KERRI JUDD QC
DIRECTOR of
PUBLIC PROSECUTIONS
VICTORIA

Director's Chambers
565 Lonsdale Street
Melbourne VIC 3000
DX 210290
T: [redacted]
E: [redacted]

Mr Bruce Gardner PSM
Acting Chair
Victoria Law Reform Commission
GPO Box 4736
Melbourne VIC 3001
DX 144 Melbourne VIC

12 August 2019

Dear Mr Gardner,

Victorian Law Reform Commission Reference on Committals

Thank you for the opportunity to provide comments on the Victorian Law Reform Commission's (**VLRC**) Issues Paper on Committals.

The VLRC has previously been provided with a Policy Paper I released on 1 October of last year titled 'Proposed Reforms to Reduce Further Trauma to Victims and Witnesses (**the Policy Paper**). The Policy Paper articulates my views on most questions raised by your Issues Paper and the comments that follow are intended to supplement what I have previously said. For completeness, I have appended the Policy Paper.

Purpose of committals

1. Question one: The Policy Paper recognised '*the essential role magistrates play in ensuring the proper disclosure of evidence, narrowing the issues in dispute and obtaining fair resolutions (and avoiding trials) as early as possible*.' There should be a limited opportunity to test evidence in the Magistrates' Court where it is central to resolution discussions or will inform the charges to be proceeded with. It is also appropriate that the availability of summary jurisdiction is determined in the Magistrates' Court.

Charging practices and the decision to prosecute

2. Questions two and three: The divergence between charges filed by police and those ultimately prosecuted can be problematic. The charges originally filed can substantially inform the victim's expectations for the rest of the prosecution. This expectation is reinforced if a Magistrate makes a decision to commit on the more serious charges.

3. It is understandable that police often file charges for more serious offences than those ultimately proceeded with. It is not until a proper assessment of a brief has been undertaken by a Crown Prosecutor or a solicitor from the Office of Public Prosecutions (**OPP**) that a final determination can be made as to which charges ought be proceeded with.

4. In accordance with Chapter 10 of my Prosecution Policy the DPP will provide advice to police if:

   - the OPP will prosecute the matter if charges are filed; and
   - the matter has some complexity, novelty, raises a potential conflict of interest for police or has broader policy implications; and
   - the advice is not about operational or investigative matters; and
   - the advice is not about whether to file charges in a particular jurisdiction.

   This advice will be about whether there are reasonable prospects of conviction and whether a charge is in the public interest.

5. It is appropriate for police to seek advice about charging in these circumstances. However, it would require a significant increase in resources if the OPP were involved in determining the appropriate indictable charges for all cases prior to charges being filed. It is very difficult to provide such advice until a brief of evidence has been fully prepared and this typically occurs at least a month after a charge is filed. Moreover, charges are frequently filed shortly after an accused is arrested and this short space of time provides limited scope for the OPP to provide advice. There may also be a perception that the provision of advice prior to the receipt of a brief of evidence may diminish the independence of the OPP from the investigation.

6. In the model proposed in the Policy Paper the prosecution would be required, in advance of the Case Management Hearing, to indicate the charges it considers have reasonable prospects of success (and are likely to appear on a trial indictment). This would ensure that a Crown Prosecutor has given proper consideration to the charges, even if a resolution is unlikely.

Disclosure obligations

7. Question four: The difficulties with disclosure arise primarily as a result of the following:

   a. A misunderstanding by police as to what is required to fulfil disclosure obligations;

   b. Police waiting to see whether defence request disclosure of particular items rather than simply providing appropriate disclosure up front;

   c. Police merging the concepts of disclosure and public interest immunity.

8. It may be appropriate to have a legislative non-exhaustive list of categories of documents that are to be disclosed.

9. It may be appropriate for there to be a legislative direction that an assessment of disclosure ought occur independently of any public interest immunity assessment. Once the relevant documents that ought be disclosed have been identified, police can assess the documents for public interest immunity and make any appropriate public interest immunity claims.

10. The resolution of the public interest immunity claim ought be determined by the trial judge, rather than at a committal, given that public interest immunity is not absolute and the trial judge will be best placed to make an assessment of the overriding interest.

