

Victorian Law Reform Commission (VLRC) Committals Issues Paper



Victoria Police's submission

Executive Summary	2
Response to the issues paper	4
Protecting the right to a fair trial	4
Charging practices and the decision to prosecute.....	4
Disclosure obligations	5
The case management function of the courts	7
The test for committals.....	8
Guilty pleas	9
Pre-trial delay.....	9
Delay in the Children's Court.....	10
Implications of reforming the pre-trial process.....	10
Conclusion	11

Executive Summary

Victoria Police appreciates the opportunity to provide a submission to the VLRC's review of Victoria's committal procedure.

Victoria Police supports the removal of committals from court proceedings. The review presents an opportunity to consider a fresh approach which addresses some of the concerning aspects of the current committals procedure, such as the adverse impacts of criminal proceedings (including cross-examination) of victims and witnesses, lengthy delays and significant resourcing impacts on police and the courts and the frequent use of committals by the accused as a 'fishing exercise' to determine the best line of defence.

Victoria Police considers that committals could be replaced by alternative pre-trial procedures that alleviate these impacts while maintaining the fundamental protection for the accused of the right to a fair trial.

In particular, Victoria Police advocates for reforms to the committal procedure that will:

- facilitate early and comprehensive disclosure between investigating agencies and the Director of Public Prosecutions (DPP) as well as the prosecution and defence;
- reduce victim and witness trauma by introducing a presumption against cross-examination;
- result in timely, more efficient proceedings and reduce resourcing burden on investigators, prosecutors and the courts; and
- facilitate the early resolution of matters.

Victims and witnesses

The committals process can contribute to poor experiences and outcomes for victims and witnesses.

Victims and witnesses may be re-traumatised by the committals process for a number of reasons including:

- the willingness of defence practitioners to aggressively cross-examine a witness when a jury is not present (arguably making the committals process more traumatic for witnesses and victims than trials);
- the requirement for victims and witnesses to appear in court multiple times often over a protracted period of time; and
- the intimidation by supporters of the defendant(s), often merely through their presence in the courtroom.

Additionally, there is a prevailing view among investigators that the defence will run a committal even if the case is exceedingly strong and a plea is likely. In such circumstances, the defence is still given the benefit of an early plea post-committal in spite of the fact that victims and witnesses have been unnecessarily traumatised by the experience. There is also concern that the defence will use the committal:

- as a 'fishing exercise' where admissibility issues will be explored that require re-litigation before the trial judge, thereby wasting time and resources; and/or
- to test a particular line of defence that is subsequently abandoned at trial.

Recent reforms have removed committal proceedings in respect of prosecution of sexual offences committed against children and cognitively impaired persons. Victoria Police considers that there is scope for further reform to reduce trauma to victims and witnesses, create quicker and more efficient processes, and ensure that victims are clearly informed and engaged throughout the criminal justice process.

Victoria Police cautions that any attempt to streamline the committals procedure should not inadvertently preclude victims further from pre-trial procedures. It is still important that there be a focus on facilitating the visibility and engagement of victims and witnesses throughout any alternative pre-trial process to achieve more positive experiences and outcomes for those affected.

Lengthy process

The committals process represents a considerable impost on staffing for Victoria Police. Currently, investigators are required to be in attendance all day for each day of a committal hearing. In exceptionally complex cases, the committal hearing can stretch to weeks at a time in addition to the time spent in attendance at the trial.

Victoria Police also notes the additional costs potentially incurred by defence due to an inefficient process. As outlined in paragraphs 5.67, 5.105 and 5.108 of the VLRC Committals issues paper, costs may be significant depending on the counsel involved, court venue or whether legal representation is government funded.

Victoria Police considers the VLRC review presents an opportunity to streamline pre-trial processes to facilitate more timely criminal proceedings and reduce the administrative and resourcing burdens on investigators, prosecutors, defence and the courts.

