightly from the number of cases provided by the Magistrates' Court in Table 1.

**Table 5: Outcome of committal hearings according to OPP<sup>109</sup>**

	Committed <sup>110</sup>		Adjourned		Charges withdrawn		Summary jurisdiction granted		Discharged		Total <sup>111</sup>
	No.	%	No.	%	No.	%	No.	%	No.	%	No.
<b>2013–14</b>	1081	50.9%	727	34.3%	52	2.5%	84	4.0%	26	1.2%	<b>2122</b>
<b>2014–15</b>	926	47.4%	721	36.9%	46	2.4%	93	4.8%	18	0.9%	<b>1953</b>
<b>2015–16</b>	929	50.9%	654	35.8%	30	1.6%	66	3.6%	25	1.4%	<b>1826</b>
<b>2016–17</b>	1026	54.8%	623	33.3%	26	1.4%	48	2.6%	30	1.6%	<b>1872</b>
<b>2017–18</b>	1292	54.2%	745	31.3%	56	2.3%	116	4.9%	33	1.4%	<b>2384</b>

## Guilty pleas

3.57 If an accused enters a plea of guilty to an indictable offence at any stage during the committal proceeding, a magistrate must consider the evidence and if satisfied it is of sufficient weight to support a conviction,<sup>112</sup> may commit the accused for trial in a higher court.<sup>113</sup>

3.58 Alternatively, if an application for summary jurisdiction has been granted, a guilty plea may be dealt with in the Magistrates' Court.

3.59 The *Sentencing Act 1991* (Vic) encourages early guilty pleas by requiring the sentencing court to have regard to whether the offender entered a guilty plea and at what stage in the proceedings this occurred.<sup>114</sup>

3.60 Unlike some other jurisdictions, Victoria does not prescribe a specific discount offered to offenders for a guilty plea.<sup>115</sup>

3.61 Rather, Victorian courts take an 'instinctive synthesis' approach to sentencing.<sup>116</sup> This process requires that:

the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case. Only at the end of the process does the judge determine the sentence.<sup>117</sup>

108 This table relates to outcomes of the final committal *hearing*, not outcomes of committal proceedings more broadly.  
109 Office of Public Prosecutions Victoria, Response to VLRC Request for Statistics, *Victorian Law Reform Commission Committals Reference* (24 April 2019).

110 This includes cases that were committed at the committal hearing where the accused pleaded guilty or not guilty: *ibid*.

111 In addition to this total, each year approximately 135 records have been created where the outcome of the committal hearing, if any, is not known due to errors in data entry. This includes situations where no result was entered for the hearing, the hearing was booked in error, vacated, closed by the system or prosecuted by an agency other than the Office of Public Prosecutions: *ibid*.

112 *Criminal Procedure Act 2009* (Vic) s 142(1).

113 The language in the CPA does not distinguish between cases committed for trial following a not guilty plea and those where a guilty plea has been entered and the higher court will sentence the accused.

114 See *Sentencing Act 1991* (Vic) s 5(2)(e).

115 For example, South Australia provides for reduction of the sentence the court would otherwise have imposed of up to 40 per cent if a plea is entered within four weeks of a defendant's first court appearance. This reduces incrementally until reaching a possible sentence reduction of up to 10 per cent if a guilty plea is entered immediately after arraignment and up to the commencement of the trial: *Sentencing Act 2017* (SA) ss 39–40.

116 *R v Williscroft* [1975] VR 292, 300.

117 *Markarian v The Queen* (2005) 228 CLR 357, 378 [51].

## Data relating to guilty pleas

- 3.62 Approximately two-thirds of all cases in the committal stream currently resolve prior to committal hearing with a plea of guilty.<sup>118</sup> This includes guilty pleas that are heard and determined in the higher courts, as well as guilty pleas that are heard and determined summarily.
- 3.63 In 2017–18:
- the OPP handled 2,995 new briefs for prosecution in the higher courts
  - 91.8 per cent of prosecutions completed resulted in a guilty outcome
  - 80.4 per cent of prosecutions were finalised as a guilty plea
  - of the cases that involved a guilty plea, 79.4 per cent of these guilty pleas were achieved by committal.<sup>119</sup>
- 3.64 The OPP has also provided data to the Commission which shows that of cases committed for trial following a committal hearing over the last ten years:
- 67.73 per cent of accused pleaded not guilty
  - 26.55 per cent of accused pleaded guilty
  - 4.56 per cent of accused entered a mixed plea
  - 1.15 per cent of accused reserved their plea.<sup>120</sup>
- 3.65 Of all cases committed to a higher court (regardless of which stage of committal proceeding this occurs), Table 6 shows the percentage of those cases that involved guilty pleas at the time of committal.

**Table 6: Cases committed to higher courts where guilty plea entered at time of committal<sup>121</sup>**

	2013–14	2014–15	2015–16	2016–17	2017–18
Number of cases committed to higher courts	2,263	1,979	2,029	2,253	2,432
Percentage of these cases where guilty plea entered at time of committal (%)	49.5%	50.0%	51.4%	54.0%	45.8%

118 Criminal Law Committee of the Magistrates' Court of Victoria, *Magistrates' Court Response to the DPP's Proposed Reforms of the Committal Process* (10 April 2019).

119 Victoria Director of Public Prosecutions, *Annual Report 2017–18* (2018) 11–12.

120 Office of Public Prosecutions Victoria, Response to VLRC Request for Statistics, *Victorian Law Reform Commission Committals Reference* (24 April 2019).

121 Magistrates' Court of Victoria, *Committal Data Requested by the VLRC* (24 April 2019).

- 3.66 In 2015, the Victorian Sentencing Advisory Council examined the timing of guilty pleas in higher courts.<sup>122</sup> Of cases involving a guilty plea, Table 7 shows the point at which offenders pleaded guilty. While this data is not current, it demonstrates when a majority of pleas are entered and how many occur late in the process.

**Table 7: Timing of guilty pleas for all proven cases in the County and Supreme Courts 2009–10 to 2013–14<sup>123</sup>**

Court event	Number of cases	% of cases <sup>124</sup>
Committal stage (Magistrates' Court)	5,546	55.4%
Callover/case conference (in higher court)	128	1.3%
At higher court directions hearing	230	2.3%
After higher court directions hearing	1,421	14.2%
Door of higher court	1,307	13.1%
During higher court trial	268	2.7%
Found guilty at trial	1,095	11.0%

## Commonwealth offences

- 3.67 Victorian courts have jurisdiction to hear matters relating to Commonwealth criminal offences. Victoria's criminal procedure rules apply in these instances.<sup>125</sup>
- 3.68 Commonwealth offences are prosecuted by the Commonwealth Director of Public Prosecutions (Commonwealth DPP).<sup>126</sup> Prosecutorial decisions are governed by the *Prosecution Policy of the Commonwealth*.<sup>127</sup>
- 3.69 If the court determines the evidence is of sufficient weight to support a conviction in relation to a Commonwealth offence, the accused may be committed for trial in either the Federal Court or a Victorian higher court. Before committing a matter for trial the magistrate must invite the Commonwealth DPP to suggest the appropriate court in which the matter should be heard.<sup>128</sup>

## Committal proceedings in the Children's Court

- 3.70 The Criminal Division of the Children's Court has jurisdiction to both:
- hear and determine all charges against children for summary offences<sup>129</sup>
  - hear and determine summarily all charges against children for indictable offences, other than categorised offences such as murder, attempted murder and manslaughter.<sup>130</sup>

122 Victoria Sentencing Advisory Council, *Guilty Pleas in the Higher Courts: Rates, Timing, and Discounts* (August 2015).

123 Ibid [2.36].

124 The total number of proven cases in the County and Supreme Courts between 2009–10 and 2013–14 was 9,995: *ibid* [2.36].

125 *Judiciary Act 1903* (Cth) s 68.

126 *Director of Public Prosecutions Act 1983* (Cth).

127 See Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (undated) <<https://www.cdpp.gov.au/prosecution-process/prosecution-policy>>.

128 *Judiciary Act 1903* (Cth) s 68A.

129 *Children, Youth and Families Act 2005* (Vic) s 516(1)(a).

130 *Ibid* s 516(1)(b).

- 3.71 In 2018, amendments to the *Children, Youth and Families Act 2005* (Vic)<sup>131</sup> (CYFA) created two categories of offence:
- Category A serious youth offences—if an accused child is aged 16 or over at the time of the offence, it is presumed that these cases will be determined in a higher court.<sup>132</sup>
  - Category B serious youth offences—if an accused child is aged 16 or over at the time of the offence, the Children’s Court must consider whether the charge is suitable to be heard and determined summarily before proceeding.<sup>133</sup>
- 3.72 Where an offence is too serious to be dealt with in the Children’s Court, or it determines it unsuitable to do so, the case is ‘uplifted’ to a higher court. Before being transferred, committal proceedings are conducted in the Children’s Court<sup>134</sup> and follow the procedure prescribed in the CPA.<sup>135</sup>
- 3.73 Prior to the 2018 amendments, the only offences that could not be dealt with by the Children’s Court were six death-related offences.<sup>136</sup> Applications for uplift could be made in other serious matters involving an accused child but it was uncommon for the Court to find that a charge should be dealt with in a superior court.<sup>137</sup>
- 3.74 Table 8 captures information about committal cases in the Children’s Court.

**Table 8: Committal cases in the Children’s Court<sup>138</sup>**

	2014–15	2015–16	2016–17	2017–18	2018-19 <sup>139</sup>
Committal stream cases initiated <sup>140</sup>	9	15	13	22	45 <sup>141</sup>
Cases committed without a committal hearing <sup>142</sup>	2	2	4	2	4
Committal hearings	1	3	2	4	6
Cases discharged following committal hearing	0	0	0	0	1
Matters dealt with summarily	0	4	4	5	19
Other <sup>143</sup>	1	1	4	1	1

- 3.75 This shows that following the 2018 CYFA amendments, there has been a two-fold increase in the number of initiations in the Children’s Court committal stream.<sup>144</sup>

131 See *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (Vic).  
 132 *Children, Youth and Families Act 2005* (Vic) ss 3(1), 356(6). See section 356(6) for the list of circumstances in which a court may consider keeping some Category A offences in the Children’s Court.  
 133 Ibid ss 3(1), 356(8). See s 356(8) for a list of the court’s mandatory considerations when making this determination.  
 134 Ibid ss 356(3), 516(1)(c).  
 135 Ibid s 528(2)(b).  
 136 Murder, attempted murder, manslaughter, child homicide, arson causing death and culpable driving causing death: ibid s 356(1).  
 137 Children’s Court of Victoria, ‘Criminal Division—Procedure’, *Children’s Court Research Materials* (Web Page, 2 April 2019) [10.1].  
 138 Response to Request for Children’s Court Data Email from Children’s Court of Victoria to Victorian Law Reform Commission, 16 May 2019.  
 139 The figure in this column reflects data as at 10 May 2019, but more cases are likely to have been initiated prior to 1 July 2019: ibid.  
 140 When considering this data, it is important to remember that while a matter may be initiated in a certain reporting period, it may not necessarily be finalised in that same period: ibid.  
 141 Of these 45 cases, four involved a death-related offence, 39 involved a Category A serious youth offence and the two remaining matters were considered unsuitable for summary jurisdiction: ibid.  
 142 This involves cases where pleas of guilty or not guilty (straight hand-up brief) were entered: ibid.  
 143 The Children’s Court notes that further analysis is needed to explain what cases fall within this category: ibid.  
 144 Response to Request for Children’s Court Data Email from Children’s Court of Victoria to Victorian Law Reform Commission, 16 May 2019.

## Direct indictments

- 3.76 The DPP has the power to directly indict an accused person for trial.<sup>145</sup> This power rests solely with the DPP and is not subject to judicial review.<sup>146</sup>
- 3.77 The DPP can directly indict an accused after a magistrate has discharged that accused following a committal hearing,<sup>147</sup> but to do so involves the DPP making a 'special decision'.<sup>148</sup> The DPP can only make a special decision after having obtained the advice of the Director's Committee.<sup>149</sup>
- 3.78 The Director's Policy states that a direct indictment can be filed after an accused has been discharged at committal only if, in the view of the Director's Committee, all of the following apply:
- the magistrate made an error in discharging the accused
  - the DPP's criteria governing the decision to prosecute are satisfied
  - there has not been unreasonable delay between the accused being discharged and the decision to directly indict.<sup>150</sup>
- 3.79 The Director's Policy also provides that a direct indictment may be filed where no committal has been held, if:
- there are strong grounds justifying a trial without a committal
  - a trial without a committal would not be unfair to the accused.<sup>151</sup>
- 3.80 Table 9 below shows how many direct indictments were filed by the DPP over the last five years. The OPP does not have specific data about how many were filed following discharge by a magistrate at committal.<sup>152</sup>

**Table 9: Direct indictments filed by the DPP<sup>153</sup>**

	2013–14	2014–15	2015–16	2016–17	2017–18
Direct indictments	21	15	11	16	19

145 *Criminal Procedure Act 2009* (Vic) ss 3, 159, 161.

146 *Maxwell v The Queen* (1996) 184 CLR 501, 534.

147 *Criminal Procedure Act 2009* (Vic) s 156(a), 159(2).

148 *Public Prosecutions Act 1994* (Vic) s 3.

149 Ibid. The Director's Committee consists of the DPP, the Chief Crown Prosecutor and the Solicitor for Public Prosecutions, and in relation to a special decision, the most senior lawyer involved in the case: Office of Public Prosecutions Victoria, 'Director's Committee', (Web Page, 2016) <<http://www.opp.vic.gov.au/About-Us/Who-we-are-and-what-we-do/Director-s-Committee>>.

150 Director of Public Prosecutions for Victoria, *Policy of the Director of Public Prosecutions for Victoria* (27 March 2019) [7] <<http://www.opp.vic.gov.au/getattachment/b5d48af4-3bef-4650-84fa-6b9befc776e0/DPP-Policy.aspx>>.

151 Ibid [8].

152 Office of Public Prosecutions Victoria, Response to VLRC Request for Statistics, *Victorian Law Reform Commission Committals Reference* (24 April 2019).

153 Ibid.



## Pre-trial witness examination

- 3.81 Committal hearings are not the only occasion prior to trial when witnesses may be required to give evidence. Different pre-trial mechanisms for cross-examination of witnesses apply to different types of cases and in a variety of circumstances.
- 3.82 This section outlines the different ways a witness can be required to give evidence prior to trial.

## General (non-sexual offence) cases

### Section 198B

- 3.83 Codifying hearings previously known as '*Basha hearings*',<sup>154</sup> section 198B of the CPA allows an accused person to apply for an order permitting cross-examination of a witness. This cannot be granted unless the court is satisfied that it is necessary to do so in order to avoid a serious risk that the trial would be unfair.<sup>155</sup>
- 3.84 An order under section 198B can be made both before and during a trial.<sup>156</sup> If made during trial, cross-examination takes place in the absence of the jury.<sup>157</sup>
- 3.85 The same restrictions that apply when granting leave to cross-examine a witness during a committal hearing apply when deciding whether to make an order under section 198B.<sup>158</sup>

### Section 198

- 3.86 If a witness is not available at the time set for the trial, an order may be granted for their examination to take place prior to trial.<sup>159</sup> This type of order must not be made unless the court is satisfied it is in the interests of justice to do so.<sup>160</sup>

## Voir dire

- 3.87 A '*voir dire*' is a 'hearing in which a court determines questions of fact and law after hearing evidence from witnesses'.<sup>161</sup>
- 3.88 The *voir dire* process is based in common law.<sup>162</sup>
- 3.89 It is rare that a witness who has given evidence at a committal hearing will also be required to give evidence at a *voir dire*.<sup>163</sup> Evidence given during a *voir dire* does not form part of the evidence in the trial,<sup>164</sup> but is instead given to allow the judge to determine a question of law such as whether the evidence of a witness is admissible, or whether it should be rejected on discretionary grounds.<sup>165</sup>

154 The common law procedure of an accused cross-examining a witness to enable the accused to adequately prepare and present a defence, derived from *R v Basha* (1989) 39 A Crim R 337, has been abolished: *Criminal Procedure Act 2009* (Vic) s 198C.

155 *Criminal Procedure Act 2009* (Vic) s 198B(3).

156 *Ibid* s 198B(6).

157 *Ibid* s 198B(7).

158 *Ibid* s 198B(4).

159 *Ibid* s 198.

160 *Ibid* s 198.

161 Judicial College of Victoria, 'Chapter 17–*Voir Dire*', *Magistrates' Court Bench Book* (Web Page, 28 August 2013) [1].

162 See *ibid* for a discussion of the relevant authorities.

163 *Ibid* [9].

164 *Ibid* [26].

165 *Ibid* [4].

## Sexual offences

3.90 When applying the sections of the CPA which deal with witnesses in sexual offence cases, courts are required to have regard to the fact that:

- there is a high incidence of sexual violence within society
- sexual offences are significantly underreported
- a significant number of sexual offences are committed against women, children and other vulnerable persons including persons with a cognitive impairment
- offenders are commonly known to their victims
- sexual offences often occur in circumstances where there is unlikely to be any physical sign of an offence having occurred.<sup>166</sup>

### Section 198A

3.91 Witnesses in a sexual offence case involving a complainant who is either under the age of 18 or cognitively impaired cannot be ordered to be cross-examined during a committal hearing. Section 198A, however, allows an accused to make an application to cross-examine a witness *other than the complainant* at any time except during a trial.<sup>167</sup>

3.92 An application under section 198A must state:

- each issue for which leave to cross-examine is sought
- the reason the evidence of the witness is relevant to the issue
- the reason cross-examination of the person on the issue is justified.<sup>168</sup>

### Special hearings

3.93 If a complainant in a sexual offence case is under the age of 18 or has a cognitive impairment, the whole of their evidence (including cross-examination) must be given either before or during the trial at a 'special hearing'.<sup>169</sup> If held during a trial, the jury must be present during the special hearing.<sup>170</sup>

3.94 If the special hearing takes place prior to the trial, the audio-visual recording of the special hearing constitutes the complainant's evidence at trial and is played for the jury.<sup>171</sup>

3.95 During the special hearing, the accused cannot be in the same room as the complainant but is entitled to see and hear the evidence being taken.<sup>172</sup>

3.96 Once evidence is given at a special hearing, the court can only grant leave to cross-examine or re-examine a witness in limited circumstances.<sup>173</sup>

### Recorded evidence-in-chief

3.97 In cases involving sexual offences, family violence or assault,<sup>174</sup> a recording of a witness answering questions put to them by the informant (or by another person prescribed in the CPA) can be played during a trial in place of that witness giving evidence-in-chief.<sup>175</sup>

3.98 This only applies to witnesses who are either under the age of 18 or who have a cognitive impairment.<sup>176</sup>

---

166 *Criminal Procedure Act 2009* (Vic) s 338.

167 *Ibid* s 198A(2).

168 *Ibid* s 198A(3).

169 *Ibid* s 370.

170 *Ibid* s 372(1)(ba).

171 *Ibid* s 374.

172 *Ibid* s 372.

173 *Ibid* s 376.

174 *Ibid* s 366.

175 *Ibid* s 367.

176 *Ibid* s 366.

## Other protections for witnesses

- 3.99 Throughout a criminal proceeding, there are a number of other procedures and rules protecting witnesses in sexual offence (and other) cases. They include:
- a prohibition on questions that relate to a complainant's chastity<sup>177</sup>
  - a restriction on questioning that relates to a complainant's prior sexual history<sup>178</sup>
  - a prohibition on a protected witness<sup>179</sup> in a sexual offence case or a case involving family violence, from being personally cross-examined by the accused<sup>180</sup>
  - provision for alternative arrangements for giving evidence for witnesses in cases involving sexual offences and family violence, such as giving evidence by CCTV, from behind a screen or in the presence of a support person.<sup>181</sup>

## Intermediaries for witnesses and ground rules hearings

- 3.100 Following recommendations made by the Commission in 2016,<sup>182</sup> an intermediary scheme was established.<sup>183</sup> Appointed by the court in certain cases, an intermediary's role is to facilitate communication between witnesses under the age of 18 or with a cognitive impairment ('vulnerable witnesses'),<sup>184</sup> and the court.<sup>185</sup> The CPA allows intermediaries to be appointed for vulnerable witnesses at any stage of a criminal proceeding, including committal hearings.<sup>186</sup>
- 3.101 As an officer of the court, an intermediary has a duty to act impartially when helping a witness to communicate their evidence.<sup>187</sup>
- 3.102 A ground rules hearing can be ordered whether or not an intermediary has been appointed. A ground rules hearing involves a discussion between the parties, the court and any intermediary appointed about how a vulnerable witness's evidence will be taken.<sup>188</sup> This may involve the court making directions about particular issues, such as how and for how long a witness is to be questioned and the use of aids to help communicate a question or an answer.<sup>189</sup>
- 3.103 Ground rules hearings can only be held in cases involving charges for a sexual offence, charges that arise in circumstances of family violence, or charges involving an assault on, or injury or a threat of injury to, a person.<sup>190</sup>
- 3.104 The Intermediary Pilot Program is in operation until 30 June 2020, and limits the use of intermediaries and ground rules hearings to:
- complainants in sexual offence cases who are under the age of 18 or cognitively impaired<sup>191</sup>
  - witnesses in homicide matters who are under the age of 18 or cognitively impaired.<sup>192</sup>

177 *Criminal Procedure Act 2009* (Vic) s 341.