11. Significantly more training of police as to their disclosure obligations would be useful.

12. Questions five and six: The Policy Paper acknowledges the role that magistrates play in ensuring proper disclosure. There is value in judicial oversight of proper compliance with the statutory disclosure requirements imposed on all prosecution agencies. As is proposed in the Policy Paper, the requirements for early brief service could be made more prescriptive so that items commonly subject of disclosure requests are provided along with the brief. It also proposes that magistrates be empowered and encouraged to make directions for particular disclosure with deadlines. However, such judicial supervision need not be part of a 'committal proceeding' to be effective; rather it can be part of case management.

Pre-trial witness examination

13. Question seven: The concepts of disclosure and pre-trial cross-examination should not be conflated. Each are, currently, discrete purposes of committal proceedings.[1] Disclosure, in its legal sense, does not include cross-examination of witnesses. Such a broad definition of the concept of disclosure would make a prosecutor's ongoing duty of disclosure an impossible concept. If the logic of this argument were to be followed, to achieve full disclosure *all* witnesses would need to be called at committal and the prosecutor would likely need to play a more active role in examination-in-chief. Where cross-examination is for the legitimate purpose of identifying further disclosure material, this process can surely be facilitated without needing to use court time, such as defence speaking with the informant.

14. Question eight: There is a difference between the *legal thresholds* for cross-examination that exist in Victoria and other states, and the *practical* application. The VLRC has correctly identified that most jurisdictions allow some form of pre-trial cross-examination. While pre-trial cross-examination is largely universal in Australian jurisdictions, the Policy Paper addresses the cultural expectation in Victoria that any witness be made available to defence pre-trial; such a culture does not, as far as we have been advised, exist in other jurisdictions. We recognise that it is difficult to quantify in an objective manner this disparity between jurisdictions.

15. In Victoria between the financial years 2011/12 and 2015/16, magistrates granted leave to cross-examine a witness at committal in 89% of cases where application was made.[2] In

---

1 *Criminal Procedure Act 2009* s 97(d).

2 Department of Justice, Criminal Law Review, 'Discussion paper – Proposed reforms to criminal procedures: Reducing trauma and delay for witnesses and victims', p 40 Figure 6.

2015/16 leave was granted in 1188 cases.[3] According to OPP data, in the same year there were 1335 matters where an accused pleaded not guilty when committed. That means that approximately 89% of contested cases in that year involved cross-examination of a witness.

16. By contrast, in Queensland in 2008, *before* committal proceedings were reformed to tighten the availability of cross examination of witnesses, about 70% of matters proceeded through committal without any oral testimony or cross-examination of witnesses.[4] This figure does *not* include matters committed on pleas of guilty. That means only 30% of contested matters involved cross-examination of one or more witnesses. In 2011, following the changes to legislation in that state, the Chief Magistrate of Queensland said there had 'been surprisingly few applications' to cross-examine witnesses.[5]

17. Informally we have been advised that cross-examination of witnesses arises in about 10% of contested cases in New South Wales and that in South Australia the 'vast majority' of committals are 'on the papers'[6].

18. These statistics and anecdotes are imperfect, but they support the notion that cross-examination of witnesses is far more common in Victoria than in other Australian jurisdictions. It is for this reason that the Policy Paper describes Victoria as having a 'culture of cross-examining prosecution witnesses' which does not exist in other jurisdictions.

19. Questions 9-11: These questions are addressed in the appended Policy Paper.

20. Question 12: The current legislation requires that a magistrate grant leave for the issues that cross-examination may canvass, and the witness cannot be cross-examined on matters that have not been identified.[7] As a practical matter, a committal magistrate is not always aware of what issues leave was granted on because there are inconsistent practices in terms of their inclusion on court extracts. Moreover, there are inconsistent approaches in terms of how strictly this provision is applied. The legislative arrangement appears appropriate, but the practical enforcement is something that requires attention.