Fair trial

Victoria Police acknowledges that committals can be a means for the accused to learn of or find out the evidence against them. Victoria Police supports the introduction of alternative pre-trial procedures to ensure that the rights of the accused are not compromised and are based on principles of fairness and justice. For example, Victoria Police supports early and comprehensive disclosure and the introduction of an issues hearing which would provide the opportunity to identify and discuss any disclosure issues and facilitate early resolution where appropriate.

Response to the issues paper

Protecting the right to a fair trial

Victoria Police supports reforms to replace the current committals procedure with alternative pre-trial procedures, as proposed in the DPP policy paper *Proposed Reforms to Reduce Further Trauma to Victims and Witnesses*¹ (the DPP model).

It is widely recognised that the current committals procedure can contribute to poor experiences and outcomes for victims and witnesses, particularly for many victims of family violence, sexual offending and child abuse (compared with other indictable offences), often resulting in adverse impacts to longer term wellbeing and recovery.

The current committals process also represents a considerable impost on staffing for Victoria Police and the courts and contributes to lengthy delays in the resolution of matters. For example, as noted in the DPP model, a matter may proceed through multiple court mentions prior to the committal hearing, and can take days or weeks for the defence to cross-examine all witnesses and for the magistrate to make the committal decision.²

Victoria Police considers the DPP model represents an approach which would alleviate these adverse impacts while maintaining the accused's fundamental right to a fair trial. For example, the DPP model:

- emphasises full disclosure of all available material (except for a plea brief), including material commonly requested by the defence;
- introduces an 'Issues Hearing' where the court would ensure that all information is properly disclosed and at which the parties can engage in resolution discussions;
- replaces the committal hearing with a 'Case Management Hearing', at which the prosecution is required to give an indication of which charges it considers have reasonable prospects of conviction, in order to narrow and clarify the issues in dispute; and
- reduces delays and limits the appearance to less than a day in court in most cases, resulting in less time for the accused in pre-sentence custody.³

Victoria Police also supports that lawyers (authorised to make critical decisions to the case – e.g. enter into plea negotiations/deals) and OPP prosecutors are involved in the Issues Hearings.

Victoria Police considers that these proposed reforms would provide the accused with the necessary protection of appropriate pre-trial procedures to ensure a fair trial without the lengthy delays associated with current committals procedures.

Charging practices and the decision to prosecute

Victoria Police notes that issues in relation to charging practices were raised in the context of the Royal Commission into Institutional Responses to Child Sexual Abuse which made the recommendation that prosecution charging and plea decisions in prosecutions for child sexual offences are guided by specific

¹ 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-further.aspx>>

² Ibid, p. 2

³ Ibid, pp. 1-4

principles.⁴ The recommended principles recognise, amongst other things, the importance to complainants of early and correct charging practices. Victoria Police supports these principles and efforts to reduce the adverse impacts of charging practices on victims.

While strongly of the view that police should retain the lead in the investigation and laying of initial charges, Victoria Police considers that the pre-charge involvement of the Office of Public Prosecutions (OPP) to provide independent prosecution advice, together with early and ongoing communication between the police and the OPP goes a significant way towards ensuring that the most appropriate charges are ultimately proceeded with at the earliest possible stage. For instance, this can involve OPP advice at the pre-charge stage where appropriate, or at the "Issues Hearing" stage as suggested under the proposed DPP model.

In order to achieve the desired outcome of early, consistent and accurate charging practices, Victoria Police recommends that clear processes are implemented to facilitate the coordination and cooperation of the OPP and Victoria Police within specified time periods.

Other measures that could be considered to improve charging practices include filing hearings, case conferences and mention hearings for indictable charges/serious offences prosecuted by the OPP. These measures could be utilised to facilitate the following pre-trial outcomes:

- ensuring that a brief of evidence identifies the most appropriate charges to proceed;
- determining whether any/all charges can be heard and finalised in the Magistrates' Court or summarily; and
- identifying any legal issues for resolution.