178 *Ibid* s 342.

179 A 'protected witness' includes the complainant, a family member of the complainant, a family member of the accused, or any other witness whom the court declares to be a protected witness: *ibid* s 354.

180 *Ibid* s 356.

181 *Criminal Procedure Act 2009* (Vic) ss 359–65.

182 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August, 2016) 174.

183 *Criminal Procedure Act 2009* (Vic) pt 8.2A.

184 County Court of Victoria, *Multi-Jurisdictional Court Guide for the Intermediary Pilot Program: Intermediaries and Ground Rules Hearings*, 28 June 2018, [5].

185 *Criminal Procedure Act 2009* (Vic) s 389I.

186 *Ibid* s 389F.

187 *Ibid* s 389I.

188 For a best practice example of how a ground rules hearing is conducted both with and without an intermediary, the Judicial College of Victoria's has prepared a video available on its webpage: Judicial College of Victoria, 'Ground Rules Hearings', (Web Page, 29 April 2019) <<http://www.judicialcollege.vic.edu.au/node/1312>>.

189 *Criminal Procedure Act 2009* (Vic) s 389E.

190 *Ibid* s 389A(1).

191 County Court of Victoria, *Multi-Jurisdictional Court Guide for the Intermediary Pilot Program: Intermediaries and Ground Rules Hearings*, 28 June 2018, [11.1].

192 *Ibid* [11.2].

- 3.105 The operation of the Intermediary Pilot Program, including the process through which an intermediary is appointed, is outlined in the County Court’s ‘Multi-Jurisdictional Court Guide for the Intermediary Pilot Program’. This is supplemented by the Magistrates’ Court Practice Direction 6 of 2018.

## Time limits

- 3.106 There are a variety of time limits that the parties must adhere to in committal proceedings, designed to assist with the court’s management of cases. For example, a committal mention hearing must be held within six months<sup>193</sup> of the commencement of the proceeding, unless it is in the interests of justice to extend this time,<sup>194</sup> and parties are required to engage in discussions to explore resolution of the case at least 14 days prior to a committal mention hearing.<sup>195</sup>
- 3.107 Another important timeframe, which is fixed by a magistrate at filing hearing, is the date by which the informant must serve the hand-up brief on the accused and prosecution. In most cases, this must be at least 42 days prior to the committal mention.<sup>196</sup>
- 3.108 Table 10 shows the median number of days it takes for a case to be committed to a higher court when this happens at a committal hearing.<sup>197</sup>

**Table 10: Median time (days) for a case to be committed at committal hearing<sup>198</sup>**

	2013–14	2014–15	2015–16	2016–17	2017–18
Filing hearing to committal hearing <sup>199</sup>	185	193	214	232	228
Filing hearing to committal hearing (sexual offence)	153	151	194	208	193*

\* denotes that there were less than 100 cases in this particular category.

- 3.109 By comparison, Table 11 shows the median number of days it takes for a case to be committed to a higher court when this happens at either a committal mention or committal case conference.<sup>200</sup>

**Table 11: Median time (days) for a case to be committed at committal mention or case conference<sup>201</sup>**

	2013–14	2014–15	2015–16	2016–17	2017–18
Filing hearing to committal mention	91	97	98	104	107
Filing hearing to committal case conference	105	85	84	84	84

193 This period is reduced to 3 months in sexual offence cases: *Criminal Procedure Act 2009* (Vic) s 126(1)(a).  
 194 *Ibid* s 126.  
 195 Magistrates’ Court of Victoria, *Practice Direction No 6 of 2013: Directions Concerning the Case Direction Notice*, 10 October 2013.  
 196 *Criminal Procedure Act 2009* (Vic) s 108.  
 197 Where a case commenced in the summary stream and was then transferred to the committal stream, the number of days the matter was in the summary stream are not included: Magistrates’ Court of Victoria, *Committal Data Requested by the VLRC* (24 April 2019).  
 198 *Ibid*.  
 199 Some sexual offence committal hearings may be included in this data: *ibid*.  
 200 Where a case commenced in the summary stream and was then transferred to the committal stream, the number of days the matter was in the summary stream are not included: *ibid*.  
 201 *Ibid*.

- 3.110 In Tables 10 and 11, cases where one or more warrants to arrest were issued were removed from the dataset to avoid inflating the median number of days.<sup>202</sup>
- 3.111 The overall time frame to complete the prosecution of an indictable case was an average of 17.6 months in 2016–17<sup>203</sup> and 15.5 months in 2017–18.<sup>204</sup> The five year average to 2017–18 is 19.9 months.<sup>205</sup>
- 3.112 Table 12 shows the current backlog in Victorian courts, expressed as a percentage of the total pending caseload in each court. Cases in which a warrant of arrest was issued are not included in this data.<sup>206</sup> In the Magistrates' Court, the figures include all summary as well as committal stream cases. In the Supreme and County Courts, the figures exclude appeal cases.

**Table 12: Backlog in Victorian courts (as at 30 June), 2017–18<sup>207</sup>**

	Supreme Court	County Court	Magistrates' Court <sup>208</sup>	Children's Court
<b>Cases &gt; 6 months (%)</b>			27.9%	16.6%
<b>Cases &gt; 12 months (%)</b>	25.0%	19.5%	10.3%	4.2%
<b>Cases &gt; 24 months (%)</b>	8.1%	4.1%		

- 3.113 Table 13 shows the time taken to finalise a case from its date of commencement, expressed as a percentage of the total number of finalised cases in each court. The data reflects all pending cases in each court (excluding appeal cases), not just pending committal stream cases.

**Table 13: Time taken to finalise cases in Victorian courts, 2017–18<sup>209</sup>**

	Supreme Court	County Court	Magistrates' Court <sup>210</sup>	Children's Court
<b>Cases finalised &lt;= 6 months (%)</b>			74.7%	88.1%
<b>Cases finalised &lt;= 12 months (%)</b>	69.5%	82.1%	90.7%	96.8%
<b>Cases finalised &lt;= 24 months (%)</b>	92.7%	97.6%		

202 Where a case commenced in the summary stream and was then transferred to the committal stream, the number of days the matter was in the summary stream are not included: Magistrates' Court of Victoria, *Committal Data Requested by the VLRC* (24 April 2019).

203 Victoria Director of Public Prosecutions, *Annual Report 2016–17* (2017) 1.

204 Ibid.

205 Ibid.

206 Australian Productivity Commission, *Report on Government Services* (2019) pt C, ch 7, Table 7A.17.

207 Ibid.

208 Ibid Table 7A.17(i). The Australian Productivity Commission explains that the Magistrates' Court of Victoria data is unaudited and subject to revision. A review of data capture and extraction processes has been foreshadowed.

209 Ibid Table 7A.19.

210 Ibid Table 7A.19(d). The Australian Productivity Commission explains that the Magistrates' Court of Victoria data is unaudited and subject to revision. A review of data capture and extraction processes has been foreshadowed.

---

## Access to legal aid

- 3.114 The *Charter of Human Rights and Responsibilities Act 2006* (Vic) recognises that an accused person has a right 'to have legal aid provided if the interests of justice require it'.<sup>211</sup>
- 3.115 Victoria Legal Aid's (VLA) guidelines state that legal aid will be provided for representation during committal proceedings if either:
- the accused has been charged with homicide (including culpable driving and attempted murder) or
  - there is a real issue of consent or identification.<sup>212</sup>
- 3.116 In all other cases, legal aid will be provided if the available material suggests there is a 'strong likelihood'<sup>213</sup> that a benefit will result from representation.<sup>214</sup> Examples of 'benefit' include:
- the charge that the accused person faces will be dealt with summarily
  - a committal hearing is likely to result in an early plea
  - a committal hearing will lead to a significant reduction in the length of any later trial or plea
  - the person will be discharged at the committal.<sup>215</sup>
- 3.117 A separate grant of aid must be sought if a case proceeds to a committal hearing. For aid to be granted for a committal hearing, the same eligibility requirements apply but the standard for satisfying them is higher.<sup>216</sup>

---

211 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(2)(f).

212 Victoria Legal Aid, 'Guideline 3.1—Committal Proceedings Involving Homicide, Consent or Identification', *VLA Handbook for Lawyers* (Web Page, 20 July 2016) <<https://handbook.vla.vic.gov.au/handbook>>.

213 Victoria Legal Aid, 'Guideline 3.2—Committal Proceedings in Other Cases', *VLA Handbook for Lawyers* (Web Page, 20 July 2016) <<https://handbook.vla.vic.gov.au/handbook>>.

214 *Ibid.*

215 *Ibid.*

216 *Ibid.*

# Committal and pre-trial proceedings in other jurisdictions

- 32** Introduction
- 32** Charging practices and the decision to prosecute
- 34** Disclosure obligations
- 35** The case management function of courts
- 36** Case conferencing
- 37** Pre-trial witness examination
- 40** The test for committal
- 41** Direct indictments
- 41** Guilty pleas
- 43** Delay
- 44** The right to a fair trial
- 45** Resource implications

---

## 4. Committal and pre-trial proceedings in other jurisdictions

### Introduction

- 4.1 All Australian states and territories and comparable common law jurisdictions overseas have reformed committal and other pre-trial proceedings.<sup>1</sup> This chapter describes a selection of these reforms and how they aimed to improve the efficiency of pre-trial procedure, advance fair trial rights or reduce trauma experienced by victims and witnesses.
- 4.2 The reforms considered here illustrate that while some jurisdictions have abolished the requirement that a magistrate assess the evidence in a case before deciding if it should be committed to a higher court, most have retained aspects of committal proceedings or have adopted other pre-trial procedures replicating procedures that were formerly part of a committals process.

### Charging practices and the decision to prosecute

- 4.3 In all Australian jurisdictions, there tends to be some disparity between the criminal charges filed by police or other investigating agencies and those ultimately prosecuted on indictment. Reforms have been introduced to ensure better consistency between the charges originally filed and those that are prosecuted indictably, and also to encourage the settling at an early stage of those charges that will be prosecuted. The latter reforms are designed to facilitate early resolution discussions between the parties.
- 4.4 In 2018, wide-ranging changes were made to the pre-trial criminal system in **New South Wales**.<sup>2</sup> One feature of the new pre-trial system is the requirement that senior police officers and prosecutors review, at an early stage, the evidence relating to indictable offences. The Director of Public Prosecutions (DPP) must then file a 'charge certificate' confirming the charges that will proceed to trial.<sup>3</sup> The charge certificate must confirm that the evidence available to the prosecutor is capable of establishing each element of the offences that are charged.<sup>4</sup>

---

1 See, eg, Department of the Attorney-General and Justice, Northern Territory Government, *Committal Reform Review* (Report, March 2015) 5; Emily Warner, Supreme Court of Tasmania, *A Guide to New Proceedings for the Disposition of Indictable Offences, Version 2.1* (February 2010); New South Wales Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas—Models for Discussion* (Consultation Paper No 15, 2013) 111.

2 These amendments were contained in the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW), the *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* (NSW) and the *Crimes (High Risk Offenders) Amendment Act 2017* (NSW).

3 *Criminal Procedure Act 1986* (NSW) div 4.

4 *Ibid* s 66(2).



- 4.5 The charge certificate process was introduced to address the issue of police ‘over-charging’ or filing many more charges than were ultimately prosecuted. This practice meant many accused did not offer early guilty pleas in the expectation that charges would be reduced as proceedings advanced.<sup>5</sup>
- 4.6 Requiring the DPP to file a charge certificate aims to ensure the ‘prosecutor will perform a gatekeeping role earlier in the process by certifying which charges will proceed’.<sup>6</sup>
- 4.7 Like New South Wales, in **South Australia** the DPP plays a central role in determining which charges are prosecuted. Committal proceedings may be commenced only once the DPP has reviewed the material in a preliminary brief and made a ‘charge determination’ as to the appropriate charge or charges to be prosecuted.<sup>7</sup> Until a charge determination has been made, South Australian police appear in the Magistrates’ Court on behalf of the prosecution.<sup>8</sup>
- 4.8 DPP policies have been adopted in most jurisdictions to ensure accurate and evidence-based indictments. The prosecution Guidelines adopted by **Queensland’s** DPP require early communication between police and prosecutors, including consultation with the arresting officer regarding such things as perceived deficiencies in the evidence or matters that have been raised by the defence.<sup>9</sup>
- 4.9 The **Australian Capital Territory’s** DPP has adopted a policy of preparing a ‘case statement’ which is described by the DPP as:
- ...innovative and comprehensive, incorporating a reference to the elements of each offence on the indictment, and how those elements will be proved. This means that when an indictment has been signed, which is immediately after committal for trial, the Crown has considered whether there is sufficient evidence to justify the indictment, and how the case will be proved. That material is also available to the defence.<sup>10</sup>
- 4.10 In **England and Wales**, Crown prosecutors, rather than the police, are responsible for deciding whether a person should be charged with a serious criminal offence, and which charges should be laid. Although they cannot direct the police or other investigators in their conduct of investigations, and are themselves independent of the police,<sup>11</sup> prosecutors provide advice to police at an early stage in the investigation process. This advice may canvass issues such as ‘possible reasonable lines of inquiry, evidential requirements, pre-charge procedures, disclosure management and the overall investigation strategy’.<sup>12</sup> A key responsibility of the prosecution is to ensure ‘accurate charging decisions’.<sup>13</sup>

5 New South Wales Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas—Models for Discussion* (Consultation Paper No 15, 2013) 5.

6 New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 October 2017, 6 (Mark Speakman, Attorney-General).

7 *Criminal Procedure Act 1921 (SA)* s 106(1).

8 *Ibid* s 106(1)(b).

9 Office of the Director of Public Prosecutions Queensland, *Director’s Guidelines* (30 June 2016) [21] <[https://www.justice.qld.gov.au/\\_\\_data/assets/pdf\\_file/0015/16701/directors-guidelines.pdf](https://www.justice.qld.gov.au/__data/assets/pdf_file/0015/16701/directors-guidelines.pdf)>.

10 Australian Capital Territory Director of Public Prosecutions, *Annual Report 2017-2018* (2018) 2.

11 Director of Public Prosecutions England and Wales, ‘The Code for Crown Prosecutors’, (Web Page, 26 October 2018) [2.1], [3.3] <<https://www.cps.gov.uk/publication/code-crown-prosecutors>>.

12 *Ibid* [3.2].

13 Judiciary of England and Wales, *The Better Case Management (BCM) Handbook* (8 January 2018) 21 [5].

## Disclosure obligations

- 4.11 Efforts to improve disclosure and ensure that it happens at an early stage in proceedings have been made in all jurisdictions. Obligations apply between the prosecution and the defence and also between the various prosecuting agencies.

### Disclosure between investigating agencies and the DPP

- 4.12 It is the role of investigating agencies (often the police) in each jurisdiction to commence proceedings, prepare an initial brief of evidence and serve this on the accused. All jurisdictions have legislated requirements concerning the contents of the brief of evidence.
- 4.13 At the same time as the brief is served on the accused, it must be served on the DPP.
- 4.14 In **New South Wales**, police must include a 'disclosure certificate'<sup>14</sup> when providing the brief of evidence to the DPP. The disclosure certificate must confirm that all relevant information, documents or other things obtained during the investigation that might reasonably be expected to assist the case for the prosecution or the case for the accused person have been provided.<sup>15</sup> According to a formal agreement between NSW Police and the NSW Office of the DPP, the brief of evidence must not be served on the ODPP until a senior police officer has certified that the investigation, brief of evidence and disclosure certificate are complete.<sup>16</sup>
- 4.15 In **South Australia**, the Court of Criminal Appeal has emphasised that the decision about what material should be disclosed to the defence is to be made by the DPP rather than the investigating agency, which is obliged to disclose *all* potentially relevant material to the DPP:

It is not appropriate for the investigating officers, or their superiors, to make a decision that potentially relevant and disclosable material will not be disclosed, because there are or may be grounds for resisting that disclosure. That is a decision that should be made by the Director.<sup>17</sup>

### The DPP's disclosure obligations

- 4.16 Like Victoria, other jurisdictions impose ongoing statutory disclosure obligations on the DPP. In **Queensland** the prosecution has an ongoing obligation to provide 'full and early disclosure' of evidence on which it intends to rely, as well as things in its possession that could help the case for the accused.<sup>18</sup> In **Western Australia** the prosecution's disclosure obligations commence as soon as an accused has had an opportunity to plead to an indictable charge and they are ongoing until the charge is finally dealt with.<sup>19</sup>
- 4.17 All state and territory DPPs have adopted guidelines on disclosure. These are generally consistent with the Commonwealth DPP's 'Statement on Disclosure,' which says that:
- The need to ensure that the accused receives a fair trial is the ultimate criterion for determining what material should be disclosed by the prosecution.
  - In order to ensure that the accused receives a fair trial, he or she must have adequate notice of the evidence to be adduced as part of the prosecution case.
  - In addition to fulfilling any local statutory obligations relating to disclosure, the prosecution must disclose to the accused any material which:

14 *Director of Public Prosecution Act 1986* (NSW) s 15A(4)(b). The disclosure certificate must be in the form prescribed in Schedule 1 of *Director of Public Prosecutions Regulation 2015* (NSW).

15 *Director of Public Prosecution Act 1986* (NSW) s 15A(1).

16 NSW Police Force and Office of the DPP, *Agreement Between NSW Police Force & Office of the DPP (NSW) Concerning the Content and Service of an Early Appropriate Guilty Plea Brief and Charge Certification* (27 April 2018) pt 4.

17 *R v Solomon* (2005) 192 FLR 421, 442.

18 *Criminal Code Act 1899* (Qld) s 590AB.

19 *Criminal Procedure Act 2004* (WA) ss 41, 42(6), 95.

- can be seen on a sensible appraisal by the prosecution to run counter to the prosecution case (i.e. points away from the accused having committed the offence); or
- might reasonably be expected to assist the accused in advancing a defence; or
- might reasonably be expected to undermine the credibility or reliability of a material prosecution witness.<sup>20</sup>

### Consequences of non-disclosure

- 4.18 In most jurisdictions, a trial court may refuse to admit evidence in proceedings relating to an indictable offence if the party seeking to rely on the evidence has not complied with its pre-trial disclosure obligations.<sup>21</sup>
- 4.19 In some jurisdictions, such as **Queensland**, the court has the power to make costs orders in favour of an accused person if certain disclosure obligations have not been complied with and the non-compliance was unjustified, unreasonable or deliberate.<sup>22</sup>
- 4.20 Courts may also have the power to dismiss a charge for want of prosecution if there has been a failure to comply with a court order for disclosure in a timely manner, as is the case in **Western Australia**.<sup>23</sup>

### The case management function of courts

- 4.21 Courts at all levels and in all jurisdictions proactively manage cases to ensure they are dealt with expeditiously. This includes:
- setting timelines within which parties' procedural obligations must be met
  - monitoring compliance with disclosure and case conferencing obligations
  - requiring the parties to narrow the issues in dispute.
- 4.22 In **New Zealand**, judges in the lowest-level District Court conduct 'case review hearings' in those cases deemed to require judicial input prior to trial. They may assess the strengths and weaknesses of the case and give a range of directions for case management, including encouraging negotiation between the parties or amending the summary of facts.<sup>24</sup>
- 4.23 In **England and Wales**, the Magistrates' Court 'sends' indictable cases to the Crown Court for a 'Plea and Trial Preparation Hearing' (PTPH).<sup>25</sup> During a 'sending hearing', the Magistrates' Court explores what issues are agreed or disputed between the parties and what information is required to facilitate an effective PTPH. During a PTPH, the Crown Court will 'actively and robustly manage' the case, including by attempting to determine the issues for trial and by giving necessary directions to ensure an effective trial.<sup>26</sup>
- 4.24 In **Canada**, a 'focus hearing' may be ordered by the court in matters where a preliminary inquiry has been requested by one of the parties.<sup>27</sup> At the focus hearing, the parties must identify the witnesses to be heard at the preliminary inquiry and the issues on which evidence will be given and consider 'any other matters that would promote a fair and expeditious inquiry'.<sup>28</sup>

20 Commonwealth Director of Public Prosecutions, *Statement on Disclosure in Prosecutions Conducted by the Commonwealth* (March, 2017) 3.

21 See, eg, *Criminal Procedure Act 1921* (SA) s 125(1).

22 *Justices Act 1886* (Qld) s 83B. See also Magistrates' Courts Queensland, *Practice Direction No 13 of 2010: Disclosure*, 1 November 2010, [15].

23 *Criminal Procedure Act 2004* (WA) s 44(1)(b)(iii).

24 *Criminal Procedure Act 2011* (NZ) ss 54, 57–58; New Zealand Community Law, 'Criminal Courts', *NZ Community Law Manual Online* <<https://communitylaw.org.nz/community-law-manual/chapter-33-the-criminal-courts/the-criminal-courts/>>.

25 United Kingdom Crown Court, *Plea and Trial Preparation Hearings – Introduction and Guidance* (Revised December 2015) 4 <<http://www.hse.gov.uk/enforce/enforcementguide/court/crowncourt.htm>>.

26 Judiciary of England and Wales, *The Better Case Management (BCM) Handbook* (8 January 2018) 5–6.

27 A 'preliminary inquiry' is the Canadian equivalent of a committal hearing.

28 *Criminal Code*, RSC 1985, c C-46, s 536.4(1)(c).