The test for committal

21. Question 13: This question is addressed by the appended Policy Paper.

22. Question 14: A court has power to stay a proceeding, including a direct indictment, even at a very early stage. This means that there remain judicial safeguards where the DPP has

---

3 Ibid.

4 Moynihan, M, *Review of the civil and criminal justice system in Queensland* (2008) 172.

5 Butler, B, 'Criminal Law Reform – One Year on' presented to the Current Legal Seminar Series on 10 November 2011, 8.

6 In support of this anecdotal information, King CJ wrote in *Goldsmith v Newman* (1992) 59 SASR 404 that 'proof of facts [at preliminary/committal hearings] by means of statements in writing without oral examination or cross-examination has been made the norm' (at 410).

7 *Criminal Procedure Act 2009*, ss 124(6), 132(1), 132A(2).

decided to directly indict. This is in addition to the many safeguards that exist during a trial proceeding.

23. Question 15: This question is addressed by the appended Policy Paper.

Guilty pleas

24. Questions 16 and 17: Pre-trial case management, which currently takes place in a committal proceeding, is valuable because it creates trigger points or 'events' that force the parties to turn their attention to the issues. There is a great deal of benefit that comes from these hearings. The committal mention hearing generally works well because it is connected to the service of the brief, requires the parties to enter discussions a week in advance (at least, theoretically) and involves judicial case management. Each of these aspects, none of which are required to take place in the context of a committal proceeding, promote early resolution and preparation for trial.

25. By contrast, committal hearings can harm efficient use of court time and preparation for trial. Obtaining a committal hearing date can take many months, particularly when many witnesses need to be available at the same time. Counsel appearing at these hearings are often different to those who will appear at trial, so it does not mean that preparation for trial is commencing any earlier than it otherwise would; in fact, it can mean trial preparation is actually delayed compared with had there been a straight hand up.

26. The Policy Paper suggests an alternative case management model which retains the useful aspects of the committal proceeding.

Pre-trial delay

27. Questions 18-19: These questions are addressed by the appended Policy Paper.

Delay in the Children's Court

28. Question 20: Listings in the Children's Court tend to be quicker than in the Magistrates' Court but, otherwise, the same concerns for committal proceedings in the Children's Court apply as in the Magistrates' Court.

Implications of reforming pre-trial procedure

29. Question 21: It is difficult to answer this question without reference to a specific reform model.

30. Any reform should continue to have judicial case management in the Magistrates' Court so that the costs of early resolutions and of disclosure do not increase.

31. The model outlined in the Policy Paper is likely to decrease the length of criminal proceedings and reduce the expenses involved in counsel attending committal proceedings.

It may move some, but certainly not all or even the majority, of the work to trial courts. The reductions in time and expense will, no doubt, be made up for in volume. A more efficient process (both in terms of time and expense) will mean a greater number and turnover of cases for police, prosecutors and defence firms, alike. It is difficult to project precisely how these impacts will look in terms of resource implications.

32. Any proposal that is adopted will require short term resources to be made available to handle the transition, particularly where there is the prospect of a backlog of matters being uplifted simultaneously.

The Supreme Court model

33. The Issues Paper attaches the early case management model propounded by the Supreme Court. The DPP supports any measures that reduce delay. But the model proposed does raise some concerns.

34. Selection of cases:

- Including a power of remittal back to the Magistrates' Court in this proposal undermines the stated purpose of avoiding the double-handling of cases.
- If matters are remitted this would cause further delay rather than reducing delay. In fact, the timeframes may end up replicating the current case management timelines so no material reduction in delay will have been achieved.
- The Supreme Court could use this process to 'cherry pick' the cases to be case managed.
- The prosecution will then be placed in a very difficult position having to explain to victims and/or their families as to why one case has been chosen to be case managed and not another.
- How can this be done fairly and consistently to ensure access to 'speedy justice' for all?

35. Proper investigation and assessment of cases, and obligations towards victims:

Under the Supreme Court proposal complex cases may be forced on before:

- police have had time to thoroughly investigate;
- prosecutors have had time to properly assess the hand-up brief; and
- prosecutors have had time to properly prepare victims and/or their families for significant decisions that may occur in the initial stages of a matter, and to manage their expectations.

36. The DPP's independence:

- If pressure is brought to bear upon Victoria Police and the DPP to list a matter for hearing prior to a comprehensive investigation, this would undermine the independence of the DPP.
- There are potential ramifications for the prosecution's obligations to victims and witnesses which could impact on our ability to fulfil our prosecutorial duties.