Victoria Police notes that the DPP model requires the prosecution to indicate the charges it considers have reasonable prospects of conviction in advance of the case management hearing (which is proposed to replace the committal hearing).⁵ Requiring this information at an earlier stage in the process will benefit both the accused and victims in assisting the parties to understand the nature of the case and the next steps in the process.

Finally, while supportive of efforts to improve charging practices generally, Victoria Police wishes to emphasise that charges should be based on the quality of the evidence available and not on the anticipation of a court outcome. It is also worth noting that an amendment to charges does not necessarily mean that the original charge was incorrect, but rather could be the result of an assessment regarding what can be proven or the result of other considerations. Victoria Police will continue to monitor charging outcomes and develop strategies where appropriate to improve its charging practices.

Disclosure obligations

Pre-trial proceedings should be focused on ensuring there is appropriate and thorough disclosure between the police, OPP and the defence. In particular, Victoria Police recognises the importance of full and early disclosure as the foundation for a fair trial. Early, full and continuing disclosure by the prosecution will

⁴ Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Recommendations*, p. 104 <https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_recommendations.pdf>

⁵ Director of Public Prosecutions Victoria, *Proposed Reforms to Reduce Further Trauma to Victims and Witnesses* (Policy Paper, 1 October 2018), p. 2 <<http://www.opp.vic.gov.au/getattachment/0da88912-0a57-48f0-9048-31a0ad1b15df/DPP-Policy-Paper-Proposed-reforms-to-reduce-furthe.aspx>>

ensure that the issues in dispute are properly narrowed and that the defence has a clear understanding of the evidence against them, which will minimise delays and may also result in the earlier settlement of a matter.

Increasingly, the scope of an investigation and the material to be assessed can be complex and voluminous. The assistance of the OPP in assessing material for relevance and advising police of this appraisal is crucial in the disclosure process. This is particularly the case given that police officers may not be legally trained and consequently rely on the guidance and advice of the OPP in determining questions of relevance.

The increased involvement of the OPP in assessing public interest immunity (PII) material at an early stage and assisting with appropriate court applications would also improve efficiencies in the disclosure process. The common law requires police to provide prosecutors with material subject to a claim of PII so that the prosecutor is aware of any exculpatory material in the possession of investigating agencies and can consider the effect of a successful claim of PII on the overall fairness of a trial. For example, considerations of fairness may require the prosecutor to charge a lesser or different offence if the accused would not receive a fair trial without the material subject to PII.

As suggested in the DPP model, Victoria Police supports the preparation by police of a comprehensive hand-up brief of evidence, which contains all available material in existence at that time, including police notes. However, Victoria Police stresses the importance of clearly defining the scope of this material to ensure it is relevant and necessary for forensic purposes, in acknowledgment of the growing volume and complexity of evidence relevant to criminal cases. A lack of clear parameters around the material to be included in a brief could potentially impact significantly on police resourcing. Further, noting that the preparation of briefs of evidence can be very time-consuming, any proposal to reduce the current period of time for the preparation of briefs would have significant resourcing impacts on Victoria Police.

Victoria Police considers that the use of a 'disclosure certificate', as used in NSW and referenced in the VLRC Issues paper, could be considered in the Victorian jurisdiction to facilitate the disclosure process. This would require police to confirm that all relevant material obtained in the investigation has been provided to the OPP in the brief of evidence. The certificate should provide an exhaustive list of documents to be disclosed, and could be modelled on the template currently used by Victoria Police for matters related to sex offences involving children and cognitively impaired victims and witnesses.

Victoria Police is also supportive of the DPP model's proposal of 'directed disclosure' where a magistrate would order particular material be disclosed by the date directed. It is proposed that magistrates would set a date in all cases to ensure material is disclosed prior to hearings to allow for adequate resolution discussions.⁶ Victoria Police notes that this approach would need to ensure that sufficient time is provided prior to the due disclosure date for police to prepare the brief of evidence, including any expert evidence that may be required.