## Failure to comply with case management directions

4.25 Failure to comply with case management directions can result in sanctions such as the dismissal of matters or the ordering of costs. In the **Australian Capital Territory**, for example, a Magistrates' Court Practice Direction warns: '[p]arties should be aware that the Court will exercise its power of dismissal and to award costs' for failure to facilitate the efficient finalisation of criminal matters.<sup>29</sup>

## Case conferencing

4.26 Most jurisdictions now either require or encourage the parties to engage in a case conference at an early stage in proceedings.

4.27 In **Tasmania** committal to the Supreme Court occurs at the accused's first or second appearance in the Magistrates' Court. After committal, however, if either party seeks an order for witness examination at a pre-trial preliminary proceeding, the parties must first confer and identify:

- areas of agreement or disagreement with respect to the request
- an estimated hearing time for the preliminary proceedings
- a tentative date upon which, and place at which, the preliminary proceeding can be heard.<sup>30</sup>

4.28 In **New South Wales**, the 2018 reform package included additional funding to ensure the involvement of senior lawyers in case conferences prior to committal hearings.<sup>31</sup> The lawyers must have the authority to negotiate and finalise matters.<sup>32</sup>

4.29 In **New Zealand**, the prosecution and a legally represented defendant must hold case management discussions if the defendant has pleaded not guilty to an offence punishable by a term of imprisonment.<sup>33</sup> The purpose of case management discussions is 'to ascertain whether the proceeding will proceed to trial and, if so, make any arrangements necessary for its fair and expeditious resolution.'<sup>34</sup>

4.30 Although there is no requirement for a 'case conference' as such, in **England and Wales** the parties have a duty to engage with each other about the issues in the case from the earliest opportunity and throughout the proceedings. The aim of this discussion is to determine issues such as:

- how the defendant is likely to plead
- those matters that are agreed upon and those that are contested
- what information needs to be disclosed.<sup>35</sup>

4.31 The parties must report to the court on their communications at the first hearing and thereafter.<sup>36</sup>

29 Magistrates' Court of the Australian Capital Territory, *Practice Direction No 1 of 2014: Listing Procedure for Criminal Matters*, 18 December 2014 [1.2].

30 Supreme Court of Tasmania, *Practice Direction No 2 of 2016: Applications for Preliminary Proceedings Orders*, 5 September 2016, [6].

31 New South Wales, Parliamentary Debates, Legislative Assembly, 11 October 2017, 6 (Mark Speakman, Attorney-General).

32 *Criminal Procedure Act 1986* (NSW) s 65.

33 *Criminal Procedure Act 2011* (NZ) ss 55–6.

34 *Ibid* s 55(1)(a).

35 United Kingdom Ministry of Justice, *The Criminal Procedure Rules—The Criminal Practice Directions* (April 2019) r 3.3 <<https://www.justice.gov.uk/courts/procedure-rules/criminal/docs/2015/criminal-procedure-rules-practice-directions-april-2019.pdf>>.

36 *Ibid* r 3.3(2)(d).

## Pre-trial witness examination

### Evidence-in-chief

- 4.32 All Australian and comparable international jurisdictions allow a witness statement to be relied on during committal proceedings as evidence-in-chief.<sup>37</sup> This is designed to reduce the need for witnesses to appear and be examined prior to trial.

### Cross-examination prior to trial

- 4.33 Regardless of whether committal proceedings have been retained, all jurisdictions allow some form of pre-trial witness cross-examination. In **England and Wales**, however, this is limited to situations involving vulnerable witnesses such as children. The pre-trial cross-examination of these witnesses is recorded and they cannot subsequently be called to give evidence or be cross-examined at trial.<sup>38</sup>
- 4.34 The Australian jurisdiction with the most restrictions on pre-trial witness examination is **Western Australia**. In 2002, the ability of the accused person to obtain leave of the court to cross-examine witnesses during a committal hearing was abolished. The prosecution may make an application for the pre-trial examination of a witness who has refused to provide a witness statement, and whose evidence may be relevant to the charge.<sup>39</sup>
- 4.35 Where such an order is made, the witness may be examined and re-examined by the prosecutor and cross-examined by the defence.<sup>40</sup> The court cannot allow cross-examination on matters relating solely to the credibility of the witness, or about matters that do not relate directly to the evidence given during examination by the prosecutor.<sup>41</sup> There are no other pre-trial opportunities for witness examination or cross-examination in Western Australia.
- 4.36 In all other jurisdictions, the defence may seek leave to cross-examine witnesses prior to trial. In **New South Wales** and **Queensland**, leave of the court is not required if the prosecution and the accused agree that a witness may be called to be examined or cross-examined during committal proceedings, although this does not apply to witnesses in respect of whom examination and cross-examination are absolutely prohibited.<sup>42</sup>
- 4.37 In the **Northern Territory**, unless the court is satisfied it would not be in the interests of justice, or the application relates to witnesses in respect of whom cross-examination is absolutely prohibited, the Court must grant the accused leave to cross-examine a witness if the prosecutor consents to leave being granted.<sup>43</sup>
- 4.38 When the prosecution opposes cross-examination, the test the court applies to determine whether to permit it varies. Generally, the accused must identify an issue or issues to which the proposed questioning relates, and the court must have regard to the need to ensure that the prosecution's case is adequately disclosed.

37 While generally in the form of a written statement, evidence may in some situations be audio or video recorded. For example, in NSW a recorded statement made by a child under 16 years or a person who is cognitively impaired can form his or her evidence-in-chief: *Criminal Procedure Act 1986* (NSW) s 306U(1).

38 *Youth Justice and Criminal Evidence Act 1999* (UK) ss 27–28.

39 *Criminal Procedure Act 2004* (WA) sch 3 cl 5(4).

40 *Ibid* sch 3 cl 6(2)(b).

41 *Ibid*.

42 *Criminal Procedure Act* (NSW) s 82(4); *Justices Act 1886* (Qld) s 110A(5).

43 *Local Court (Criminal Procedure) Act 1928* (NT) s 105H(2).

- 4.39 In addition, most jurisdictions impose an additional requirement that the court is satisfied that:
- examination or cross-examination is necessary ‘in the interests of justice’ (**Australian Capital Territory**,<sup>44</sup> **Northern Territory**,<sup>45</sup> **Tasmania**<sup>46</sup>)
  - there are ‘substantial reasons’ for examination or cross-examination ‘in the interests of justice’ (**New South Wales**,<sup>47</sup> **Queensland**<sup>48</sup>)
  - there are ‘special reasons’ for examination or cross-examination ‘in the interests of justice’ (**South Australia**<sup>49</sup>).
- 4.40 In **Canada**, the court may compel a witness to attend a preliminary inquiry for examination or cross-examination upon an application by a party to the proceeding and where the court considers it appropriate.<sup>50</sup> The parties may be required by the court to attend a focus hearing prior to the preliminary inquiry and to consider ‘witnesses’ needs and circumstances’ when identifying witnesses to be heard.<sup>51</sup>
- 4.41 In **New Zealand**, the court may make an order permitting a party to question a witness orally at a pre-trial callover if the court is satisfied that the order is necessary to determine a pre-trial application, or if the witness has been asked to give evidence in the form of a formal statement but has failed or refused to do so, or if it is otherwise in the interests of justice.<sup>52</sup>

### Cross-examination of vulnerable witnesses

- 4.42 Some jurisdictions impose additional tests that must be met before certain categories of witness may be cross-examined prior to trial:
- 4.43 In **New South Wales**, the court must be satisfied there are ‘special reasons’ for cross-examination ‘in the interests of justice’ where:
- the witness is an alleged victim of an offence involving violence
  - the witness is a vulnerable person but not the alleged victim in offences involving violence (unless the prosecution consent to the cross-examination)
  - the evidence of the witness relates to a prescribed sexual offence but the witness is not the alleged victim.<sup>53</sup>
- 4.44 In the **Northern Territory**, the court must take into consideration ‘any mental, intellectual or physical disability to which [a] witness is or appears to be subject’.<sup>54</sup> Where the witness is a child, the court must have regard to the need to minimise the trauma that might be experienced by the witness in giving evidence. The court must also consider the relative importance of the evidence to be given by the witness.<sup>55</sup>
- 4.45 In **Queensland**, child witnesses may only be cross-examined if the court is satisfied that it is necessary in the interests of justice, and that a number of other conditions are satisfied.<sup>56</sup>

44 *Magistrates Court Act 1930* (ACT) ss 90AA(6)–(7) s 90AB(2)(b).

45 *Local Court (Criminal Procedure) Act 1928* (NT) s 105H(3)–(4)

46 *Criminal Code Act 1924* (Tas) s 331B(c).

47 *Criminal Procedure Act 1986* (NSW) s 82(5).

48 *Justices Act 1886* (Qld) ss 83A(5AA), 110B.

49 *Criminal Procedure Act 1921* (SA) ss 114(2)–(3).

50 *Criminal Code*, RSC 1985, c C-46, s 540(9).

51 *Ibid* c C-46, s 536.4(1)(b).

52 *Criminal Procedure Act 2011* (NZ) s 92.

53 *Criminal Procedure Act 1986* (NSW) s 84. The regulations may make provision for or with respect to the determination of special reasons under this section.

54 *Local Court (Criminal Procedure) Act 1928* (NT) s 105H(4)(h).

55 *Ibid* s 105H(5).

56 *Evidence Act 1977* (Qld) s 21AG(4)–(5).

- 4.46 In **South Australia**, where an application is made to examine or cross-examine the following categories of witness, the court must not grant leave unless it is satisfied that the interests of justice cannot adequately be served except by calling the witness:
- victims of an alleged sexual offence
  - people with cognitive impairments that adversely affect their capacity to give a coherent account of their experiences or to respond rationally to questions
  - children who are 14 years or younger.<sup>57</sup>
- 4.47 In **Tasmania**, where an application is made to examine or cross-examine an 'affected person',<sup>58</sup> the court may only grant leave to do so if satisfied that exceptional circumstances require the witness to give evidence and it is necessary in the interests of justice.<sup>59</sup>
- 4.48 In **New Zealand**, a court considering an application for a pre-trial oral evidence order that relates to a complainant in a case of a sexual nature must take into account (in addition to the other matters it would ordinarily consider):
- the particular vulnerability of the complainant
  - the impact on the complainant of giving oral evidence.<sup>60</sup>

#### Prohibition on cross-examination of certain witnesses

- 4.49 As well as these limits, most jurisdictions do not, in any circumstances, permit cross-examination of certain witnesses at committal hearings. This includes prohibition on the cross-examination of:
- complainants in sexual offence matters (**Australian Capital Territory**,<sup>61</sup> **Northern Territory**)<sup>62</sup>
  - complainants who have a cognitive impairment where the matter involves a prescribed sexual offence (**New South Wales**)<sup>63</sup>
  - complainants in relation to child sexual offences who are under 18 years at the time of the committal hearing and who were under 16 years at the time of the alleged offence (**New South Wales**)<sup>64</sup>
  - children, where the charge relates to a sexual offence (**Northern Territory**)<sup>65</sup>
  - children, where the charge involves a serious violence offence (**Northern Territory**).<sup>66</sup>
- 4.50 In addition, in **Queensland** children may not be called to give evidence-in-chief.<sup>67</sup>

#### Limits on scope of questioning during witness examination

- 4.51 In **New South Wales** and **Queensland**, the magistrate must prevent questioning that deals with matters that were not the basis of the reasons for which leave to examine or cross-examine was given, unless satisfied there are substantial reasons in the interests of justice for examination on these matters.<sup>68</sup>

57 *Criminal Procedure Act 1921 (SA)* s 114(3).

58 'Affected person' is the complainant in a range of specified offences, all of which relate to sexual offences and/or the ill treatment of children: *Justices Act 1959 (Tas)* s 3.

59 *Criminal Code Act 1924 (Tas)* s 331B(3).

60 *Criminal Procedure Act 2011 (NZ)* ss 92–3.

61 *Magistrates Court Act 1930 (ACT)* s 90AB(1).

62 *Local Court (Criminal Procedure) Act 1928 (NT)* s 105L.

63 *Criminal Procedure Act 1986 (NSW)* s 83(1).

64 *Ibid* s 83(2).

65 *Local Court (Criminal Procedure) Act 1928 (NT)* s 105L.

66 *Ibid*.

67 *Evidence Act 1977 (Qld)* ss 21AB(iii), 21AF. The legislation refers to an 'affected child', which means a child who is a witness and not a defendant in a proceeding: s 21AC.

68 *Justices Act 1886 (Qld)* s 110C(1)–(2); *Criminal Procedure Act 1986 (NSW)* s 85(4).



- 4.52 In **New South Wales** the court must be satisfied there are special reasons in the interests of justice for examination on these matters if the witness is the alleged victim of an offence involving violence.<sup>69</sup> In **Queensland**, the court must not allow cross-examination of a child witness to continue if it is not relevant to the issue in relation to which cross-examination was allowed.<sup>70</sup>
- 4.53 In the **Northern Territory**, the defence is not limited to cross-examining a witness on the issue for which leave to cross-examine was given, but the court may disallow questions not clearly relevant to a matter in issue, or that are not justified having regard to the factors that the court was required to consider when deciding whether or not to grant leave to cross-examine.<sup>71</sup>
- 4.54 In **Tasmania**, an order that a witness give evidence in preliminary proceedings may limit the matters on which the witness may be examined, cross-examined and re-examined, and may impose conditions in relation to such examination, cross-examination and re-examination.<sup>72</sup> If the witness is an affected person<sup>73</sup> the order must limit the matters on which the witness may be examined, cross-examined or re-examined, and may impose conditions in relation to such examination, cross-examination and re-examination.<sup>74</sup>
- 4.55 In **Canada**, the court must order ‘the immediate cessation’ of questioning at a preliminary inquiry which is, in the opinion of the justice, ‘abusive, too repetitive or otherwise inappropriate’.<sup>75</sup>

### Other protections for witnesses

- 4.56 In **Queensland**, if the court has granted leave to cross-examine a child witness during committal proceedings, arrangements must be made to limit any distress or trauma suffered by the child during cross-examination.<sup>76</sup>
- 4.57 In **New Zealand**, although pre-trial oral evidence may generally be taken before a registrar or magistrate, in cases of a sexual nature where the complainant is giving evidence, the evidence must be taken before a judge and there are limits on who may be present in court during the complainant’s evidence.<sup>77</sup>

### The test for committal

- 4.58 The requirement that a magistrate commit a case to a higher court based on an assessment of the evidence in that case has been retained in:
- the **Australian Capital Territory**, although the Magistrates’ Court may commit an accused person for trial without an assessment of the evidence on an application of the accused person and with the prosecutor’s consent<sup>78</sup>
  - the **Northern Territory**<sup>79</sup>
  - **Queensland**, although the court may commit an accused person for trial or sentence without applying the test for committal if the parties agree; and a clerk of court may commit an accused person for trial or sentence without applying the test for committal if the parties agree and if certain other prerequisites are met, such as that the accused is not in custody in relation to another matter<sup>80</sup>

69 *Criminal Procedure Act 1986* (NSW) s 85(4)–(5).

70 *Evidence Act 1977* (Qld) s 21AH.

71 *Local Court (Criminal Procedure) Act 1928* (NT) s 105K.

72 *Criminal Code Act 1924* (Tas) s 331B(4)(a).

73 An ‘affected person’ is the complainant in a range of specified offences, all of which relate to sexual offences and/or the ill treatment of children: *Justices Act 1959* (Tas) s 3.

74 *Criminal Code Act 1924* (Tas) s 331B(4)(b).

75 *Criminal Code*, RSC 1985, c C-46, s 537(1.1).

76 *Justices Act 1886* (Qld) s 83A(5AB); *Evidence Act 1977* (Qld) ss 9E, pt 2, div 4A, sub-divs 2–4.

77 *Criminal Procedure Act 2011* (NZ) s 97.

78 *Magistrates Court Act 1930* (ACT) ss 88B, 94.

79 *Local Court (Criminal Procedure) Act 1928* (NT) ss 109, 112.

80 *Justices Act 1886* (Qld) ss 104, 108, 110A, 114.



- **South Australia**, although there is no requirement to conduct committal proceedings or apply the test for committal if the accused either concedes that there is a case to answer or pleads guilty<sup>81</sup>
- **Canada**, but only where the accused or the prosecution has requested a preliminary inquiry, which is the Canadian equivalent of a committal procedure.<sup>82</sup>

4.59 There is no longer a test for committal involving assessment of the evidence in:

- **New South Wales** (as of April 2018)<sup>83</sup>
- **Tasmania** (since 2000)<sup>84</sup>
- **Western Australia** (since 2002)<sup>85</sup>
- **England and Wales** (since 2001 for indictable only offences, and since 2013 for offences that can be ‘tried either way’<sup>86</sup>).

## Direct indictments

4.60 In all Australian jurisdictions, DPPs have the power to directly indict an accused to stand trial, regardless of whether a committal proceeding was held. A direct indictment can be filed even in instances where a magistrate has found there is insufficient evidence to commit the accused for trial and has discharged the matter.

4.61 In **South Australia**, the DPP’s Prosecution and Policy Guidelines state that to directly indict (referred to in South Australia and many other jurisdictions as an ‘ex officio indictment’) a person without prior committal proceedings ‘will only be justified if any disadvantage to the accused that may thereby ensue will nevertheless not be such as to deny the accused a fair trial.’<sup>87</sup>

4.62 These Guidelines also consider the issue of direct indictment following discharge at committal:

The result of committal proceedings has never been regarded as binding on those who have the authority to indict. An error may have resulted in the Magistrate discharging the accused, and in such a case the filing of an ex officio information may be the only feasible way that the error can be corrected. Nevertheless, a decision to indict following a discharge at the committal proceedings should never be taken lightly.<sup>88</sup>

## Guilty pleas

### Data on the timing of guilty pleas

4.63 All jurisdictions confront the issue of a significant minority of guilty pleas being entered at a late stage in proceedings—sometimes ‘at the door of the court’, or on the day a matter is listed for trial, and sometimes during the trial itself. It is difficult, however, to compare data relating to guilty pleas as this data is recorded and expressed differently across jurisdictions.

81 *Criminal Procedure Act 1921 (SA)* ss 113(3), 115(1)(a).

82 *Criminal Code*, RSC 1985, c C-46, ss 535, 536(4), 536.1(3), 584(1)(a).

83 *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2018* (NSW).

84 *Justices Act 1959* (Tas) s 60.

85 *Criminal Procedure Act 2004* (WA) ss 43–44.

86 That is, where the defendant may elect either to have the matter tried summarily in the Magistrates’ Court, or before a judge and jury in the Crown Court: United Kingdom Ministry of Justice, *Guide to Criminal Court Statistics* (13 December 2018) <<https://www.judiciary.uk/wp-content/uploads/2018/02/bcm-guide-for-practitioners-20180207.pdf>>.

87 Director of Public Prosecutions South Australia, *Statement of Prosecution Policy and Guidelines* (October 2014) 13 <<http://www.dpp.sa.gov.au/wp-content/uploads/2015/03/DPP-Prosecution-and-Policy-Guidelines.pdf>>.

88 *Ibid.*

4.64 Some illustrative data shows that:

- in the **Australian Capital Territory** in 2017–18, around 62 per cent of matters committed for trial in the Supreme Court subsequently resolved with a guilty plea, and of these guilty pleas, 11 per cent were entered on the day of the trial<sup>89</sup>
- in **Queensland** in 2017–18, 18 per cent of guilty pleas that were entered after a matter was committed for trial in a higher court were entered on or after the first day of the trial<sup>90</sup>
- in **South Australia**, in 2017–18, of those matters that proceeded to trial in a higher court in Adelaide, 16 per cent had guilty pleas entered during the trial.<sup>91</sup>

### Sentencing discounts for early guilty pleas

4.65 A plea of guilty and its timing are among the factors that all courts must consider when sentencing. **South Australia** and **New South Wales** have introduced reforms to encourage early guilty pleas by specifying the amount by which a sentence should be reduced depending on the timing of the plea.

4.66 In **New South Wales**, the following discounts apply to sentences that would have otherwise been imposed:

- 25 per cent discount if the plea was accepted by the Magistrate in committal proceedings
- 10 per cent discount for pleas or notice of plea up to 14 days before the first day of trial
- 5 per cent discount in any other circumstances.<sup>92</sup>

4.67 Judges do, however, retain a discretion to provide no sentencing discount, or a lesser discount, in cases of extreme culpability.<sup>93</sup>

4.68 In **South Australia**, the fixed scale of sentence discounts to be applied depending on the timing of a guilty plea is:

- up to 40 per cent for a guilty plea entered within four weeks of the defendant's first court appearance
- up to 30 per cent for a guilty plea entered before or on the day of the defendant's committal appearance
- up to 20 per cent for a guilty plea entered after the defendant's committal appearance but before the defendant is committed for trial
- up to 15 per cent for a guilty plea entered between the defendant being committed for trial and just after the defendant is arraigned in a superior court
- up to 10 per cent for a guilty plea entered after the defendant is arraigned but before the defendant's trial commences.<sup>94</sup>

89 Australian Capital Territory Director of Public Prosecutions, *Annual Report 2017–18* (2018) 22.

90 Queensland Office of the Director of Public Prosecutions, *Annual Report 2017–18* (2018) 18.

91 South Australia Office of the Director of Public Prosecutions, *2017–18 Annual Report* (2018) 9. The percentage of guilty pleas entered during a trial was lower (8 per cent) in South Australia's higher circuit courts.

92 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25D.

93 *Ibid* s 25F.