- Victims have a legitimate expectation that matters be fully investigated by police, that the prosecution case be reviewed as to its legal merits and that the best possible evidence available be produced in proof of the charges. If these matters are forced on before time this process could be compromised, and victims of crime could be denied their 'day in court'.

37. The discretion whether to indict:

- The proposal does not factor in the DPP's discretionary decision whether to indict an accused person for trial. This is a critical stage of any criminal proceedings and a fundamental function of this office.
- If a Supreme Court Judicial Registrar makes the decision to commit an accused to stand trial, is it envisaged that the DPP is still able to decline to file an indictment despite an accused having been committed?

38. 'Charges' versus 'indictment':

- The terminology used draws the distinction between the 'filing of charges' and the 'filing of an indictment' but, as noted above, it does not clearly set out at which point in the process that the DPP considers whether to actually file an indictment.
- Is the process of filing 'charges', which we understand will incorporate a leave requirement, separate and distinct from the process of filing an 'indictment'?
- If leave was required for the DPP to file an indictment this would represent a serious erosion of the DPP's independence.

Thank you again for the opportunity to provide comments on the VLRC Issues Paper. I look forward to further discussions at our meeting on 16 August 2019. If you have any further questions, please contact [redacted] at [redacted] or [redacted].

Yours faithfully,

Kerri Judd QC

Director of Public Prosecutions

Annexure 1

Director's Policy Paper dated 1 October 2018 – Proposed reforms to reduce further trauma to victims and witnesses

KERRI JUDD QC
DIRECTOR of
PUBLIC PROSECUTIONS
VICTORIA

POLICY PAPER – 1 OCTOBER 2018

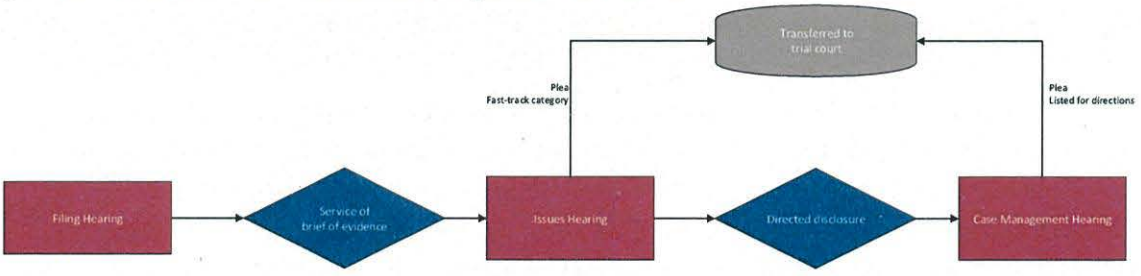
PROPOSED REFORMS TO REDUCE FURTHER TRAUMA TO VICTIMS AND WITNESSES

THE PROPOSAL

This proposal is intended to lessen the undesirable impacts of criminal proceedings on victims and witnesses by building upon processes refined by the Magistrates' Court. It achieves this by creating a presumption against victims and witnesses having to give evidence twice in a proceeding and replacing the decision to commit with case management.

This new process strikes the right balance by improving the experience of victims and witnesses in criminal proceedings without compromising the rights of the accused and the need to prove a case beyond reasonable doubt.

This proposal will expand the essential role magistrates play in ensuring the proper disclosure of evidence, narrowing the issues in dispute and obtaining fair resolutions (and avoiding trials) as early as possible. The role of assessing the strength of evidence will fall, at this pre-trial phase, to the Director of Public Prosecutions. In place of the existing pre-committal and committal proceedings, a prosecution for an indictable offence will proceed as follows:



Click here for larger view

The key changes from the current process are that this model:

- abolishes the culture of cross-examining prosecution witnesses twice during a criminal proceeding – a culture which does not exist in other jurisdictions;
- simplifies the process by removing the 'committal decision' of determining whether there is evidence of sufficient weight to support conviction;

PREPARATION FOR ISSUES HEARING

In advance of the Issues Hearing, the parties should discuss the issues in dispute and the prospects of the matter resolving.

Defence will be required to provide in advance of the Issues Hearing:

a) a notice of specific issues in dispute in the matter;
b) any requests for pre-trial cross-examination of witnesses; and
c) any requests for further disclosure.