To facilitate early and efficient disclosure between police and the OPP, Victoria Police suggests that a full list or 'log' of documents in a matter could be made available in an 'online portal' to be used between police and the OPP to ensure all materials are initially provided to the defence and continue to be available during the matter.

⁶ Ibid, pp. 3-4

Victoria Police has established the Electronic Brief Preparation and Disclosure project, to enable police to compile and share summary and indictable briefs of evidence electronically. This project aims to:

- enable efficient access to the brief of evidence for parties to court proceedings;
- facilitate the early resolution of matters; and
- reduce the need for matters to be adjourned due to briefs of evidence not being supplied;

This project also aims to provide a standardised method of brief compilation for members, streamlining delivery, management and service of the brief to both internal and external stakeholders.

A victims' portal could also be considered as a means to increase and facilitate the access of information by victims as well as assist police informants to comply with their responsibilities to keep victims informed as required under the *Victims Charter Act 2006*.

Victoria Police notes that the issues hearing proposed in the DPP Model would also be used to deal with any disclosures issues. At these hearings, the court would ensure the prosecution case is properly disclosed, assist in identifying any issues in dispute and facilitate discussions about early resolution where appropriate.⁷ For example, any concern by the accused that they had not received all appropriate material as part of the standardised disclosure process proposed above, could be discussed and resolved at the issues hearing. Another potential measure to improve the disclosure process is concurrent pre-trial discussions between expert witnesses and the prosecution and defence to explain or discuss relevant findings (also known colloquially as 'hot-tubbing'). This enables the parties to hear all experts discussing the same issue at the same time and, ideally, facilitates a clear understanding of what the experts are saying.

In relation to forensic procedures, the Victoria Police Drug Science Group (DSG), currently holds case conferences with the OPP, and investigators for all clandestine laboratory (drug manufacture) cases and on occasion for significantly large drug analysis cases. These meetings are essential in streamlining work flow and meeting set dates by targeting key items for analysis and ensuring appropriate prioritisation of work. Victoria Police considers that extending these case conferences more broadly may be beneficial in improving disclosure between investigating agencies and the OPP.

The case management function of the courts

Victoria Police notes that under section 97 of the *Criminal Procedure Act 2009*, one of the methods of ensuring a fair trial is to enable the accused to cross-examine witnesses. However, the ability to cross-examine witnesses is not considered necessary to ensure adequate and timely disclosure of the prosecution case as adequate pre-trial processes can be implemented to achieve the requisite goals. Further, there is a risk in family violence, sexual offending and child abuse matters in particular that trauma may be increased by the number of times the victim or witness must recount their evidence.

While some argue that cross examination of witnesses at the committals stage provides the accused an opportunity to assess the veracity/reliability of a witness, a strict interpretation of disclosure is the provision of information or material, and as such, cross-examination at the pre-trial stage is not required for this purpose.

⁷ Ibid, p. 3

Accordingly, Victoria Police's first preference is for the abolishment of cross-examination in all pre-trial procedures. Should this view not be supported, Victoria Police advocates for an approach that limits cross-examination as much as possible, such as that proposed in the DPP model. In particular, Victoria Police supports the DPP model's inclusion of a presumption that no witness will be cross-examined pre-trial, with:

- no pre-trial cross-examination of a complainant where the proceeding relates to a sexual or family violence offence; and
- no pre-trial cross-examination of a 'vulnerable witness' (that is, a child or a person with cognitive impairment, whether or not they are the complainant in the matter), unless the intention is to record that evidence to be used at trial.⁸

Victoria Police notes the DPP proposal that a magistrate can only direct that a witness (other than a vulnerable witness or where the proceeding relates to a sexual or family violence offence) be cross-examined before trial if satisfied that there are substantial reasons why, in the interests of justice, the witness should attend to give oral evidence.⁹ As a matter of policy, if both sides consent, cross-examination should be allowed.

Consideration could also be given to how pre-recorded statements – for example video audio recording of evidence (VARE) or digitally recorded evidence-in-chief (DREC)¹⁰ or recording at court – could be used for crimes against the person offences, thereby reducing the retelling and cross examination of victims and witnesses.