94 *Sentencing Act 2017* (SA) s 40.

- 4.69 In **Western Australia**, legislative provisions allowing sentence discounts for early guilty pleas were introduced in 2012. The earlier the plea is made, the greater the sentence reduction available.<sup>95</sup> Where the sentence for the offence is, or includes, a fixed term, the court must not reduce the sentence by more than 25 per cent and may only reduce the sentence by 25 per cent if the accused pleaded guilty 'at the first reasonable opportunity'.<sup>96</sup>
- 4.70 Since June 2017, adult accused in **England and Wales** who wish to receive the maximum available reduction for an early guilty plea must enter their guilty plea at the first stage of proceedings, normally at the first hearing at which a plea or plea indication is sought and recorded by the court.<sup>97</sup> This generally occurs during the accused's second court appearance. If a guilty plea is entered at this appearance, the accused is entitled to a sentence discount of one-third.<sup>98</sup>
- 4.71 After the first stage of proceedings, the discount for an early guilty plea falls to one quarter of the sentence that would otherwise be imposed, with a sliding scale of reduction applied after this.<sup>99</sup> A reduction of one tenth will be applied for guilty pleas entered on the first day of trial. Sentence reductions will be reduced further, 'even to zero', if a guilty plea is entered during the course of a trial.<sup>100</sup>

## Delay

- 4.72 Regardless of the features of a jurisdiction's pre-trial system, all jurisdictions experience delay in resolving cases.
- 4.73 Tables 14, 15 and 16 below compare the time taken to finalise a case from its commencement date in each court, expressed as a percentage of the total number of finalised cases in that court.<sup>101</sup> In Tables 14 and 15 the data excludes appeal cases.

**Table 14: Time taken to finalise criminal cases in Australian Supreme Courts, 2017–18<sup>102</sup>**

	Cases finalised <= 12 months (%)	Cases finalised <= 24 months (%)
<b>ACT</b>	78.8%	98.3%
<b>NSW</b>	41.8%	88.8%
<b>NT</b>	92.7%	98.6%
<b>QLD</b>	90.6%	98.4%
<b>SA</b>	89.8%	96.6%
<b>TAS</b>	59.4%	87.4%
<b>WA</b>	85.8%	99.1%

95 *Sentencing Act 1995* (WA) s 9AA(3).

96 *Ibid* s 9AA(4).

97 *Criminal Justice Act 2003* (UK) s 144; United Kingdom Sentencing Council, *Reduction in Sentence for a Guilty Plea—Definitive Guideline* (1 June 2017) <<https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-Sentence-for-Guilty-Plea-definitive-guideline-SC-Web.pdf>>.

98 United Kingdom Sentencing Council, *Reduction in Sentence for a Guilty Plea—Definitive Guideline* (1 June 2017)

<<https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-Sentence-for-Guilty-Plea-definitive-guideline-SC-Web.pdf>>.

99 *Ibid*.

100 *Ibid*.

101 *Ibid*.

102 Australian Productivity Commission, *Report on Government Services* (2019) Part C, Chapter 7, Table 7A.19, (a). See Table 13 in Chapter 3 of this issues paper for comparable Victorian data. This data predates the introduction of the Early Appropriate Guilty Plea Scheme in NSW.

**Table 15: Time taken to finalise criminal cases in Australian District/County Courts, 2017–18<sup>103</sup>**

	Cases finalised <= 12 months (%)	Cases finalised <= 24 months (%)
<b>NSW</b>	22.1%	55.4%
<b>QLD</b>	93.3%	98.1%
<b>SA</b>	72.7%	91.5%
<b>WA</b>	84.7%	98.8%

**Table 16: Time taken to finalise criminal cases (summary as well as indictable stream cases) in Australian Magistrates'/Local Courts, 2017–18<sup>104</sup>**

	Cases finalised <= 6 months (%)	Cases finalised <= 12 months (%)
<b>ACT</b>	81.8%	93.6%
<b>NSW</b>	88.1%	98.2%
<b>NT</b>	83.8%	94.6%
<b>QLD</b>	81.5%	92.0%
<b>SA</b>	70.0%	88.4%
<b>TAS</b>	54.6%	79.9%
<b>WA</b>	85.8%	94.3%

- 4.74 This data shows that the vast majority of cases in most jurisdictions finalise in higher courts within 24 months, and within 12 months in Local or Magistrates' Courts. With the exception of Tasmania in the Magistrates' Court and New South Wales in the higher courts, a majority of cases in the higher courts finalised within 12 months and within six months in Local or Magistrates' Courts.
- 4.75 The Commission does not have data on the overall average time frame for the final disposition of indictable matters in Australian jurisdictions other than Victoria.

## The right to a fair trial

- 4.76 In all jurisdictions, the common law right to a fair trial applies equally to committal and pre-trial procedures as it does during a trial. Issues that may infringe an accused person's right to a fair trial include undue delay, failure of the prosecution to disclose its case in a timely way, and an inability to access legal aid funding.<sup>105</sup>

<sup>103</sup> Australian Productivity Commission, *Report on Government Services* (2019) Part C, Chapter 7, Table 7A.19, (a). See Table 13 in Chapter 3 of this issues paper for comparable Victorian data.

<sup>104</sup> *Ibid.*

<sup>105</sup> See the discussion under the heading 'Protecting the right to a fair trial' in Chapter 5.

- 4.77 The **Australian Capital Territory** (since 2004), **Queensland** (since February 2019), as well as **Victoria** and comparable overseas jurisdictions, have dedicated human rights legislation.<sup>106</sup> This legislation recognises the right of an accused person to a fair trial (or hearing) and to other rights that should be accorded during criminal proceedings, including to be presumed innocent until proved guilty, to have adequate time and facilities to prepare a defence, and to be tried without unreasonable delay.<sup>107</sup>
- 4.78 The human rights legislation in the **Australian Capital Territory** and in **Queensland** also recognises that a child charged with a criminal offence has the right to be brought to trial as quickly as possible, and to a procedure that takes into account the child's age and the desirability of promoting his or her rehabilitation.<sup>108</sup>

### Access to legal aid

- 4.79 The legal aid commission in each jurisdiction has particular policies and guidelines about who can access legal aid funding and for what types of criminal cases. Funding is available for committal and other pre-trial procedures depending on varying criteria.
- 4.80 For example, in the **Northern Territory** legal aid is available for oral committal hearings if 'specific issues have been identified which can be clarified or resolved at committal and there is a reasonable likelihood that a substantial benefit will result from representation'.<sup>109</sup>
- 4.81 In **Tasmania**, legal aid will be provided in oral preliminary proceedings if the conditions are met for the court to order that a witness give evidence.<sup>110</sup>

### Resource implications

- 4.82 Reforming pre-trial procedure may have wider impacts throughout the criminal justice system, and implementing reform is likely to have resource implications.
- 4.83 One example is provided by the 'Appropriate Early Guilty Plea' (AEGP) reforms introduced in **New South Wales** in 2018, which received \$92 million in dedicated funding.<sup>111</sup> The reforms were part of a wider criminal justice reform package that included a community sentencing and supervision scheme and a regime for the management of high risk offenders.<sup>112</sup> When it was first introduced, the New South Wales Government committed \$200 million to funding the entire package.<sup>113</sup>
- 4.84 Of the funds dedicated to the AEGP reforms, a proportion went to the New South Wales Police Force and the New South Wales ODPP to promote early disclosure and early involvement of the ODPP in finalising charges. Funding was also provided to the ODPP and New South Wales Legal Aid 'to ensure continuity of senior lawyers for both the prosecution and the defence from start to finish'.<sup>114</sup> The ODPP funding was used for a major recruitment of new staff.<sup>115</sup> Initially, \$9 million was allocated to Legal Aid.<sup>116</sup> The New South Wales Government has since committed an additional \$10 million for the funding of Legal Aid lawyers.<sup>117</sup>

106 *Human Rights Act 2004* (ACT); *Human Rights Act 2019* (Qld); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 1998* (UK); *Bill of Rights Act 1990* (NZ); *Constitution Act 1982* (Canada) pt 1, Canadian Charter of Rights and Freedoms.

107 See, eg, *Human Rights Act 2004* (ACT) ss 21–22; *Human Rights Act 2019* (Qld) ss 31–32; *Constitution Act 1982* (Canada) pt 1; Canadian Charter of Rights and Freedoms, ss 10–11.

108 *Human Rights Act 2004* (ACT) s 20; *Human Rights Act 2019* (Qld) s 33.

109 Northern Territory Legal Aid Commission, *Guidelines* (15 June 2018) Ch 5, 3.2.

110 Legal Aid Commission of Tasmania, *Guidelines for Grants* (13 November 2018) 1(b) <<https://www.legalaid.tas.gov.au/resources-for-lawyers/guidelines/>>. The considerations the court must take into account when deciding whether to make an order that a witness give evidence are set out in section 331B(3) of the *Criminal Code Act 1924* (Tas).

111 Emmanuel Kerkyasharian, 'Crisis in Legal Aid' (Spring 2018) *Bar News, New South Wales Bar Association* 18, 20.

112 New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 October 2017, (Mark Speakman, Attorney-General).

113 Ibid 1.

114 Ibid [34].

115 New South Wales Office of the Director of Public Prosecutions, *Annual Report 2017–18* (2018) 17.

116 Emmanuel Kerkyasharian, 'Crisis in Legal Aid' (Spring 2018) *Bar News, New South Wales Bar Association* 18, 20.

117 Ibid.



# Objectives and options for reform of committals in Victoria

<b>48</b>	<b>Introduction</b>
<b>48</b>	<b>Reform objectives</b>
<b>51</b>	<b>Issues</b>
<b>65</b>	<b>Implications of reforming pre-trial procedure</b>
<b>68</b>	<b>Reform models</b>

---

## 5. Objectives and options for reform of committals in Victoria

### Introduction

- 5.1 The Commission is considering changes to Victoria’s committal system and related pre-trial procedures that could:
- reduce trauma experienced by victims and witnesses
  - improve efficiency in the criminal justice system
  - ensure fair trial rights.
- 5.2 The first section of this chapter elaborates on these objectives.
- 5.3 The second part of the chapter sets out the issues raised by the terms of reference. The issues are not organised in order of priority. Instead, the structure of this part of the chapter reflects how criminal matters progress through the courts from the original filing of charges to ultimate disposition.
- 5.4 The discussion does not pre-empt or evaluate proposals for reform. Rather, it describes the issues and provides contextual information and relevant data. The Commission seeks comments from stakeholders and interested members of the public on these issues and on any others that they believe the Commission should address in its final report.
- 5.5 The third part of the chapter provides an overview of two reform models previously proposed in Victoria.

### Reform objectives

#### Reducing trauma experienced by victims and witnesses

- 5.6 Victims of crime and witnesses to criminal acts may experience physical and psychological trauma. The complex and enduring emotional and psychological damage caused by criminal acts has been extensively documented.<sup>1</sup> Recent reports also emphasise the often damaging impact on victims and witnesses of participating in criminal justice proceedings.<sup>2</sup> Long delays,<sup>3</sup> complex processes, and feeling ‘almost incidental’ to proceedings<sup>4</sup> can cause anxiety and distress. In addition, victims and witnesses may find giving evidence in court, particularly cross-examination, traumatic and intimidating.<sup>5</sup>

---

1 See Royal Commission into Institutional Responses to Child Sexual Abuse (Final Report, 2017); *Royal Commission into Family Violence* (Parliamentary Paper No 132, 2014-16); Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report 34, August, 2016).

2 See, eg, Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report 34, August, 2016).

3 See Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice* (Consultation Paper, September, 2016) 325 and ch 8 more generally.

4 *Ibid* 11, 76.

5 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report 34, August, 2016) xx [58].



- 5.7 The right of victims and witnesses to be treated respectfully in the criminal justice process is widely accepted.<sup>6</sup> Victims and witnesses are entitled to acknowledgement and respect, information and support, participation and protection.<sup>7</sup>
- 5.8 Committal proceedings may contribute to the harms experienced by victims and witnesses if they delay finalisation of a matter,<sup>8</sup> or require victims or witnesses to be cross-examined.<sup>9</sup> They may also have a negative impact if victims and witnesses perceive the process as a trigger for the prosecution to inappropriately downgrade or withdraw charges.<sup>10</sup>

### Improving efficiency in the criminal justice system

- 5.9 Efficiency in a criminal justice system can be measured by markers such as timeliness and affordability.<sup>11</sup> Timeliness may be characterised as ‘a balance between the time required to properly obtain, present, and weigh the evidence, law and arguments, and unreasonable delay due to inefficient processes and insufficient resources.’<sup>12</sup>
- 5.10 Committal proceedings have been both celebrated and criticised for their impact on efficiency in the criminal justice system.
- 5.11 From a critical perspective, in 2007 the Queensland Department of Justice and Attorney-General cited court staff who reported lengthy delays in resolving committal proceedings as a result of:
- multiple committal mentions
  - late consent to proceeding by way of hand-up brief
  - late changes to requests to cross-examine witnesses
  - difficulties in accurately estimating the timeframe for contested committals
  - lengthy and unproductive cross-examination of witnesses.<sup>13</sup>
- 5.12 Subsequent reforms in Queensland gave magistrates greater powers to set and enforce timelines for committal proceedings and limited the circumstances in which prosecution witnesses can be called to give evidence and the matters on which they can be cross-examined.<sup>14</sup>
- 5.13 From a more positive perspective, the Magistrates’ Court of Victoria (MCV) suggests that, ‘the current committal system is working effectively and efficiently’, producing considerable ‘benefits to the administration of justice’.<sup>15</sup> MCV observes that, currently, around two-thirds of all cases in the committal stream resolve prior to committal with a guilty plea heard either summarily or in a higher court.<sup>16</sup> The Court also notes it has introduced changes over a number of years to enhance the efficiency of committal proceedings, including more active case management.<sup>17</sup>

6 See Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice* (Consultation Paper, September, 2016) 11, 76. This recognition has developed over several decades: victims’ compensation schemes were progressively introduced in Australian jurisdictions from 1967; in the 1990s, there was an increased focus on support services for victims; victim impact statements were introduced; and Director of Public Prosecution Director’s Guidelines now require prosecutors to consult with victims.

7 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report 34, August, 2016) vi. The Commission’s discussion of these principles focuses on victims, but with appropriate limitations the principles apply to other witnesses.

8 See Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice* (Consultation Paper, September, 2016) 340–1 [8.4.4].

9 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Parts VII–X and Appendices* (Final Report, 2017) 250.

10 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice* (Consultation Paper, September, 2016) 280.

11 Western Australia Law Reform Commission, *Review of the Criminal and Civil Justice System* (Report No 92, 1999) 4 [1.4], 5 [1.9]. The discussion in these sections focuses on civil litigation but applies equally to the criminal justice system, as it makes clear generally in its report.

12 International Consortium for Court Excellence, *Global Measures of Court Performance* (2018) 49.

13 Department of Justice and Attorney-General, Queensland Government, *Reform of the Committal Proceedings Process* (Discussion Paper 2008) 6–7.

14 *Justices Act 1886* (Qld) ss 83A, 110A–110C.

15 Criminal Law Committee of the Magistrates’ Court of Victoria, *Magistrates’ Court Response to the DPP’s Proposed Reforms of the Committal Process* (10 April 2019).

16 *Ibid.*

17 *Ibid.*

## Protecting the right to a fair trial

- 5.14 Committal proceedings have been viewed as an important element of the right to a fair trial, ensuring independent scrutiny of the evidence before an accused person faces trial.<sup>18</sup> Their importance from the perspective of fair trial rights has also been defended on the basis they are ‘the key mechanism through which an accused obtains disclosure of the prosecution case.’<sup>19</sup>
- 5.15 In many respects, the purposes of committal proceedings set out in Victoria’s *Criminal Procedure Act 2009* (Vic) (CPA) echo the rights of an accused person in criminal proceedings contained in the *Victorian Charter of Human Rights and Responsibilities Act 2006* (the Charter).<sup>20</sup> Of particular note are the Charter rights to:
- be informed promptly and in detail of the charge<sup>21</sup>
  - have adequate time and facilities to prepare a defence<sup>22</sup>
  - examine or have examined witnesses against him or her, unless otherwise provided for by law<sup>23</sup>
  - be tried without unreasonable delay.<sup>24</sup>
- 5.16 An accused person also has a right to access legal representation, regardless of his or her financial circumstances.<sup>25</sup> Legal aid is currently available for committal proceedings in Victoria, subject to eligibility criteria.<sup>26</sup>
- 5.17 Committal proceedings have been criticised for unduly delaying the resolution of criminal matters.<sup>27</sup> To the extent that this is true, they may undermine rather than support an accused person’s right to a fair trial, especially if the accused is in custody pending resolution of his or her case.
- 5.18 The contribution of committal proceedings to a fair trial is also more broadly disputed. The New South Wales Law Reform Commission (NSWLRC) suggests that alternative pre-trial procedures, combined with the role played by professional public prosecutors in filtering indictable criminal prosecutions, have usurped the role of committal proceedings in affording an accused person a fair trial.<sup>28</sup>

## Question

### 1 What purposes can or should committal proceedings serve?

18 See the discussion in *Barton v The Queen* (1980) 147 CLR 75, 99–101.  
19 Liberty Victoria Submission to Victorian Department of Justice & Regulation, ‘Proposed Reforms to Criminal Procedure: Reducing Trauma and Delay for Witnesses and Victims, Criminal Law Review’ (14 June 2017).  
20 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25.  
21 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(2)(a); *Criminal Procedure Act 2009* (Vic) s 97(d)(i).  
22 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(2)(b); *Criminal Procedure Act 2009* (Vic) s 97(d)(iii).  
23 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(2)(g); *Criminal Procedure Act 2009* (Vic) s 97(d)(ii).  
24 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(2)(c).  
25 *Ibid* ss 25(2)(d)–(f).  
26 See the section titled ‘Access to legal aid’ in Chapter 3.  
27 This is discussed further in the section below titled ‘Delay’.  
28 See New South Wales Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas* (December 2014) pp 194–5.

## Issues

### Charging practices and the decision to prosecute

- 5.19 As in many jurisdictions, in Victoria the charges originally filed by police or other investigating agencies are likely to be different from those that are ultimately prosecuted. This is so despite general consistency between police charging guidelines<sup>29</sup> and the Policy of the Director of Public Prosecutions for Victoria on the discretion to prosecute.<sup>30</sup> The divergence between police charges and those ultimately prosecuted may stem from a number of factors:
- police charges may appropriately be informed by evidence and investigations that are incomplete and ongoing<sup>31</sup>
  - the police tend to file individual charges whereas the DPP is more likely to use 'consolidated' charges<sup>32</sup>
  - plea negotiations generally occur only after defence lawyers are involved in a case.
- 5.20 While acknowledging that some divergence between the charges initially filed and those ultimately prosecuted may be appropriate, the Royal Commission into Institutional Responses to Child Sexual Abuse (RCIRCSA) emphasised the distress this can cause victims. This is similarly the case if the prosecution accepts a guilty plea on the basis that charges are downgraded or withdrawn. The RCIRCSA says that the distress for victims is greatest where 'they feel that the charges...do not reflect the worst abuse or the extent of the abuse they suffered.'<sup>33</sup>
- 5.21 The *Policy of the Director of Public Prosecutions for Victoria* (the Director's Policy) encourages early resolution and supports plea negotiations to achieve it, but cautions that charges should reflect an accused's criminality, based on what can be proved beyond reasonable doubt and allowing for a sentence that adequately reflects the accused's criminality.<sup>34</sup> A victim's views must be sought prior to resolution, and will be taken into account when determining if the resolution is in the public interest.<sup>35</sup>
- 5.22 The RCIRCSA made several recommendations to improve charging practices:
- police charging decisions should recognise the importance to complainants of the correct charges being laid as early as possible, so that charges are not significantly downgraded at or close to trial<sup>36</sup>
  - prosecutors should recognise the importance to complainants of the correct charges being laid as early as possible so that charges are not significantly downgraded or withdrawn at or close to trial. They should provide early advice to police on appropriate charges to lay when such advice is sought<sup>37</sup>
  - prosecutors should confirm the appropriateness of the charges as early as possible once the case is allocated to them, to ensure that the correct charges have been laid and to minimise the risk that charges will be downgraded or withdrawn closer to the trial date<sup>38</sup>

29 See Victoria Police, *Victoria Police Manual* (at 18 April 2019).

30 Director of Public Prosecutions for Victoria, *Policy of the Director of Public Prosecutions for Victoria* (27 March 2019) <<http://www.opp.vic.gov.au/getattachment/b5d48af4-3bef-4650-84fa-6b9befc776e0/DPP-Policy.aspx>>.

31 For further discussion, see Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice* (Consultation Paper, September, 2016) 139–40 [3.9.2].

32 In this context, 'consolidation' occurs where multiple individual charges in a case are merged into one or more charges covering the entirety of the criminal offending.

33 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice* (Consultation Paper, September, 2016) 280.

34 *Ibid* ch 4. See also Office of Public Prosecutions Victoria, *Annual Report 2017–18*, 12.

35 Director of Public Prosecutions for Victoria, *Policy of the Director of Public Prosecutions for Victoria* (27 March 2019) 16–17 [5–10] <<http://www.opp.vic.gov.au/getattachment/b5d48af4-3bef-4650-84fa-6b9befc776e0/DPP-Policy.aspx>>.

36 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report, Preface and Executive Summary* (2017) 198.