Finally, Victoria Police supports the continued use of measures such as the recently introduced ground rules regime and intermediaries as a means of reducing trauma for victims giving evidence or being cross-examined. These methods allow for further involvement of magistrates in making directions about particular issues and allow third parties to assist vulnerable witnesses. Victoria police support trialling the broader application of the intermediary scheme, across any type of hearing and not limited to proceedings relating to offences such as homicides and sexual offences.

The test for committals

The current test under section 128 of the *Criminal Procedure Act 2009* is that the Magistrates' Court is to determine whether there is evidence of sufficient weight to support a conviction.

Victoria Police supports the proposal in the DPP model to remove the 'committal decision', as long as the charging decision of the DPP is properly recorded, on the basis that the independent DPP already makes a decision as to the sufficiency of the evidence in deciding whether to pursue charges.¹¹ Further, the DPP has the statutory authority to indict directly, irrespective of the magistrate's decision.¹² As such, Victoria Police agrees with the DPP that the magistrate committal decision creates an unnecessary layer of decision-making and involves some duplication of functions.

⁸ Ibid, pp. 4-5

⁹ Ibid, p. 5

¹⁰ DREC is a victim statement that is recorded using a Victoria Police-issued body worn camera

¹¹ Director of Public Prosecutions Victoria, *Proposed Reforms to Reduce Further Trauma to Victims and Witnesses* (Policy Paper, 1 October 2018), pp 6-7 <<http://www.opp.vic.gov.au/getattachment/0da88912-0a57-48f0-9048-31a0ad1b15df/DPP-Policy-Paper-Proposed-reforms-to-reduce-further.aspx>>

¹² Sections 3, 159 and 161 of the *Criminal Procedure Act 2009* (Vic)

The removal of the committal decision would also alleviate some of the time and workload pressure on magistrates, which would free them up to focus on other aspects of the proposed new pre-trial procedures.

Victoria Police notes the important safeguards referred to in the DPP model should the committal decision be abolished, including the independent decision of police to file initial charges.¹³ To further ensure procedural fairness, it is recommended that the current DPP *Internal review of the decision to discontinue a prosecution* and the *OPP Complaints Policy* are retained. The policies require prosecutors to seek authorisation from the DPP to discontinue a prosecution¹⁴ and permit complaints from victims dissatisfied with a decision not to proceed with a prosecution.¹⁵

Victoria Police also supports the option for judicial review of the DPP's charging decision.

Guilty pleas

Victoria Police considers the proposed reforms to pre-trial procedures as proposed by the DPP model could potentially encourage appropriate guilty pleas at an earlier stage of the process. For example, early and full disclosure of evidence and the requirement for the prosecution to give an indication of which charges it considers have reasonable prospects of conviction in advance of the case management hearing may assist in convincing the defence of the strength of the prosecution case.

The VLRC may wish to consider further reforms for encouraging early guilty pleas, including clear incentives as reflected in the sentencing discount scheme introduced in NSW.

Victoria Police supports efforts to facilitate the early resolution of matters, which may benefit the accused, as well as victims and witnesses, by avoiding protracted proceedings. Early guilty pleas would also alleviate resourcing pressures for prosecutors and support the more efficient use of court time.

Pre-trial delay

Pre-trial delay is an inherent issue in the criminal justice system. The allocation of further resources would assist in addressing some of the delays.

Victoria Police also considers that comprehensive and early disclosure between the parties would go some way towards addressing inappropriate delays. As mentioned earlier, noting that the preparation of disclosure items can be time intensive for police, a limited list of standard disclosure items that should be served with the brief may assist in expediting this process. Items outside of a standard list should be requested, with reasons for the request and the provision managed through the issues-hearing process.

In relation to the 'Flexible early case management' model, proposed in 2017 by the Supreme Court of Victoria (SCV) (and referred to in the VLRC Issues Paper as the SCV 2017 model), Victoria Police notes that 'uplifting' matters from the Magistrates Court to the Supreme Court once charges are filed will save time and Court expense.¹⁶ While supportive of the SCV 2017 model, Victoria Police is of the view that

¹³ Director of Public Prosecutions Victoria, *Proposed Reforms to Reduce Further Trauma to Victims and Witnesses* (Policy Paper, 1 October 2018), pp 7 <<http://www.opp.vic.gov.au/getattachment/0da88912-0a57-48f0-9048-31a0ad1b15df/DPP-Policy-Paper-Proposed-reforms-to-reduce-furthe.aspx>>

¹⁴ DPP website, *Review of the decision to discontinue a prosecution*, <<https://victimsandwitnesses.opp.vic.gov.au/victims/requesting-reasons-for-decisions>>

¹⁵ DPP website, *OPP Complaints*, <<http://www.opp.vic.gov.au/Resources/Complaints>>

¹⁶ Department of Justice and Regulation, Victorian Government, *Proposed Reforms to Civil Procedure: Reducing Trauma and Delay for*

further consideration should be given to replicating proposed reforms in the DPP model in relation to introducing a presumption against cross examination and replacing committal hearings with alternative pre-trial procedures.

Victoria Police considers that each stage of the pre-trial procedure should have a purpose and outcome which provides clarity about the next steps for the accused, victims and witnesses. Ensuring that parties are well informed and engaged in the process will create the best opportunities for the early resolution of matters and consequently reduce delays.

Delay in the Children's Court

Victoria Police has changed its practice in this area in the last two years. Previously it had no specialist Children's Court prosecutors. Victoria Police has now used fast track remand court (FTRC) funding to create a specialist Children's Prosecution Unit. OPP engagement in the Children's Court is also new.

Since the fast-track process was introduced, case delay has decreased by 24 per cent, according to Melbourne Children's Court statistics in FTRC stakeholder meetings.

Implications of reforming the pre-trial process

Victoria Police considers that the timeframes for completion of hand up briefs should not be reduced. If reforms are made which require police to prepare a more comprehensive hand up brief, this will have significant time and resource implications for Victoria Police. Consequently, it will be important to clarify the requirements for the contents of a more complete hand-up brief to ensure this is limited to material that is relevant and necessary for forensic purposes. Consideration should also be given to ensuring that timeframes for the preparation of more comprehensive briefs of evidence are sufficient.

Costs awarded against police for matters dismissed at various stages should also be considered as part of the VLRC review. Victoria Police considers that it is generally preferable that costs only be able to be awarded against the prosecution – whether police or the DPP – where there has been some failure or wrongdoing on the part of the prosecution.

The reformation of pre-trial procedures as proposed in this submission will also likely have broader resourcing and technology implications for Victoria Police. This is particularly the case given that data is increasingly in electronic form and often complex and expansive in nature. For example, a document management system would need to be developed and implemented in order for police to efficiently and effectively participate in the improved pre-trial procedures envisaged in this submission.

Conclusion

Committals procedures can contribute to poor experiences and outcomes for victims and witnesses, often resulting in adverse impacts to longer term wellbeing and recovery. They also represent a considerable impost on staffing for Victoria Police and the courts and contribute to inappropriate and lengthy delays. The VLRC's review of committals procedures in Victoria provides an important opportunity to consider a fresh approach which addresses these issues.

Victoria Police supports the removal of committals in Victoria to be replaced with alternative pre-trial procedures which address the adverse aspects of the current committals process while maintaining important protections for the accused that are based on principles of fairness and justice.

Victoria Police recommends the VLRC consider adopting the DPP model which proposes:

- early and comprehensive disclosure processes;
- creating a presumption against victims and witnesses having to give evidence twice during a criminal proceeding;
- abolishing the 'committal decision' of determining whether there is sufficient weight to support conviction;
- introducing case management hearings to facilitate engagement and resolution of issues; and
- fast-tracking certain criminal cases into the trial courts.