37 *Ibid* 207.

38 *Ibid*.

- prosecutors must endeavour to ensure that they allow adequate time to consult the complainant and the police in relation to any proposal to downgrade or withdraw charges.<sup>39</sup>
- 5.23 These recommendations are consistent with those made in 2000 by the Standing Committee of Attorneys-General's (SCAG) 'Deliberative Forum on Criminal Trial Reform'.<sup>40</sup> The Forum recommended that Directors of Public Prosecutions should provide prosecution advice during the investigative process in all complex cases.<sup>41</sup> This could include 'reviewing the sufficiency of evidence, advising on proofs to be obtained and suggesting appropriate charges.' SCAG also recommended the DPP's involvement at the earliest possible opportunity in reviewing charges laid by police.<sup>42</sup>
- 5.24 A review of criminal proceedings in England and Wales also called for reforms to ensure appropriate early charging decisions.<sup>43</sup> This review recommended that those who make charging decisions are appropriately trained in the law, that there should be a mechanism for review of inappropriate charges, and a direct line of accountability to the DPP.<sup>44</sup>
- 5.25 Crown prosecutors in England and Wales are now responsible for deciding if a person should be charged with a serious criminal offence.<sup>45</sup>
- 5.26 Similar reform in New South Wales introduced the involvement of senior DPP prosecutors earlier in proceedings as a means of dealing with inconsistency between police and DPP charging practices. NSW Police now commence proceedings against an accused person and provide a simplified brief of evidence to the NSW Director of Public Prosecutions.<sup>46</sup> A supervising police officer must certify that the investigation and brief are complete.<sup>47</sup> The brief is then reviewed by a senior prosecutor who files a 'charge certificate' confirming the charges that will proceed to trial and identifying any charges that should be withdrawn.<sup>48</sup>

## Questions

- 2 What, if any, measures should be introduced to:
- (a) reduce the difference between charges that are initially filed and those ultimately prosecuted?
  - (b) ensure appropriate charges are filed at the earliest possible stage in a case?
- 3 Should the OPP be involved in determining appropriate indictable charges at an earlier stage? If so, how?

39 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report, Preface and Executive Summary* (2017) 207.

40 Standing Committee of Attorneys-General, *Report of the Deliberative Forum on Criminal Trial Reform* (June 2000).

41 *Ibid* 15.

42 *Ibid* 16.

43 Sir Brian Leveson, *Review of Efficiency in Criminal Proceedings* (Judiciary of England and Wales, January 2015).

44 *Ibid* 21 [63].

45 Director of Public Prosecutions England and Wales, 'The Code for Crown Prosecutors' (Web Page, 26 October 2018) [3.1]

<<https://www.cps.gov.uk/publication/code-crown-prosecutors>>.

46 *Criminal Procedure Act 1986* (NSW) div 3 pt 2.

47 NSW Police Force and Office of the DPP, *Agreement Between NSW Police Force & Office of the DPP (NSW) Concerning the Content and Service of an Early Appropriate Guilty Plea Brief and Charge Certification* (27 April 2018) pt 4.

48 *Criminal Procedure Act 1986* (NSW) s 66.

## Disclosure obligations

### The importance of disclosure

- 5.27 The Hon. Justice Martin Moynihan describes proper and timely disclosure as ‘the lynchpin of our criminal justice process’.<sup>49</sup>
- 5.28 Pre-trial disclosure of the prosecution case is important because it provides the accused with knowledge of the case against him or her preventing ‘trial by ambush’ and contributing to a fair trial.<sup>50</sup>
- 5.29 Disclosure by the prosecution of relevant material helps to achieve ‘equality of arms’ by ensuring that each party has a reasonable opportunity to put their case in conditions that do not place them at a substantial disadvantage compared to their opponent.<sup>51</sup> Full disclosure redresses the imbalance that might otherwise characterise an adversarial system where the police and prosecutors have control of ‘the investigatory process’.<sup>52</sup>
- 5.30 Timely disclosure also facilitates the efficient conduct of criminal matters. Justice Moynihan notes that proper and timely disclosure ‘minimises delay... fosters early pleas of guilty, fosters negotiation and reduces wasting of resources’.<sup>53</sup>

### Do committal proceedings facilitate disclosure?

- 5.31 Committal proceedings were once widely viewed as playing a central role in ensuring full prosecution disclosure. The various steps involved in committal proceedings were seen as providing numerous opportunities to ensure adequate disclosure, with the committal hearing playing a particularly significant role. There is now some doubt about the value of committal proceedings in this regard, as statutory disclosure obligations and other pre-trial procedures attempt to ensure early disclosure.
- 5.32 In 2014, the NSWLRC considered whether committal proceedings facilitate prosecution disclosure. The Commission concluded that while they provide a trigger point for disclosure, they do not operate effectively to ensure provision of a comprehensive brief of evidence. The Commission found that many matters were committed for trial despite the prosecution case not being fully disclosed. It also suggested that the committal hearing was not the optimal point in proceedings to focus on disclosure, which ideally should occur much earlier.<sup>54</sup>
- 5.33 Conversely, Liberty Victoria argues that a committal hearing is ‘the key mechanism through which an accused obtains disclosure of the prosecution case’.<sup>55</sup> Given that witness statements are commonly drafted under the guidance of police officers, Liberty Victoria suggests adequate disclosure can only be achieved ‘where witnesses are cross-examined [at committal] about important aspects of their potential evidence which are not found in the written materials’.<sup>56</sup>

---

49 Martin Moynihan, *Review of the Civil and Criminal Justice System in Queensland* (Report, 2008) 85.  
 50 David Plater and Lucy De Vreeze, ‘Is the ‘Golden Rule’ of Full Prosecution Disclosure a Modern ‘Mission Impossible’?’ (2012) 14 *Flinders Law Journal* 133, 140.  
 51 *Ragg v Magistrates’ Court of Victoria and Corcoris* (2008) 18 VR 300, 310, 315.  
 52 David Plater and Lucy De Vreeze, ‘Is the ‘Golden Rule’ of Full Prosecution Disclosure a Modern ‘Mission Impossible’?’ (2012) 14 *Flinders Law Journal* 133, 136.  
 53 Martin Moynihan, *Review of the Civil and Criminal Justice System in Queensland* (Report, 2008) 86.  
 54 New South Wales Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas* (Report No 141, December 2014) 197–8.  
 55 Liberty Victoria Submission to Victorian Department of Justice & Regulation, ‘Proposed Reforms to Criminal Procedure: Reducing Trauma and Delay for Witnesses and Victims, Criminal Law Review’ (14 June 2017).  
 56 *Ibid.*

## Challenges that arise in relation to proper disclosure

### Disclosure between investigating agencies and the prosecution

- 5.34 In *Farquharson*, the Court confirmed that relevant material which is in the hands of the police or other investigating agencies must be treated as 'disclosable', even if the police fail to communicate the material to the DPP.<sup>57</sup> For disclosure purposes, the prosecution is indivisible from the police, and all its agencies are assumed to have constructive knowledge of anything known to other agencies.<sup>58</sup>
- 5.35 As discussed in Chapter 4, in New South Wales, legislation attempts to ensure early and full disclosure between the police or other investigating agency and the DPP. Law enforcement officers have a duty to disclose to the DPP 'all relevant information, documents or other things obtained during the investigation that might reasonably be expected to assist the case for the prosecution or the case for the accused person'.<sup>59</sup> When a police brief of evidence relating to an indictable matter is served on the DPP, it must be accompanied by a 'disclosure certificate'.<sup>60</sup> The brief of evidence must not be served on the DPP until a supervising police officer has certified that the investigation, brief of evidence, and disclosure certificate are complete.<sup>61</sup>

### Is the prosecution a partisan participant?

- 5.36 The role of modern prosecuting authorities in the criminal justice system has been described as to act as 'an impartial "minister of justice"'.<sup>62</sup> The prosecution is expected to assist the court by acting fairly and impartially and avoiding appellable error.<sup>63</sup> Yet to expect the prosecution to accord full disclosure is viewed by some commentators as equivalent to 'putting a fox in charge of a hen coop'.<sup>64</sup>
- 5.37 The heavy burden that disclosure obligations place on prosecuting authorities—who may have to sift through voluminous material to determine its relevance—has also been noted.<sup>65</sup>
- 5.38 The ability of the defence to cross-examine witnesses and victims at a committal hearing, and thereby to obtain disclosure of the prosecution case, may be considered one way of alleviating the disclosure burden that currently falls on the prosecution. Cross-examination of witnesses may also respond to concerns that if the prosecution controls what material is disclosed, unfairness to the accused will invariably result, given the conflict between the prosecution's obligations to act impartially and its 'legitimate interest in seeking the conviction of the accused'.<sup>66</sup>
- 5.39 It has been suggested that in jurisdictions that preclude or narrow the ability of the defence to cross-examine witnesses during committal proceedings, there have been 'many instances where "non-disclosure" issues have resulted in convictions being overturned...where a competently contested committal...would have likely avoided such miscarriages'.<sup>67</sup>

57 This applies even if the material is in the hands of members of the police who were not themselves involved in the initial investigation and who did not relay the relevant material to the original informant: *R v Farquharson* (2009) 26 VR 410, 464.

58 *R v Farquharson* (2009) 26 VR 410, 464.

59 *Criminal Procedure Act 1986* (NSW) s 15A.

60 *Director of Public Prosecution Act 1986* (NSW) s 15A. Disclosure certificates are discussed in more detail in the section titled 'Disclosure obligations' in Chapter 4.

61 NSW Police Force and Office of the DPP, *Agreement Between NSW Police Force & Office of the DPP (NSW) Concerning the Content and Service of an Early Appropriate Guilty Plea Brief and Charge Certification* (27 April 2018) pt 4.

62 David Plater and Lucy De Vreeze, 'Is the "Golden Rule" of Full Prosecution Disclosure a Modern "Mission Impossible"?' (2012) 14 *Flinders Law Journal* 133, 136; Victoria Director of Public Prosecutions, *Annual Report 2016–17* (2017) 12.

63 Director of Public Prosecutions for Victoria, *Policy of the Director of Public Prosecutions for Victoria* (27 March 2019) [14]

<<http://www.opp.vic.gov.au/getattachment/b5d48af4-3bef-4650-84fa-6b9befc776e0/DPP-Policy.aspx>>.

64 David Plater and Lucy De Vreeze, 'Is the "Golden Rule" of Full Prosecution Disclosure a Modern "Mission Impossible"?' (2012) 14 *Flinders Law Journal* 133, 145.

65 *Ibid* 139.

66 *Ibid* 145.

67 Robert Richter QC, 'Committal Hearings' (Speech, Saturday Criminal Law Conference, 23 March 2019) 7.

- 5.40 On the other hand, the stress and potential trauma suffered by witnesses and victims during cross-examination at committal hearings is a widely acknowledged concern.<sup>68</sup>

### Defence disclosure obligations

- 5.41 Historically, an accused person's disclosure obligations were limited on the basis this was necessary to preserve his or her right to silence.<sup>69</sup>
- 5.42 Even so, it is argued that defence disclosure is an important prerequisite to improving efficiency in the criminal justice system because it enables effective pre-trial preparation and negotiations between the parties.<sup>70</sup> This means that even if a matter is not resolved prior to trial, the trial will not be delayed or extended unnecessarily.
- 5.43 Some advocates of expanded defence disclosure obligations suggest they will not impinge on an accused's right to a fair trial as long as the accused's disclosure obligations are not as extensive as those imposed on the prosecution.<sup>71</sup>

## Questions

- 4 What measures can be introduced to improve disclosure in indictable matters:  
 (a) between investigating agencies and the DPP?  
 (b) between prosecutors and the defence?
- 5 To what extent do committal proceedings play a necessary role in ensuring proper and timely disclosure?
- 6 Could appropriate and timely disclosure occur within a pre-trial procedure that does not include committal proceedings?

### The case management function of the courts

- 5.44 Courts play an active role in case management to ensure that parties are complying with their legal obligations, identify the issues in a case, and to resolve, where possible, any issues prior to trial.
- 5.45 Case management occurs both during committal proceedings and following committal. The higher courts and the Magistrates' Court familiarise themselves with the case, set dates for the disclosure of relevant materials, and identify pre-trial legal and evidentiary issues, which raises the question of whether there is an unnecessary duplication of work.<sup>72</sup>

### Pre-trial witness examination

- 5.46 There are a variety of circumstances in which a court may grant leave for a witness to be cross-examined prior to trial.<sup>73</sup> Given the availability of other pre-trial cross-examination opportunities, there is debate about whether the ability to cross-examine some witnesses at a committal hearing should be retained.

68 This is discussed further below in the section titled 'Pre-trial witness examination'.

69 Jason Payne, *Criminal Trial Delays in Australia: Trial Listing Outcomes* (Research and Public Policy Series, No 74, Australian Institute of Criminology, 2007) 43; Arie Freiberg, 'Managerialism in Australian Criminal Justice: RIP for KPIs?' (2005) 31(1) *Monash University Law Review* 12, 28.

70 Jason Payne, *Criminal Trial Delays in Australia: Trial Listing Outcomes* (Research and Public Policy Series, No 74, Australian Institute of Criminology, 2007) 43–44.

71 *Ibid* 44.

72 Department of Justice and Regulation, Victorian Government, *Proposed Reforms to Criminal Procedure: Reducing Trauma and Delay for Witnesses and Victims – Criminal Law Review* (Discussion Paper, 2017) 10.

73 See the section titled 'Pre-trial witness examination' in Chapter 3.



## Cross-examination at committal hearings

5.47 The opportunity to cross-examine a witness at a committal hearing is defended as the only basis on which adequate disclosure of the prosecution case can be assured and thus as an important component of the accused person's right to a fair trial.<sup>74</sup>

5.48 Proponents of retaining a limited right to cross-examine at committal hearings argue:  
there is a vast difference between subjecting an accused person to trial on the basis of typewritten statements of unknown reliability and presenting an accused person for trial upon the basis of evidence the potency of which has been tested by cross-examination.<sup>75</sup>

5.49 In light of this, disclosure in the absence of the opportunity to cross-examine has been described as 'a "paper tiger" devoid of forensic teeth'.<sup>76</sup>

5.50 It is possible that other opportunities to cross-examine prior to trial do not adequately compensate for the loss of this opportunity at a committal hearing. There are two reasons for this:

- other opportunities for pre-trial cross-examination apply in a limited set of circumstances which, generally speaking, differ from those applicable to committal hearings (as set out in Chapter 3)
- where a court grants leave to cross-examine during a committal hearing, this occurs much earlier in the overall criminal proceeding than other pre-trial avenues, providing for earlier resolution.

5.51 In its report on the *The Role of Victims of Crime in the Criminal Trial Process* (Victims of Crime Report), the Commission highlighted the potentially traumatic impact on victims of being cross-examined at a committal hearing. It noted that '[c]ross-examination at a committal hearing is often described as being worse than at trial.'<sup>77</sup> It found there were 'two reasons for this:

- Victims cannot tell their story through evidence-in-chief. Rather, their statement is tendered to the magistrate and they are subject only to cross-examination.
- The manner of questioning by the defence is not constrained by the presence of a jury. As a result it may be more oppressive or intimidating.<sup>78</sup>

## Previous reforms and reform recommendations

5.52 In the Victims of Crime Report, the Commission made a number of recommendations to further limit cross-examination during committal proceedings. One recommendation was to establish an 'intermediary' scheme, as discussed in Chapter 3.

5.53 Other recommendations included:

- The introduction of a 'protected' victim category for those victims not already protected who are likely to suffer severe emotional trauma or be so distressed as to be unable to give evidence or give evidence fairly.<sup>79</sup>
- Amending the CPA to prohibit leave being granted to cross-examine victims whose cross-examination is not otherwise prohibited at committal hearings, except on matters that relate directly and substantially to the decision to commit for trial. The test for granting leave should include reference to whether the victims are able and wish to be cross-examined at a committal hearing.<sup>80</sup>

74 Liberty Victoria Submission to Victorian Department of Justice & Regulation, 'Proposed Reforms to Criminal Procedure: Reducing Trauma and Delay for Witnesses and Victims, Criminal Law Review' (14 June 2017).

75 John Coldrey QC, 'Committal Proceedings: the Victorian Perspective' (Conference Paper, Australian Institute of Criminology, The Future of Committals, 1-2 May 1990) 4.

76 Ibid 4-5.

77 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August, 2016) 207.

78 Ibid.

79 Ibid Rec 37.

80 Ibid Rec 39.



- 5.54 As set out in Chapter 4, most jurisdictions allow some form of pre-trial cross-examination, although there are differences in the tests for when leave to cross-examine may be granted. A range of measures have been adopted in other jurisdictions to reduce the trauma that may be experienced by victims and other witnesses during pre-trial cross-examination, and limits have been imposed on the scope of questions that may be put to victims and witnesses.
- 5.55 Tasmania and New Zealand no longer conduct committal hearings but have alternative pre-trial procedures allowing for cross-examination of witnesses. In Tasmania, if leave is granted to cross-examine a witness, this occurs in the Magistrates' Court.
- 5.56 There is no provision for the pre-trial examination and cross-examination of witnesses in England and Wales, except where the evidence of vulnerable witnesses is pre-recorded for use during a trial.<sup>81</sup>
- 5.57 In Western Australia, an accused may not cross-examine witnesses prior to trial unless the prosecution has obtained leave to examine a witness who has refused to provide a written statement, in which case the accused will generally be entitled to cross-examine that witness.<sup>82</sup>

## Questions

- 7 To what extent, if at all, is the ability to cross-examine witnesses during a committal hearing necessary to ensuring adequate and timely disclosure of the prosecution case?
- 8 Should some or all of the existing pre-trial opportunities to cross-examine victims and witnesses be retained? If so, why?
- 9 Should cross-examination at a committal hearing be further restricted or abolished? If so, why?
- 10 If cross-examination at a committal hearing is further restricted, how should this occur?
- 11 Are there any additional classes of victims or witnesses who should not be cross-examined pre-trial? If so, who?
- 12 What additional measures could be introduced to reduce trauma for victims or other vulnerable witnesses when giving evidence or being cross-examined at a committal or other pre-trial hearing?

## The test for committal

- 5.58 Historically, committal proceedings were designed to support the efficient functioning of criminal justice by acting as a filtering mechanism, ensuring that weak or unsubstantiated cases were not pursued to trial.<sup>83</sup> It is often said that this role is now fulfilled by a DPP.<sup>84</sup> Professional prosecutors from the Office of the Director of Public Prosecutions (ODPP) assess the material provided by the informant and make decisions about appropriate charges based on the likelihood of conviction. The Victorian Director's Policy emphasises that charges should not be pursued unless there is a reasonable prospect of conviction.<sup>85</sup>
- 5.59 The relatively low number of cases discharged by magistrates at committal hearings is cited in support of the argument that committal to a higher court based on a magistrate's assessment of the evidence in a case no longer serves any meaningful purpose. For example, in New South Wales prior to the 2018 reforms abolishing the test for committal, around one per cent of matters were discharged by magistrates at the committal hearing.<sup>86</sup>
- 5.60 Discharge figures are similar in Victoria, with the OPP suggesting that two per cent of accused were discharged at committal hearings over the past decade.<sup>87</sup>
- 5.61 In New South Wales prior to the 2018 reforms, more matters were withdrawn during committal proceedings in the Local Court by the prosecution than were discharged by a magistrate.<sup>88</sup> This suggests that committal proceedings played a role in achieving early resolution in some matters by forcing the prosecution to review its case.
- 5.62 The NSWLRC accepted this, but went on to consider whether the prosecution's exercise of its case review function was primarily a response to the 'threat or possibility that the magistrate may not commit'. It noted this threat was negated by the ability of the prosecution to issue a direct (ex officio) indictment.<sup>89</sup> The Commission posited that abolishing the test for committal would not lead to an increase in unsubstantiated matters proceeding as long as court supervised case management operates to 'ensure the prosecution gives timely consideration to the charges.'<sup>90</sup>

## The DPP's power to indict directly

- 5.63 The Commission does not have data showing how many cases were prosecuted by the DPP on direct indictment following discharge in the Magistrates' Court. Data provided by the OPP indicates that in 2017–18, 19 direct indictments were filed by the DPP.<sup>91</sup>

---

83 Northern Territory Law Reform Commission, *Report on Committals* (Report No 34, September 2009) 3–4. See also New South Wales Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas* (Report No 141, December 2014) 194.

84 Department of Justice and Attorney-General, Queensland Government, *Reform of the Committal Proceedings Process* (Discussion Paper, undated [2007]) 5. See also John Coldrey QC, 'Committal Proceedings: the Victorian Perspective' (Conference Paper, Australian Institute of Criminology, *The Future of Committals*, 1–2 May 1990) 194–5; Director of Public Prosecutions Victoria, *Proposed Reforms to Reduce Further Trauma to Victims and Witnesses* (Policy Paper, 1 October 2018) 6 <<http://www.opp.vic.gov.au/getattachment/0da88912-0a57-48f0-9048-31a0ad1b15df/DPP-Policy-Paper-Proposed-reforms-to-reduce-further.aspx>>; New South Wales Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas* (December 2014); John Johnson, 'A Case for Abolition' (Conference Paper, Australian Institute of Criminology, *The Future of Committals*, 1–2 May 1990) 94.

85 Director of Public Prosecutions for Victoria, Policy of the Director of Public Prosecutions for Victoria (27 March 2019) 2(1) <<https://www.opp.vic.gov.au/Resources/Policies>>.

86 Sixty five out of a total of 5,947 completed committal matters handled by the NSW DPP were discharged by the magistrate: New South Wales Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas* (December 2014) 177, 182.

87 Office of Public Prosecutions Victoria, Response to the VLRC Request for Statistics, *Victorian Law Reform Commission Committals Reference* (24 April 2019).

88 New South Wales Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas* (Report No 141, December 2014) 177.

89 Ibid 195.

90 Ibid.

91 Office of Public Prosecutions Victoria, Response to the VLRC Request for Statistics, *Victorian Law Reform Commission Committals Reference* (24 April 2019).

## Questions

- 13 Should the current test for committal be retained?
- 14 Having regard to the DPP's power to indict directly, is there a need for a test for committal?
- 15 Is there an appropriate alternative process for committing an accused person to stand trial?

## Guilty pleas

### The benefits of appropriate early guilty pleas

- 5.64 Most criminal matters resolve with a guilty plea. In Victoria in 2017–18, 80 per cent of prosecutions handled by the OPP were finalised on the basis of a guilty plea.<sup>92</sup>
- 5.65 The problems associated with avoidably late guilty pleas are well established, as are the benefits of appropriate early guilty pleas. Victoria's Sentencing Advisory Council notes:
 

An early guilty plea has a particularly significant impact on the cost and efficiency of criminal proceedings. It spares counsel and witnesses the cost and time involved in preparing the case and frees up the time and resources of the courts for other matters.<sup>93</sup>
- 5.66 As well as enhancing the efficiency and affordability of the criminal justice system, an early guilty plea may benefit victims and witnesses, as well as the accused. For victims and witnesses, an early guilty plea spares them the potential stress and trauma of giving oral evidence in court.<sup>94</sup> For the accused, a guilty plea expedites sentencing, which is particularly desirable if the accused is on remand in relation to the charges.<sup>95</sup>
- 5.67 A study by Flynn and Freiberg highlights the costs savings achieved when an accused person pleads guilty prior to trial.<sup>96</sup> They cite Victoria Legal Aid's assessment that in 2014:
 

an average trial, including the instructing and appearance fees for defence practitioners alone can cost [Victoria Legal Aid] approximately \$20,000 in the County Court and \$34,000 in the Supreme Court...In contrast, when a guilty plea is entered, the total cost to VLA for preparation and attendance at the plea hearing...is \$1,724 in the County Court and \$2,353 in the Supreme Court.<sup>97</sup>

### Obstacles to securing appropriate early guilty pleas

- 5.68 In some cases, late guilty pleas may be appropriate and unavoidable—if, for instance, new evidence comes to light that could not reasonably have been known or disclosed earlier in proceedings. In other cases, however, a late plea may reflect failings in pre-trial criminal procedures.

92 Victoria Director of Public Prosecutions, *Annual Report 2017–18* (2018) 1, 12.

93 Sentencing Advisory Council Victoria, *Sentence Indication: A Report on the Pilot Scheme* (February 2010) 2 [1.11]. See also, Sentencing Advisory Council Tasmania, *Statutory Sentencing Reductions for Pleas of Guilty* (Final Report No 10, October 2018) vi.

94 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice* (Consultation Paper, September, 2016) 280.

95 Department of Justice and Regulation, Victorian Government, *Proposed Reforms to Criminal Procedure: Reducing Trauma and Delay for Witnesses and Victims - Criminal Law Review* (Discussion Paper, 2017) 9.

96 Asher Flynn and Arie Freiberg, *Plea Negotiations, Report to the Criminology Research Advisory Council* (April 2018).

97 *Ibid* 1.

- 5.69 The NSWLRC identified a number of impediments to appropriate early guilty pleas:
- the prosecution serves parts of the brief of evidence late
  - the defence expects further evidence will be disclosed prior to trial
  - the defence believes that it is common practice for the prosecution to overcharge early, and that the charges will be reduced as the proceedings advance
  - the prosecution accepts a plea to a lesser charge late in the proceedings
  - Crown Prosecutors with authority to negotiate are not briefed until late in the proceedings
  - the defence perceives the court to be flexible in the way it applies a sentence discount for the utilitarian benefit of an early guilty plea that occurred later in the proceedings
  - the defence is sceptical that sentencing discounts will be conferred to their client
  - the defence believes that they will obtain better results in negotiations that occur just before trial
  - discontinuity of legal representation means that advice and negotiations are inconsistent
  - the defendant holds back a plea because the defendant wants to postpone the inevitable penalty, denies the seriousness of his or her predicament until the first day of trial, and/or is hopeful that the case will fall over due to lack of witnesses or evidence.<sup>98</sup>
- 5.70 While the NSWLRC's focus was on New South Wales, the obstacles identified have historically characterised criminal proceedings in other jurisdictions, including Victoria. For example, the practice of briefing less-experienced counsel during preliminary stages of proceedings, and only transferring briefs to more senior counsel at the trial stage, has been widespread.<sup>99</sup>
- 5.71 In response to the obstacles identified, the NSWLRC made a number of recommendations. One recommendation was for a sentencing discount scheme to be established that 'recognises the utilitarian benefit of the [guilty] plea and works to provide clear incentives to enter a plea early. It should not reward late pleas.'<sup>100</sup> The details of the scheme introduced in New South Wales in response to this recommendation are set out in Chapter 4.<sup>101</sup>

### Implications for victims and the right to a fair trial

- 5.72 When considering the potential benefits of guilty pleas and how to encourage them, two issues should be kept in mind.
- 5.73 Firstly, the impact a guilty plea may have on victims and witnesses. The RCIRCSA notes the potential benefits for victims and witnesses of securing early guilty pleas, but it cautions that when an offender pleads guilty to fewer or less serious charges than those with which he or she was initially charged, '[t]his can cause considerable distress to victims.'<sup>102</sup>
- 5.74 The second issue is the potential impact that incentives to plead guilty may have on the right to a fair trial.

---

98 New South Wales Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas* (December 2014) 9–10.  
99 Jason Payne, *Criminal Trial Delays in Australia: Trial Listing Outcomes* (Research and Public Policy Series, No 74, Australian Institute of Criminology, 2007) 45–6.  
100 New South Wales Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas* (Report No 141, December 2014) 11.  
101 See the section titled 'Guilty pleas' in Chapter 4.  
102 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice* (Consultation Paper, September, 2016) 280. See also the discussion above under the heading 'Charging practices and the decision to prosecute'.

- 5.75 The presumption of innocence may be undermined if an accused person is induced to plead guilty because of the unreasonably high cost of conducting a trial, or due to the risks attached to testing the prosecution case. In a critique of the sentencing discount scheme for early guilty pleas in England and Wales, Johnston and Smith argue that '[t]he temptation to avoid custody at any cost—even a false admission—may be overwhelmingly powerful for some defendants.'<sup>103</sup>
- 5.76 A study by Flynn and Freiberg found that when an offence carries a mandatory minimum sentence, this places an accused under pressure to plead guilty in order to avoid this mandatory sentence, 'even where there may be a strong case that the accused is not guilty of that lesser offence'.<sup>104</sup>
- 5.77 Tasmania's Sentencing Advisory Council refers to similar concerns:
- It has been argued that [sentence] reductions [for early guilty pleas] are contrary to the presumption of innocence [because they penalise] offenders who proceed to trial. Concerns have also been expressed that it may place undue pressure on an innocent offender to enter a plea of guilty, particularly when a custodial sentence would follow a guilty finding at trial, but a guilty plea would result in a non-custodial sentence.<sup>105</sup>
- 5.78 The council emphasises that any proposals for sentencing reform to encourage early guilty pleas 'should not derogate from a defendant's right to plead not guilty and receive proper advice of the case against him or her'.<sup>106</sup>
- 5.79 Recognition that early guilty plea incentives may undermine the right to a fair trial explains why the phrase 'appropriate early guilty pleas' is widely used. It makes clear that any inducement to plead guilty early should:
- ...be an...encouragement for appropriate early pleas of guilty and not...an incentive to enter a guilty plea where an [alleged] offender would not otherwise have done so.<sup>107</sup>

### Do committal proceedings facilitate appropriate early guilty pleas?

- 5.80 The various stages of committal proceedings may all play a role in securing—or alternatively, in hindering—appropriate early guilty pleas. The influence each stage has will vary depending on how well designed it is, as well as on other factors such as how effectively rules are enforced and the wider legal culture.
- 5.81 Flynn and Freiberg found that
- ...a strong early resolution culture permeates the courts, [Victoria Legal Aid], Victoria Police and the OPP, which may, in part, contribute to the high rate of guilty pleas entered in Victoria each year. Indeed, there has been a noticeable shift in all facets of the legal process in Victoria (as evident elsewhere in Australia) towards a commitment to early resolution, where appropriate.<sup>108</sup>
- 5.82 In the view of many defence counsel, committal hearings play an important role in securing appropriate early guilty pleas because they encourage the accused to confront the strength of the prosecution case at an early stage. Legal Aid Queensland has expressed the view—paraphrased here—that committal hearings are
- ...more effective than other court events, such as mentions, in underlining to the defendant the need to make decisions. Sometimes the evidence and the cross-examination at committal may steer the defendant towards a guilty plea if, for instance, the defendant has resisted [entering a guilty plea] because of a belief that a key

103 Ed Johnston and Tom Smith, 'The Early Guilty Plea Scheme and the Rising Wave of Managerialism', *University of the West of England Research Repository* (E-print, Undated) 2 <<http://eprints.uwe.ac.uk/31457/3/The%20Early%20Guilty%20Plea%20Scheme%20and%20the%20Rising%20Wave%20of%20Managerialism%20FINAL.pdf>>. The sentencing discount scheme is described in Chapter 4.

104 Asher Flynn and Arie Freiberg, *Plea Negotiations, Report to the Criminology Research Advisory Council* (April 2018) xiii.

105 Sentencing Advisory Council Tasmania, *Statutory Sentencing Reductions for Pleas of Guilty* (Final Report No 10, October 2018) vi.

106 Ibid vi.

107 Ibid vi.

108 Asher Flynn and Arie Freiberg, *Plea Negotiations, Report to the Criminology Research Advisory Council* (April 2018) xii.

prosecution witness may be unreliable or hostile. The cross-examination of that witness at the committal may indicate that there is little prospect of the defendant being able to defend the charges.<sup>109</sup>

5.83 In Victoria, guilty pleas are entered at the time of committal in approximately 45 per cent of cases committed to higher courts.<sup>110</sup> Moreover, an increasing proportion of matters that commence in the committal stream in Victoria are finalised summarily. In 2008–09, 20 per cent of committal stream cases were determined summarily, compared with 29 per cent of committal proceedings in 2017–18.<sup>111</sup>

5.84 While the NSWLRC conceded that guilty pleas do occur in the period surrounding the committal procedure, it suggested:

this is likely to be because it coincides with the time that the ODPP is adequately briefed in matters. As full committal hearings [involving cross examination of witnesses] are uncommon, it is more likely to be the participation of the prosecuting agency which cause an increase in negotiation and plea activity than the actual process of committal itself.<sup>112</sup>

## Questions

- 16 How effectively do committal proceedings ensure:
- (a) appropriate early resolution of cases
  - (b) efficient use of court time
  - (c) parties are adequately prepared for trial?
- 17 Are there other pre-trial procedures that could equally or more effectively ensure:
- (a) appropriate early resolution of cases
  - (b) efficient use of court time
  - (c) parties are adequately prepared for trial?

## Pre-trial delay

- 5.85 The Supreme Court of Victoria says the benefits of avoiding delay include:<sup>113</sup>
- the time which may be spent on remand is minimised for the accused
  - events are fresher in the mind of witnesses and therefore the quality of their evidence is not diminished by delay
  - the experience of victims is substantially improved
  - for those convicted and sentenced, access to rehabilitative programs is brought about sooner.<sup>114</sup>

109 Nicolee Dixon, 'Committal Proceedings Reforms: The Civil and Criminal Jurisdiction Reform and Modernisation Amendment Bill 2010 (Qld)' (Research Brief 2010/14, Queensland Parliamentary Library, May 2010) 18.

110 Magistrates' Court of Victoria, *Committal Data Requested by the VLRC* (24 April 2019). See also Table 6 in Chapter 3.

111 Ibid. See also 'Court events and case management' in Chapter 3.

112 New South Wales Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas* (December 2014) 46 [3.31].

113 Victorian Department of Justice and Regulation, *Proposed Reforms to Criminal Procedure: Reducing Trauma and Delay for Witnesses and Victims - Criminal Law Review* (Discussion Paper, 2017) 9.

114 Ibid.

- 5.86 Committal proceedings have been criticised for contributing to delay by unnecessarily duplicating aspects of other pre-trial procedures and of the trial.<sup>115</sup> Aside from this duplication, the time taken to finalise matters may be extended as a result of backlogs that develop when matters are waiting for committal mentions and hearings, and other committal events. The Supreme Court of Victoria suggests:
- some of the largest periods of delay in the system are attributable to awaiting a hearing date, effectively “queuing”. This occurs in both the Magistrates’ Court during the committal process and then again in the higher court. The fact that this occurs twice within the course of a criminal proceeding significantly contributes to the overall time it takes to bring the matter to a conclusion.<sup>116</sup>
- 5.87 In 2017–18 in Victoria, the median days between filing hearing<sup>117</sup> and committal to a higher court was 228 days if committal occurred at a committal hearing.<sup>118</sup> By comparison, if committal to a higher court occurred at a committal mention, the median number of days this took was 107.<sup>119</sup>
- 5.88 The Magistrates’ Court of Victoria points out that it has introduced several measures to reduce delay. It reports that the ‘vast majority’ of committal hearings are listed for one day or less, and suggests that the length of committal hearings is kept within appropriate bounds as a result of the Court’s ‘stringent approach to the granting of leave to cross-examine.’<sup>120</sup> It continues:
- The cases involving longer periods tend to be in the area of white collar crime or murder which have the benefit of narrowing the real issues in dispute and highlighting matters of admissibility.<sup>121</sup>
- 5.89 A problem not yet addressed by the Magistrates’ Court is the relatively high number of committal hearings that are adjourned. According to the OPP, over the last decade, 36 per cent of committal hearings were adjourned.<sup>122</sup> The reason for these adjournments, the next listing type, and the progress of these matters is unknown, but any adjournment contributes in some degree to delay.
- 5.90 In Victoria in 2016–17, indictable matters took 17.6 months to complete.<sup>123</sup> In 2017–18, indictable matters took on average 15.5 months to complete, bringing the five-year average down to 19.9 months.<sup>124</sup>
- 5.91 As noted in Chapter 4, the Commission does not have data from other jurisdictions on the average time frame for completion of indictable matters. Regardless, however, of whether a jurisdiction has dispensed with a test for committal that involves an assessment of the evidence in a case, a significant minority of matters in all jurisdictions take more than six months to be finalised within the jurisdiction of the Magistrates’ or Local Courts (noting that these figures include summary as well as indictable stream cases), and more than a year until finalisation after entering the higher trial courts.<sup>125</sup>

115 Department of Justice and Regulation, Victorian Government, *Proposed Reforms to Criminal Procedure: Reducing Trauma and Delay for Witnesses and Victims - Criminal Law Review* (Discussion Paper, 2017) 10.

116 Ibid 9–10.

117 Or from the date on which a case that commenced in the summary stream was transferred to the committal stream: Magistrates’ Court of Victoria, *Committal Data Requested by the VLRC* (24 April 2019).

118 Ibid. This does not include data relating to committal hearings for sexual offence cases, which took a median of 193 days.

119 Ibid.

120 Criminal Law Committee of the Magistrates’ Court of Victoria, *Magistrates’ Court Response to the DPP’s Proposed Reforms of the Committal Process* (10 April 2019).

121 Ibid.

122 Office of Public Prosecutions Victoria, Response to the VLRC Request for Statistics, *Victorian Law Reform Commission Committals Reference* (24 April 2019) 1.

123 Victoria Director of Public Prosecutions, *Annual Report 2016–17* (2017) 1.

124 Victoria Director of Public Prosecutions, *Annual Report 2017–18* (2018) 1.

125 Australian Productivity Commission, *Report on Government Services* (2018) pt C, Ch 7, Table 7A.19. See Tables 14, 15 and 16 in the section titled ‘Delay’ in Chapter 4.



## Previous reform proposals to address delay

- 5.92 The RCIRCSA in its ‘Criminal Justice Consultation Paper’ said that consideration should be given to abolishing committal hearings in those jurisdictions that have not already abolished them as a measure to reduce delay in prosecutions for child sexual abuse offences.<sup>126</sup> While it concluded that ultimately the submissions it received concerning the contribution—if any—of committal hearings to avoidable delay aligned with replacing committal processes with the form of case management adopted in New South Wales,<sup>127</sup> it did not make the abolition of committal proceedings a formal recommendation in its final report.
- 5.93 The RCIRCSA proposed that delay be addressed by measures to encourage:
- early allocation of prosecutors and defence counsel
  - the Crown—including subsequently allocated Crown prosecutors—being bound by early prosecution decisions
  - appropriate early guilty pleas
  - case management and the determination of preliminary issues before trial.<sup>128</sup>

## Questions

- 18 How should concerns that committal proceedings contribute to inappropriate delay be addressed?
- 19 How should concerns that other pre-trial processes contribute to inappropriate delay be addressed?

## Delay in the Children’s Court

- 5.94 As discussed in Chapter 3, there has been a substantial increase in the number of committal stream matters in the Children’s Court following amendments to the *Children, Youth and Families Act 2005* (Vic) (CYFA) which saw a growing number of serious indictable offences uplifted from the Children’s Court to the higher courts.<sup>129</sup> For example, nine committal stream cases were initiated in 2014–15, whereas 45 committal stream cases were initiated in 2018–19.<sup>130</sup>
- 5.95 Delay may also occur when an uplifted matter is transferred back to the Children’s Court for determination—for example, if resolution is achieved on the basis of downgraded charges that can be determined summarily.<sup>131</sup>

## Question

- 20 Do committal proceedings contribute to inappropriate delay in the Children’s Court?

126 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice* (Consultation Paper, September 2016) 340–1.  
127 Ibid 253.  
128 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report, Preface and Executive Summary* (2017) 215.  
129 See section titled ‘Committal proceedings in the Children’s Court’ in Chapter 3.  
130 Response to Request for Children’s Court Data, Email from Children’s Court of Victoria to Victorian Law Reform Commission, 16 May 2019.  
131 *Criminal Procedure Act 2009* (Vic) ss 168, 168A.



## Implications of reforming pre-trial procedure

- 5.96 Reforming pre-trial procedure will have wider impacts throughout the criminal justice system. The Commission's Terms of Reference require it to address these systemic issues, including what financial or other resources may be necessary to ensure the successful implementation and operation of any reform proposals.

### Wider impacts of reforming the pre-trial system

- 5.97 Queensland's Moynihan Review emphasised the importance of considering the wider impacts of reform initiatives. This Review pointed out that in Western Australia:

One of the unintended consequences of abolishing the committal hearing has been the inadvertent elimination of opportunities for discussion and negotiation between the prosecution and defence. This has led to the need for more intensive judicial supervision in the District Court before there is a plea or a trial.<sup>132</sup>

- 5.98 As well as focusing on the need to consider all potential consequences flowing from reforms, the Moynihan Review highlighted that local legal and political cultures are likely to influence the success or failure of reform efforts.<sup>133</sup>
- 5.99 Successful reform requires a coordinated effort from all involved in the criminal justice system. This approach was taken in Victoria in the early 1990s in relation to the issue of late guilty pleas. An inquiry considered ways to reduce delay in criminal proceedings and concluded that late guilty pleas were a 'fundamental' contributor to delay,<sup>134</sup> and that encouraging earlier pleas would require 'a fairly dramatic attitudinal change on the part of all those involved in the [criminal justice] system pre-committal'.<sup>135</sup>
- 5.100 Victoria Legal Aid and the DPP were responsive to this, and moved to ensure the availability of both duty lawyers and lawyers from the OPP at committal mentions in order to conduct negotiations. The result was that a greater proportion of guilty pleas began to be entered earlier in proceedings.<sup>136</sup> While late guilty pleas remain an issue, their instance in Victoria was greater a few decades ago.<sup>137</sup>
- 5.101 In its discussion of delay in the criminal justice system, the RCIRCSA also pointed out the 'significant and complex interactions' between issues and reform options, as well as their funding implications.<sup>138</sup> It noted that:

any significant changes [to reduce delay] will require additional resources, at least initially, not just for the courts but also for prosecution agencies and publicly funded defence services and in some cases for police. Even where reforms achieve improvements, these may require an initial additional investment, and they may lead to increased demand rather than reducing the need for resources.<sup>139</sup>

132 Martin Moynihan, *Review of the Civil and Criminal Justice System in Queensland* (Report, 2008) 181.

133 Ibid 166.

134 Ann-Louise Boag, 'Legal Aid and its Role in the Reduction of Delays in Criminal Proceedings in Victoria' in David Biles and Sandra McKillop (eds) *Proceedings of the Criminal Justice Planning and Coordination Conference* (Australian Institute of Criminology, April 1993) 228.

135 Ibid 229.

136 Ibid 228–9.

137 Sentencing Advisory Council, Victoria, *Guilty Pleas in the Higher Courts: Rates, Timing and Discounts* (August 2015) xvi.

138 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (August 2017) 263.

139 Ibid 266.

## Resource implications of pre-trial reform

5.102 The criminal justice system is designed to support a range of outcomes, some of which are difficult to quantify. Social benefits such as public trust in the system, or costs such as high rates of wrongful conviction, are not amenable to financial quantification. Nevertheless, it is important to assess the relative costs and benefits of reform proposals, considering—to the degree that it is possible—any likely impacts on financial and other resources.

### Short and long-term resource implications

- 5.103 Reform may require an initial financial outlay to offset the costs of implementation, and may also have ongoing costs—for example, if it requires additional or more senior personnel, as was the case with New South Wales’ ‘Appropriate Early Guilty Plea’ reforms, discussed in Chapter 4.
- 5.104 Although implementing reforms may be initially costly, the end result may be improved affordability. In the New South Wales example, if the early involvement of senior lawyers successfully reduces the proportion of late guilty pleas, it is likely this will reduce overall costs, given the time and resources spent on preparing matters for trial.

### Legal aid

- 5.105 Around 80 per cent of people who face criminal trial in Victoria have their case funded by Victoria Legal Aid (VLA).<sup>140</sup> In 2014, the cost of funding these cases was approximately \$33.2 million per year.<sup>141</sup>
- 5.106 As was recognised in New South Wales, funding to implement and support the ongoing costs of any reforms must be directed to all relevant agencies, including VLA.

### The cost of hearing cases in different courts

- 5.107 A consideration in relation to the most appropriate forum for pre-trial and committal procedures is the different cost structures applicable within the court hierarchy.
- 5.108 In 2008, PricewaterhouseCoopers looked at the indicative costs for an hour of court time.<sup>142</sup> The costs include provision for the magistrate or judge’s time, a court registrar, prosecution and defence counsel (where funded by VLA), and the notional rent of court space. They do not include the defendant’s and witnesses’ time, travel expenses, and other court administration costs and overheads.<sup>143</sup>

140  
141  
142  
143

Victoria Legal Aid, *Delivering High Quality Criminal Trials* (Consultation and Options Paper, January 2014) 4.

Ibid 6.

PriceWaterhouseCoopers, *Review of Fees Paid by Victoria Legal Aid to Barristers in Criminal Cases* (Victorian Bar Report, April 2008) 24.

Ibid.

**Table 17: Costs for an hour of court time, 2008<sup>144</sup>**

Input	Magistrates Court	County Court	Supreme Court	Source
Magistrate or judge	\$157	\$162	\$194	Judicial Salaries Act & Magistrates' Court
Prosecutor	\$48	\$134	\$195	VPS Agreement
VLA 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	

- 5.109 While these figures are not current, they demonstrate the relative affordability of pre-trial hearings and case management conducted in the Magistrates' Court compared with the higher courts. It cannot be said based on this information, however, that conducting committal and other pre-trial procedures in the Magistrates' Court is more cost-effective than moving some of these procedures into the jurisdiction of a higher court.
- 5.110 What is ultimately most cost-effective will depend on the relative contribution the courts at each level make towards:
- achieving appropriate early guilty pleas
  - where cases are likely to proceed to trial, effective disposition of pre-trial matters such as narrowing the issues that are in dispute, and making rulings on the admissibility of evidence to be relied on at trial
  - eliminating unnecessary duplication between the Magistrates' Court and the trial court.

## Question

- 21 What are the resource implications of any proposed reforms to committal or pre-trial proceedings?

## Reform models

5.111 This section provides an overview of two reform models previously proposed in Victoria, highlighting salient features for the purposes of comparison.

5.112 The models are:

- ‘Proposed reforms to reduce further trauma to victims and witnesses’, Director of Public Prosecutions (DPP model)<sup>145</sup>
- ‘Flexible early case management’, proposed in 2017 by the Supreme Court of Victoria (SCV 2017 model).<sup>146</sup> See Appendix C.

## Aims of reform proposals

5.113 The DPP model focuses on limiting the negative effects of criminal proceedings on victims and witnesses. It creates a presumption against victims and witnesses having to give evidence twice in a proceeding and replaces the committal determination with case management.<sup>147</sup>

5.114 Changes and aims in the DPP model include:

- abolishing the culture of cross-examining witnesses twice during a criminal proceeding
- simplifying the committal process by removing the test for committal
- requiring the prosecution to give an indication before committal to trial of which charges it considers have reasonable prospects of conviction and are likely to appear on an indictment
- requiring police to provide a more complete brief of evidence
- providing for the fast-tracking of certain criminal cases into the trial courts
- delivering quicker outcomes, reducing trauma experienced by victims and delivering fair and efficient justice.<sup>148</sup>

5.115 The Supreme Court made its proposal in 2017 to allow it to trial a process of end to end case management with minimal changes to the existing legislative framework. The Court has since indicated it welcomes consideration of a broader range of options.

5.116 The SCV 2017 model is premised on the benefits that flow from reducing delay:

- time spent by the accused on remand is minimised
- events are fresher in the minds of witnesses and the quality of their evidence is not diminished by delay
- the experience of victims is substantially improved
- access to rehabilitative programs is brought about sooner for those accused who are convicted and sentenced.<sup>149</sup>

---

145 Director of Public Prosecutions Victoria, *Proposed Reforms to Reduce Further Trauma to Victims and Witnesses* (Policy Paper, 1 October 2018) <<http://www.opp.vic.gov.au/getattachment/0da88912-0a57-48f0-9048-31a0ad1b15df/DPP-Policy-Paper-Proposed-reforms-to-reduce-furthe.aspx>>.

146 Department of Justice and Regulation, Victorian Government, *Proposed Reforms to Criminal Procedure: Reducing Trauma and Delay for Witnesses and Victims - Criminal Law Review* (Discussion Paper, 2017) 9–13.

147 Director of Public Prosecutions Victoria, *Proposed Reforms to Reduce Further Trauma to Victims and Witnesses* (Policy Paper, 1 October 2018) <<http://www.opp.vic.gov.au/getattachment/0da88912-0a57-48f0-9048-31a0ad1b15df/DPP-Policy-Paper-Proposed-reforms-to-reduce-furthe.aspx>> 1.

148 Ibid.

149 Ibid 9–14.

## Reform model features

### Filing charges

- 5.117 The DPP model retains a filing hearing in which a magistrate can give directions for:
- service of the hand-up brief
  - the date of the issues hearing.<sup>150</sup>
- 5.118 In the SCV 2017 model, charges are either:
- filed in the Magistrates' Court and then uplifted to the Supreme Court on request of a party or by the Supreme Court's own motion
  - filed directly in the Supreme Court with the Court's leave.<sup>151</sup>

### Disclosure

- 5.119 Under the DPP model, the requirements relating to service of the hand-up-brief remain unchanged. The hand-up-brief should reflect full disclosure and contain all material then in existence regarding the matter, including police notes and criminal records of witnesses.<sup>152</sup>
- 5.120 The prosecution will be required to comply with its legal obligations for disclosure at all times following service of the hand-up-brief, meaning that relevant material must be provided once it becomes available.<sup>153</sup>
- 5.121 Magistrates can order 'directed disclosure' so that particular material is disclosed by a certain date.<sup>154</sup> Disclosure dates should be set well in advance of a hearing in order to facilitate resolution discussions.<sup>155</sup>
- 5.122 The SCV 2017 model proposes handing to the Supreme Court management of the initial disclosure process.<sup>156</sup>

### Pre-trial case management

- 5.123 The DPP model proposes that the Magistrates' Court conduct an Issues Hearing and a Case Management hearing:
- at the Issues Hearing the Court will ensure the prosecution case is properly disclosed and the parties engage in resolution discussions
  - at the Case Management Hearing cross-examination of witnesses is permitted where leave has been obtained.<sup>157</sup>

150 Director of Public Prosecutions Victoria, *Proposed Reforms to Reduce Further Trauma to Victims and Witnesses* (Policy Paper, 1 October 2018) <<http://www.opp.vic.gov.au/getattachment/0da88912-0a57-48f0-9048-31a0ad1b15df/DPP-Policy-Paper-Proposed-reforms-to-reduce-furthe.aspx>>.

151 Department of Justice and Regulation, Victorian Government, *Proposed Reforms to Criminal Procedure: Reducing Trauma and Delay for Witnesses and Victims - Criminal Law Review* (Discussion Paper, 2017) 11.

152 Director of Public Prosecutions Victoria, *Proposed Reforms to Reduce Further Trauma to Victims and Witnesses* (Policy Paper, 1 October 2018) <<http://www.opp.vic.gov.au/getattachment/0da88912-0a57-48f0-9048-31a0ad1b15df/DPP-Policy-Paper-Proposed-reforms-to-reduce-furthe.aspx>> 2.

153 Ibid 3.

154 Ibid 4.

155 Ibid 4.

156 Department of Justice and Regulation, Victorian Government, *Proposed Reforms to Criminal Procedure: Reducing Trauma and Delay for Witnesses and Victims - Criminal Law Review* (Discussion Paper, 2017) 11–12.

157 Director of Public Prosecutions Victoria, *Proposed Reforms to Reduce Further Trauma to Victims and Witnesses* (Policy Paper, 1 October 2018) <<http://www.opp.vic.gov.au/getattachment/0da88912-0a57-48f0-9048-31a0ad1b15df/DPP-Policy-Paper-Proposed-reforms-to-reduce-furthe.aspx>>.

- 5.124 The SCV 2017 model proposes that once uplifted, matters in the Supreme Court would be managed under the CPA with the Supreme Court being able to exercise the same powers as the Magistrates' Court relating to committal proceedings as well as those of the Supreme Court in relation to pre-trial management and, where necessary, the determination of preliminary legal issues.<sup>158</sup>

### Cross-examination of witnesses

- 5.125 The DPP model contains a presumption that victims and witnesses will not be cross-examined prior to trial. Leave to cross-examine may be given subject to the following:
- there will be no cross-examination in any circumstance of a complainant in a sexual offence or family violence matter
  - no cross examination of a 'vulnerable witness'
  - a magistrate is only able to grant leave for cross-examination on discrete issues if satisfied there are substantial reasons, in the interests of justice, the witness should give oral evidence.<sup>159</sup>
- 5.126 The 'interests of justice' include where the cross-examination of a witness is central to the resolution discussions or likely to inform what charges are included on an indictment. For the purposes of this model, testing the credibility of a witness is not a substantial reason.<sup>160</sup>
- 5.127 The SCV 2017 model proposes no change to the current test for cross-examination of witnesses.

### Test for committal

- 5.128 The DPP model abolishes the committal determination and replaces the committal hearing with a case management hearing.<sup>161</sup> If a case is not resolved at the case management hearing it will be sent to the trial court for an initial directions hearing where directions can be made about issues such as service of the indictment, time-tabling of the trial and setting of the trial date.<sup>162</sup>
- 5.129 The DPP suggests that abolishing the magistrate's committal decision is a natural progression following introduction of the independent Office of the DPP.<sup>163</sup> Additionally, the DPP claims more matters are withdrawn as a consequence of application by the prosecution of a higher standard to assess sufficiency of evidence by comparison with the Magistrates' Court.<sup>164</sup>
- 5.130 The SCV 2017 model proposes uplifting the decision to commit to the Supreme Court where the case has been uplifted to its jurisdiction.<sup>165</sup>

---

158 Director of Public Prosecutions Victoria, *Proposed Reforms to Reduce Further Trauma to Victims and Witnesses* (Policy Paper, 1 October 2018) <<http://www.opp.vic.gov.au/getattachment/0da88912-0a57-48f0-9048-31a0ad1b15df/DPP-Policy-Paper-Proposed-reforms-to-reduce-furthe.aspx>> 12.

159 Ibid 5.

160 Ibid.

161 Ibid 2.

162 Ibid 4.

163 Ibid 6.

164 Ibid 6–7.

165 Department of Justice and Regulation, Victorian Government, *Proposed Reforms to Criminal Procedure: Reducing Trauma and Delay for Witnesses and Victims - Criminal Law Review* (Discussion Paper, 2017) 11.

# Conclusion

---

## 6. Conclusion

- 6.1 By 31 March 2020 the Commission will present the Attorney-General with its report on Victoria's committal and pre-trial system.
- 6.2 The Commission is seeking comment on the form or design of pre-trial criminal procedure that would most efficiently and effectively achieve and uphold the goals and principles of the Terms of Reference.
- 6.3 This may address:
- maintaining the present system
  - reforming the present system
  - abolishing the present system and replacing it
  - the impact of any proposed changes on all parts of the criminal justice system
  - what will be needed to ensure the successful implementation and operation of those changes, including resource implications.
- 6.4 In relation to Victoria's committal and pre-trial system, the Commission is also seeking comment on:
- best practice for supporting victims
  - reduction of trauma experienced by victims and witnesses
  - improving efficiency in the criminal justice system; and
  - ensuring fair trial rights.
- 6.5 The closing date for submissions is 16 August 2019.



# Appendices

- 74** **Appendix A: Comparative table of committal proceedings in Australian jurisdictions**
- 84** **Appendix B: Previous inquiries into committal reforms**
- 85** **Appendix C: Supreme Court proposal: flexible early case management**

## Appendix A: Comparative table of committal proceedings in Australian jurisdictions

	Vic <sup>i</sup>	ACT <sup>ii</sup>	NSW <sup>iii</sup>	NT <sup>iv</sup>
<b>Provision for paper committal</b>	By 'straight hand-up brief' or election of the accused at any time after service of the hand-up brief.	'Hand up' committals without witness examination or cross-examination are the rule: charges and issues are set out in a prosecution brief; witness statements are tendered as evidence.	'Hand up' committals without witness examination or cross-examination are possible: charges and issues are set out in a prosecution brief; witness statements can be tendered as evidence.	'Hand up' committals without witness examination or cross-examination possible: the prosecution must serve a committal brief; written statements or recorded evidence of prosecution witnesses must be admitted as evidence-in-chief.
<b>Magistrate required to make a decision to commit to trial</b>	Yes—to determine if the evidence is of sufficient weight to support a conviction for an indictable offence.	Yes—if the parties do not consent to committal, then the Magistrate assesses the evidence to determine if there is a reasonable prospect that the accused will be found guilty of an indictable offence.	No	Yes—if the Magistrate is satisfied after assessment of the evidence it is sufficient to put the accused on trial for an indictable offence.
<b>Case conference</b>	A magistrate may direct the accused and the prosecution to participate in a committal case conference, usually held on the day of the committal mention.	Not prescribed.	If the accused is legally represented.	Not prescribed.

	Qld <sup>v</sup>	SA <sup>vi</sup>	Tas <sup>vii</sup>	WA <sup>viii</sup>
<b>Provision for paper committal</b>	<p>'Registry committals' are conducted on the papers by clerks of the court with the consent of the parties and subject to certain procedural requirements;</p> <p>'Hand up committals' without witness examination or cross-examination are conducted on the papers by the court with the consent of the parties.</p>	At the election of the accused if the accused pleads guilty or concedes there is a case to answer.	Automatic committal to the Supreme Court if the accused pleads not guilty to an indictable offence.	With the consent of the parties. No attendance necessary for either party.
<b>Magistrate required to make a decision to commit to trial</b>	No test for committal for registry or 'hand up committals' without witness examination or cross-examination. In other cases, the court must assess the evidence and commit on the basis if the evidence is sufficient to establish a prima facie case to put the accused on trial for an indictable offence.	Yes—if the accused does not concede committal then the Magistrate assesses the evidence to determine if it is sufficient to put the accused on trial for an indictable offence, that is, if accepted, would the evidence prove every element of the offence.	No	No
<b>Case conference</b>	The parties must engage in a case conference to discuss the possibility of narrowing the issues in dispute and to negotiate charges prior to the first court listing.	After committal to trial.	After committal to trial.	At the election of the parties.

	Vic <sup>i</sup>	ACT <sup>ii</sup>	NSW <sup>iii</sup>	NT <sup>iv</sup>
<b>Disclosure obligations</b>	<p>Police to serve hand-up brief on an accused at least 42 days prior to committal mention. Police to provide the DPP with a copy within 7 days after service on the accused.</p> <p>If the accused indicates an intention to plead guilty before the hand-up brief is served, police may serve a plea brief.</p> <p>Police have an ongoing duty to disclose any further relevant material.</p>	<p>Police to provide brief of evidence to the prosecution within 6 weeks of plea being entered; prosecution to provide brief of evidence to accused within 8 weeks of plea. Prosecution must file and serve witness statements at least 28 days before committal hearing.</p>	<p>Police to provide simplified brief of evidence to prosecution.</p> <p>A magistrate orders service of the brief of evidence on the accused.</p>	<p>A brief of evidence must be served by the prosecution on the accused 28 days before committal and updated as necessary.</p>
<b>Provision for prosecution witnesses to be called to give evidence in person</b>	<p>If the Magistrates' Court grants leave to do so 'in the interests of justice'.</p> <p>Where an accused has been granted leave to cross-examine a witness, in exceptional circumstances, the Magistrates' Court may grant leave for the witness to give the whole of his or her evidence-in-chief orally.</p>	<p>On application by the prosecution, and only if necessary 'in the interests of justice'</p>	<p>With the consent of the parties or if the court finds there are substantial reasons for attendance in the interests of justice, or in some instances, special reasons.</p>	<p>If the court is satisfied it is in the interests of justice.</p>

	Qld <sup>v</sup>	SA <sup>vi</sup>	Tas <sup>vii</sup>	WA <sup>viii</sup>
<b>Disclosure obligations</b>	<p>An accused may request copies of statements or exhibits prior to the case conference and first court listing. Where reasonably practicable, the prosecution must comply within 14 days.</p> <p>If an accused does not consent to being committed the prosecution must provide a brief of evidence at least 14 days prior to the date set for the hearing of evidence.</p> <p>The prosecution is under an ongoing obligation of disclosure.</p>	<p>Police serve and file a preliminary brief prior to an accused's first appearance. If there is to be an 'answer charge' hearing, the prosecution must file a committal brief at least four weeks prior to the hearing and serve it on the accused as soon as practicable.</p> <p>If the matter is committed for trial, disclosure obligations are ongoing.</p>	<p>Within 4 weeks after the first hearing, a brief must be served on the accused, containing the complaint:</p> <ul style="list-style-type: none"> <li>- a copy of the defendant's transcript of interview (if conducted)</li> <li>- all witness statements; and</li> <li>- a summary of the material facts relevant to the charge.</li> </ul> <p>Police have an ongoing duty to disclose any further relevant material.</p>	<p>All relevant evidence to be disclosed early in proceedings and prior to a 'disclosure /committal hearing'.</p> <p>Police have an ongoing duty to disclose any further relevant material.</p>
<b>Provision for prosecution witnesses to be called to give evidence in person</b>	<p>On application of the accused, and with the consent of the parties or if the court is satisfied there are substantial reasons why, in the interests of justice, the witness should be called.</p>	<p>If the court is satisfied there are 'special reasons' for calling the witness.</p>	<p>Upon order of the Supreme Court if satisfied it is in the interests of justice and the accused or prosecution has:</p> <ul style="list-style-type: none"> <li>- identified a matter for which a witness is to be questioned;</li> <li>- specified why the evidence of the witness is relevant to the matter; and</li> <li>- specified why cross-examination, or examination, of the witness is justified.</li> </ul>	<p>On application by the prosecution but only in relation to a witness who has refused to make a statement to the police or the prosecutor.</p>

	<b>Vic<sup>i</sup></b>	<b>ACT<sup>ii</sup></b>	<b>NSW<sup>iii</sup></b>	<b>NT<sup>iv</sup></b>
<b>Provision for prosecution witnesses to be cross-examined</b>	<p>On application by the accused and with leave of the court and only if:</p> <ul style="list-style-type: none"> <li>- the accused identifies an issue to which the proposed questioning relates</li> <li>- the accused provides a reason why the evidence of the witness is relevant to that issue; and</li> <li>- cross-examination on that issue is justified.</li> </ul>	<p>Only if the court is satisfied it is necessary 'in the interests of justice' and the party seeking to cross-examine has:</p> <ul style="list-style-type: none"> <li>- identified an issue to which the questioning relates</li> <li>- explained why the evidence of the witness is relevant to the issue</li> <li>- shown why the evidence disclosed by the prosecution does not address the issue; and</li> <li>- identified the purpose and general nature of the questions to be put.</li> </ul>	<p>With the consent of the parties or if the court finds there are substantial reasons for attendance in the interests of justice, or, for victims of violent offences, special reasons.</p>	<p>With the consent of the prosecution, unless:</p> <ul style="list-style-type: none"> <li>- the witnesses are 'protected'; and</li> <li>- the court is otherwise satisfied that it is not in the interests of justice.</li> </ul> <p>If the prosecution does not consent, then only if the court is satisfied the accused has identified an issue that the proposed cross-examination relates to, and has provided a reason why the evidence is relevant to the issue, and the cross-examination is justified.</p>
<b>Provision for accused to give evidence or call witnesses to give evidence</b>	Yes	Yes	No	Yes
<b>Provision for accused or witnesses called by accused to be cross-examined</b>	Yes—if the accused gives evidence or calls witnesses to give evidence.	Yes—if the accused gives evidence or calls witnesses to give evidence.	No	Yes—if the accused has chosen to give evidence or to call defence witnesses.

	Qld <sup>v</sup>	SA <sup>vi</sup>	Tas <sup>vii</sup>	WA <sup>viii</sup>
<b>Provision for prosecution witnesses to be cross-examined in person</b>	As above.	If the court is satisfied there are 'special reasons' for cross-examining the witness.	Upon order of the Supreme Court if satisfied it is in the interests of justice and the accused or prosecution has: <ul style="list-style-type: none"> <li>- identified a matter for which a witness is to be questioned</li> <li>- specified why the evidence of the witness is relevant to the matter; and</li> <li>- specified why cross-examination, or examination, of the witness is justified.</li> </ul>	If a prosecution witness gives evidence in person.
<b>Provision for accused to give evidence or call witnesses to give evidence</b>	Yes	No	Yes	No
<b>Provision for accused or witnesses called by accused to be cross-examined</b>	Yes—if the accused wishes to give evidence.	No	Yes	No

	Vic <sup>i</sup>	ACT <sup>ii</sup>	NSW <sup>iii</sup>	NT <sup>iv</sup>
<b>Restrictions on classes of witnesses who can be called to give evidence</b>	Prohibition on cross-examination in sexual offence cases where the complainant is a child or is cognitively impaired.	Prohibition on cross-examination of complainants in sexual offence cases.	Prohibition on cross-examination of complainants in prescribed sexual offence cases who are cognitively impaired and complainants who are under 18 in relation to a sexual offence that occurred when the complainant was under 16. The following witnesses can be called only if there are special reasons in the interests of justice: <ul style="list-style-type: none"> <li>- victims of violent offences</li> <li>- vulnerable persons, except the victim, who are witnesses to offences involving violence (unless the prosecutor consents)</li> <li>- witnesses to prescribed sexual offences.</li> </ul>	'Protected witnesses' who cannot be called: <ul style="list-style-type: none"> <li>- victims (whether children or adults) in sexual offence cases;</li> <li>- children who are witnesses in sexual offence cases;</li> <li>- children in cases involving serious violence.</li> </ul>
<b>Restrictions on scope of questioning</b>	Limited to the issues for which leave was granted.	Not prescribed	Limited to matters that were the basis of the direction to attend unless <ul style="list-style-type: none"> <li>- there are substantial reasons in the interests of justice for questioning on other matters; or</li> <li>- special reasons in the interests of justice in the case of victims of violence.</li> </ul>	Accused is not limited to cross-examining on an issue for which leave to cross-examine was granted, but the court may disallow any question if it appears that its relevance is in doubt or it is not justified having regard to factors that the court was required to take into account when deciding whether to grant leave to cross-examine.
<b>Sentencing discount for early guilty plea</b>	Sentencing court to have regard to whether an offender entered a guilty plea and at what stage in the proceedings.	A factor to be taken into account by the court when sentencing.	Fixed sentencing discounts on a scale from 25% to 5% for early guilty pleas, based on the timing of the plea.	A factor to be taken into account by the court when sentencing.



	Qld <sup>v</sup>	SA <sup>vi</sup>	Tas <sup>vii</sup>	WA <sup>viii</sup>
<b>Restrictions on classes of witnesses who can be called to give evidence</b>	<p>Child witnesses must not be called to give evidence in chief, and child witnesses may only be cross-examined in certain circumstances, including that the interests of justice cannot adequately be satisfied by leaving cross-examination to the trial.</p> <p>Arrangements must be made to limit any trauma or distress where the court has given leave for a child witness to be cross-examined.</p>	<p>The court must be satisfied not only that special reasons exist for these witnesses to be called, but also that 'the interests of justice cannot adequately be served except by doing so' for:</p> <ul style="list-style-type: none"> <li>- victims of an alleged sexual offence</li> <li>- persons with cognitive impairments that adversely affect their capacity to give a coherent account of their experiences or to respond rationally to questions</li> <li>- children who are 14 years or under</li> </ul>	<p><i>Affected persons</i> – victims of alleged sexual crimes and children - may only be examined if the court is satisfied that:</p> <ul style="list-style-type: none"> <li>- exceptional circumstances require the witness to give evidence; and</li> <li>- it is necessary in the interest of justice.</li> </ul>	No
<b>Restrictions on scope of questioning</b>	<p>Questioning is limited to issues relevant to the reasons given by the court for requiring the witness to attend, unless the court is satisfied there are substantial reasons in the interests of justice why cross-examination relating to other issues should be allowed.</p>	Not prescribed	<p>The court may order and place limitations on the matters about which a witness may be examined, cross-examined and re-examined.</p>	<p>The court must not allow the witness to be cross-examined on matters relating solely to his or her credibility or on matters that do not relate directly to the evidence given during examination by the prosecutor.</p>
<b>Sentencing discount for early guilty plea</b>	<p>A factor to be taken into account by the court when sentencing.</p>	<p>According to a set scale based on the timing of the plea, ranging from a discount of up to 40% for a plea entered within 4 weeks of the accused's first court appearance, to a discount of up to 10% for pleas entered at the start of the accused's trial.</p>	<p>A factor to be taken into account by the court when sentencing, in accordance with common law principles.</p>	<p>A factor to be taken into account by the court when sentencing.</p> <p>Where the sentence for the offence is, or includes, a fixed term, the court must not reduce the sentence by more than 25%.</p>

	Vic <sup>i</sup>	ACT <sup>ii</sup>	NSW <sup>iii</sup>	NT <sup>iv</sup>
<b>DPP has power to indict directly</b>	Yes	Yes	Yes	Yes
<b>Time taken to finalise cases (2017–18)</b>	<p>Less than 6 months: 74.7% of cases in the Magistrates' Court and 88.1% of cases in the Children's Court.</p> <p>Less than 12 months: 69.5% of cases in the Supreme Court, 82.1% of cases in the County Court, 90.7% of cases in the Magistrates' Court and 96.8% of cases in the Children's Court.</p> <p>Less than 24 months: 92.7% of cases in the Supreme Court and 97.6% of cases in the County Court.</p>	<p>Less than 6 months: 81.8% of cases in the Magistrates' Court.</p> <p>Less than 12 months: 78.8% of cases in the Supreme Court, 93.6% in the Magistrates' Court.</p> <p>Less than 24 months: 98.3% of cases in the Supreme Court.</p>	<p>Less than 6 months: 88.1% of cases in the Local Court.</p> <p>Less than 12 months: 41.8% of cases in the Supreme Court, 22.1% of cases in the District Court, 98.2% of cases in the Local Court.</p> <p>Less than 24 months: 88.8% of cases in the Supreme Court; 55.4% of cases in the District Court.</p>	<p>Less than 6 months: 83.8% of cases in the Magistrates' Court.</p> <p>Less than 12 months: 92.7% of cases in the Supreme Court, 94.6% in the Magistrates' Court.</p> <p>Less than 24 months: 98.6% of cases in the Supreme Court.</p>

	Qld <sup>v</sup>	SA <sup>vi</sup>	Tas <sup>vii</sup>	WA <sup>viii</sup>
<b>DPP has power to indict directly</b>	Yes	Yes	Yes	Yes
<b>Time taken to finalise cases (2017–18)</b>	<p>Less than 6 months: 81.5% of cases in the Magistrates' Court.</p> <p>Less than 12 months: 90.6% of cases in the Supreme Court, 93.3% of cases in the District Court, 92.0% in the Magistrates' Court.</p> <p>Less than 24 months: 98.4% of cases in the Supreme Court, 98.1% of cases in the District Court.</p>	<p>Less than 6 months: 70% of cases in the Magistrates' Court.</p> <p>Less than 12 months: 89.8% of cases in the Supreme Court, 72.7% of cases in the District Court.</p> <p>Less than 24 months: 96.6% of cases in the Supreme Court, 91.5% of cases in the District Court, 88.4% of cases in the Magistrates' Court.</p>	<p>Less than 6 months: 54.6% of cases in the Magistrates' Court.</p> <p>Less than 12 months: 59.4% of cases in the Supreme Court, 79.9% of cases in the Magistrates' Court.</p> <p>Less than 24 months: 87.4% of cases in the Supreme Court.</p>	<p>Less than 6 months: 85.8% of cases in the Magistrates' Court.</p> <p>Less than 12 months: 85.8% of cases in the Supreme Court, 84.7% of cases in the District Court, 94.3% of cases in the Magistrates' Court.</p> <p>Less than 24 months: 99.1% of cases in the Supreme Court, 98.8% of cases in the District Court.</p>

i *Criminal Procedure Act 2009* (Vic).  
ii *Magistrates Court Act 1930* (ACT).  
iii *Criminal Procedure Act 1986* (NSW).  
iv *Local Court (Criminal Procedure) Act 1928* (NT).  
v *Justices Act 1886* (Qld).  
vi *Criminal Procedure Act 1921* (SA).  
vii *Justices Act 1959* (Tas).  
viii *Criminal Procedure Act 2004* (WA).

---

## Appendix B: Previous inquiries into committal reforms

Coldrey, John QC, *Report of Advisory Committee on Committal Proceedings* (February 1986)

Director of Public Prosecutions Victoria, *Proposed Reforms to Reduce Further Trauma to Victims and Witnesses* (Policy Paper, 1 October 2018)

Leveson, Sir Brian, Judiciary of England and Wales, *Review of Efficiency in Criminal Proceedings* (Report, January 2015)

Moynihan, Martin, *Review of the Civil and Criminal Justice System in Queensland* (Report, 2008)

New South Wales Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas* (Report, December 2014)

Department of Attorney-General and Justice (NT), *Committal Reform Review* (Report, March 2015)

Northern Territory Law Reform Committee, *Report on Committals* (Report No. 34, September 2009)

Department of Justice and Attorney-General (Qld), *Reform of the Committal Proceedings Process* (Discussion Paper, undated [2007])

Standing Committee of Attorneys-General, *Report of the Deliberative Forum on Criminal Trial Reform* (June 2000)

Department of Justice and Regulation (Vic), *Proposed Reforms to Criminal Procedure: Reducing Trauma and Delay for Witnesses and Victims*, Criminal Law Review (Discussion Paper, 2017)

Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report 34, August 2016), Chapter 8

Western Australia Law Reform Commission, *Review of the Criminal and Civil Justice System* (Report No 92, 1999)

## Appendix C: Supreme Court proposal: flexible early case management

The following information was provided to the Department of Justice and Regulation in 2017 by the Supreme Court of Victoria.<sup>1</sup>

The Supreme Court proposal is as follows.

Justice is best served by bringing criminal proceedings to a conclusion within the shortest possible time consistent with fairness:

- time which may be spent on remand is minimised for the accused;
- events are fresher in the mind of witnesses and therefore the quality of their evidence is not diminished by delay;
- the experience of victims is substantially improved; and
- for those convicted and sentenced, access to rehabilitative programs is brought about sooner.

Minimising delay in the criminal justice system should therefore be the aim of all components of, and participants in, the criminal justice system.

Reforms have been introduced in the recent past which seek to reduce the length of trials (e.g. Jury Directions) and to encourage early resolution (e.g. sentence indication and statements under section 6AAA of the *Sentencing Act 1991*). However, some of the largest periods of delay in the system are attributable to awaiting a hearing date, effectively “queuing”.

This occurs in both the Magistrates’ Court during the committal process and then again in the higher court. The fact that this occurs twice within the course of a criminal proceeding significantly contributes to the overall time it takes to bring the matter to a conclusion.

The Supreme Court has therefore suggested that reforms be introduced to allow matters to be managed from the point of charge or very shortly thereafter, through to trial in the Supreme Court as a means of reducing delay (avoiding double queuing) and providing continuity of management, whilst maintaining the important processes of disclosure and testing the sufficiency of evidence to proceed to trial.

In every case, a certain amount of time is required for information to be compiled and considered by the prosecution and defence. However, beyond this time period matters are awaiting the next available court listing date.

The Supreme Court recently extracted a sample of the 84 cases finalised in 2015/2016.

The average time from charge to committal for these matters was 7.3 months. The average time from committal to final disposition for the same sample was 10.2 months.

Data provided by the Magistrates' Court to the Victorian Law Reform Commission shows that only 46% of completed committals involved cross-examination of one or more witnesses.<sup>2</sup> It is rare for a committal hearing which does involve cross-examination to take more than one or two days.

This points to there being considerable scope to reduce delays.

### **Changes in Criminal Case Management**

Over the past decade there has been a significant increase in pre-trial management of cases in the higher courts. Once committed for trial, a post committal directions hearing is immediately listed and held in the higher court (usually within 24 hours) and a timetable set for the preparation of the matter for trial, including the subpoenaing of evidence, resolution of pre-trial legal and evidential issues.

There is considerable overlap between these activities and the current committal process. Each court familiarises itself with the case and each engages in a process of facilitating disclosure of relevant materials. There is therefore a duplication of effort.

A rigid separation between the committal process and pre-trial management, no longer accords with modern case management practice which aims to reduce double handling and promote continuity of management through to trial.

The recent appointment of a Judicial Registrar for the Criminal Division of the Supreme Court provides capacity for the Court to take on management of at least a proportion of cases from the point of charge.

### **The Western Australian model**

This proposal is informed by the process which exists in Western Australia whereby the committal process is integrated within the Supreme Court. The Magistrates' Court Stirling Gardens is located within the Supreme Court building and Registrars of the Supreme Court are appointed as Magistrates to form the Court at that venue. All persons charged with indictable Supreme Court matters appear before the Magistrates' Court Stirling Gardens and these cases are managed through the disclosure and committal process through to trial.

This process, introduced in 2007, has been successful in reducing delay.

Although the above measures are relatively simple reforms they have some very beneficial outcomes. Defended matters are resolved much earlier and accused have a better opportunity of obtaining their counsel of choice. More importantly, accused who are in custody spend less time on remand, and alleged victims and secondary victims gain earlier closure. The efficiencies that flow from these reforms result in significant savings in public expenditure.<sup>3</sup>

While the committal process in Western Australia is different to that in Victoria, there is reason to believe that there is scope for similar beneficial outcomes from management of cases by the Supreme Court from the same early stage.

<sup>2</sup> Victorian Law Reform Commission, *Report into the Role of Victims of Crime in the Criminal Trial Process*, No. 34 (August 2016), 210.  
<sup>3</sup> Supreme Court of Western Australia website [http://www.supremecourt.wa.gov.au/M/magistrates\\_court\\_stirling\\_gardens.aspx?uid=4946-0149-8167-1518](http://www.supremecourt.wa.gov.au/M/magistrates_court_stirling_gardens.aspx?uid=4946-0149-8167-1518), accessed 5 December 2016.

## The Tasmanian model

It is also noted that in Tasmania amendments commenced in 2008 which altered the nature of the conduct of indictable matters. While there remains a committal process to the Supreme Court, this is essentially a formality. The essential function of the committal process in relation to examining witness has been replaced by a 'preliminary proceeding'. This occurs after the formal committal and is ordered by the Supreme Court to take place before a Magistrate or Justice of the Peace.<sup>4</sup> The Supreme Court determines which witnesses may be examined in accordance with the legislative criteria and the preliminary proceeding is then conducted in accordance with that order.<sup>5</sup>

## Nature of the proposal

The proposal is to amend the *Criminal Procedure Act* to allow:

- the uplift of matters from the Magistrates' Court to the Supreme Court once charges are filed by order of the Supreme Court. This could occur at the request of a party or at the Supreme Court's own motion
- the option to file a charge directly in the Supreme Court with the leave of the Supreme Court.
- case management by the Supreme Court encompassing all the usual powers of the Magistrates' Court during the committal process, with concurrent powers to exercise the functions of the trial court under Chapter 5, and
- the ability to remit matters to the Magistrates' Court if necessary for the conduct of a committal.

The power of the DPP to file a direct indictment "at any time" as provided for in section 159(2) of the *Criminal Procedure Act* will remain.

The process of providing an accused with access to all relevant information held by the prosecution, the evidence to be presented at trial and the ability to test whether that evidence is sufficient for the matter to proceed, are important aspects of our justice system. Nothing in this proposal detracts from that proposition. However, the proposal does allow for this process to be carried out in different ways.

The above amendments, combined with rule amendments would allow the Supreme Court to:

- manage the initial disclosure process, conduct committal proceedings before a judicial registrar and, if appropriate, commit the accused to trial. Being familiar with the matter the Court can at the same time set out the timetable for trial preparations with provision having been made for a trial date immediately following an accused being committed for trial.
- manage the initial disclosure process, and if no committal hearing is required and no contest arises as to committal, allow the matter to proceed by direct indictment with a timetable for pre-trial preparation and listing of hearings to determine preliminary issues.
- following filing of the charge, list and determine a preliminary legal issue by way of ruling which will determine the scope of the charges proceeding to trial or focus the preparation of the matter for trial.

4 *Criminal Code (Tas)* s 331B.  
5 *Justices Act 1959 (Tas)* s 61.

Key to the proposal is that the Supreme Court is in a position to manage the case from the perspective of the ultimate trial court. This will avoid two separate case management processes and allow for a single case management process from the perspective of the ultimate trial court.

The case management processes of the Supreme Court often results in the resolution of a matter via a plea of guilty to the most appropriate charge. By allowing that process to begin at an earlier stage, the prospects of early resolution are increased.

### **Bringing proceedings into the Supreme Court**

An amendment is proposed to allow for the Supreme Court to order of its own motion that a charge for an indictable offence which is not triable summarily filed in the Magistrates' Court be uplifted/removed to the Supreme Court. This would be similar in some respects to the provision in section 167 of the *Criminal Procedure Act* which allows the Court to uplift a matter for trial from the County Court.

A further amendment would allow for charges to be filed in the Supreme Court. This would be subject to a leave requirement to ensure that the process was not used vexatiously by individuals.

Conscious of the fact that this would be a significant change in the criminal justice system, this approach would allow the piloting of the procedure with a smaller number of cases. The success of the pilot and the resources available within the Court would then determine the extent to which the procedure was expanded to, for example, all homicide cases.

The initial selection of cases would be based on matters which would ordinarily proceed to trial in the Supreme Court. It would be open to the prosecution or defence to request that the Court consider uplifting a matter. However, the Court would also seek to proactively identify suitable cases for uplift through liaison with State and Federal prosecutors, defence practitioners including Victoria Legal Aid, Victoria Police and the Magistrates' Court.

The Court would, as a starting point, seek to establish a process whereby it is notified of all murder and manslaughter charges upon filing. Whilst not all cases may be subject to uplift initially, this process would allow case volumes to be monitored and improved capacity for forward planning for all homicide cases as these cases fall within the exclusive criminal jurisdiction of the Supreme Court.

### **Case Management**

Once a matter is uplifted or charges filed, the proposal is that cases proceed in accordance with the provisions of the *Criminal Procedure Act*, but do so in the Supreme Court. The difference would be that there would be the option to exercise both the powers of the Magistrates' Court in relation to committal proceedings and those of the Supreme Court in relation to pre-trial management concurrently or immediately following the committal of an accused as appropriate. There would also be the option to remit matters to the Magistrates' Court if this became necessary. For example:

- a charge may be uplifted at the request of the defence who have indicated an intention by the accused to plead guilty. The Court could give directions for the plea brief to be served, but it may be agreed that the prosecution will file a direct indictment. The plea in mitigation could be listed in the Supreme Court with directions for the filing of reports and submissions. This would substantially reduce the overall time taken to bring the matter to a conclusion.



- a charge may be uplifted to the Supreme Court, with the Supreme Court conducting a committal mention. The Court could determine whether leave will be granted to cross-examine witnesses and list the committal hearing either before the Supreme Court (most likely before the judicial registrar), or back before the Magistrates' Court, if this was deemed more appropriate, to be conducted in accordance with the directions given at the committal mention. If the committal is undertaken in the Magistrates' Court a Magistrate will be able to exercise the discretion under section 132A of the *Criminal Procedure Act* to grant leave to cross-examine a witness, in respect of whom leave exists to cross-examine, on an issue not earlier identified.

A charge may be filed by leave in the Supreme Court where the parties are seeking an initial ruling on a question of law before the matter proceeds through the committal process as this ruling may lead to the resolution of the proceeding through a plea process or a substantial change in how the matter proceeds

The intention is to provide flexibility to adapt to the needs of each case with continuity of management by the Supreme Court as the ultimate trial court. It is considered this will reduce the time each proceeding takes to reach a conclusion by eliminating the need to revisit issues in different courts, by resolving issues early in proceedings, and by eliminating listing delays, particularly for those matters which do not proceed to a full committal hearing.

In addition to provision for filing or uplifting charges, it is proposed that amendments be made to the *Criminal Procedure Act* to provide that:

- where a matter is filed in/uplifted to the Supreme Court it shall proceed in accordance with Chapter 4 of the *Criminal Procedure Act* - Committal Proceedings- subject to the below:
  - the Supreme Court may give directions for the matters to be remitted to the Magistrates' Court for the conduct of the committal hearing; and
  - the Supreme Court may exercise powers under Part 5.5- Pre-trial Procedures- in relation to a matter before an indictment has been filed, if it would be appropriate in the interests of justice to do so. See the example above in relation to a pre-committal ruling by the Supreme Court.







Victorian  
Law Reform  
Commission

**Committals**  
**ISSUES PAPER**

GPO Box 4637  
Melbourne  
Victoria 3001  
Australia

Level 3  
333 Queen Street  
Melbourne  
Victoria 3000  
Australia

**Telephone**  
+61 3 8608 7800

**Freecall**  
1300 666 555 (*within Victoria*)

**Fax**  
+61 3 8608 7888

**Email**  
[law.reform@lawreform.vic.gov.au](mailto:law.reform@lawreform.vic.gov.au)  
[www.lawreform.vic.gov.au](http://www.lawreform.vic.gov.au)