ISSUES HEARING

At the Issues Hearing, the court will ensure the prosecution case is properly disclosed and the parties will engage in resolution discussions. If the matter is resolved, it can be booked in for plea hearing. Any summary jurisdiction application can also be determined.

If the charges are in dispute, the pathway will depend on the nature of the matter: Certain categories of cases will be subject to 'fast track' procedures. These cases will involve the transfer of the charges directly to a trial court. The category of cases this fast track process will apply to will be set out in guidelines established by the County and Supreme Courts.[3] For example, this may be all cases involving sexual offending where the complainant is a child or a vulnerable adult, cases where an issue of fitness to be tried or mental impairment has been raised or where complicated issues of public interest immunity arise. The magistrate can also make directions for further disclosure when transferring the charges.

For all other matters, the magistrate will determine any application for pre-trial cross-examination of witnesses, give directions for the material **and** timing of further disclosure, and set a date for a Case Management Hearing.

Things said, done or tendered at an Issues Hearing will be inadmissible as evidence against the accused unless the parties otherwise agree.[4]

DIRECTED DISCLOSURE

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.

---

[3] To be clear, the guidelines will concern categories of cases, not individual matters. It is envisioned these guidelines will be set in consultation with the DPP and that categories of cases will **not** include those where experience shows pre-trial cross-examination can inform the charges that are included on an indictment (e.g. culpable driving cases where expert evidence informs whether a charge of dangerous driving causing death is more appropriate).

[4] This is intended to be consistent with the protections currently afforded to committal case conferences under s 127(3) of the *Criminal Procedure Act 2009*.

(1) There is a presumption that no witness will be cross-examined pre-trial.
(2) There is to be no pre-trial cross-examination, in any circumstances, of a complainant where the proceeding relates to a sexual or family violence offence.
(3) There is to be no pre-trial cross-examination of a 'vulnerable witness', unless the intention is to record that evidence to be used at trial.
    a. A 'vulnerable witness' will be defined as a child or a person with cognitive impairment, whether or not they are the complainant in the matter.
(4) For any witnesses not referred to in paras (2) and (3), a magistrate can only direct that a witness 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.[7]
    a. To be clear, testing a witness' credibility is not a 'substantial reason'
    b. The 'interests of justice' include where the cross-examination of a witness is central to resolution discussions or likely to inform what charges are included on an indictment
(5) If a direction is made under para (4), cross-examination must be confined to the issues upon which the magistrate gives leave to cross-examine.

It is not intended that this model will displace the ability of a trial court to order a witness give evidence under s 198 of the *Criminal Procedure Act 2009* for the purpose of recording evidence that will be used at trial.

WHY DO THIS?

- **Reducing victim trauma:** The criminal justice process can have the unfortunate effect of re-traumatising victims. Victims are frequently confused why they need to give evidence twice. Chapter 8 of the VLRC Victims of Crime Report recognised that cross-examination is a traumatic experience for victims. At [8.63] the report says, 'The stress experienced by victims who are cross-examined at committal can limit their ability or willingness to give evidence at trial' and goes on at [8.64] to say 'Cross-examination at a committal hearing is often described as worse than at trial.' Recommendation 39 provides for a restriction on cross-examination of witnesses at committal. The proposed policy more than answers the Commission's call for reform.
- **Helping victims understand:** This proposal makes criminal proceedings less complex and requires the prosecution to identify the most appropriate charges to prosecute at an earlier stage. This will make it easier for victims to properly understand the nature of their case and the steps involved and give them realistic expectations of what will follow. It will also remove confusion about the significance of a magistrate's committal decision.
- **More efficient criminal proceedings:** On average, it takes 18 months for an indictable criminal prosecution to conclude.[8] This is a significant improvement on times gone by, but still reflects an excessive length of time considering the profound negative effect a prosecution has on victims and accused persons. This proposal will speed up criminal

---

[7] This adopts the language used in the New South Wales (s 82 of the *Criminal Procedure Act 1986*) and Queensland (s 110B of the *Justices Act 1886*) regimes.

[8] OPP Annual Report 2016/17.

are filtered out by discharges at committal. The removal of the judicial committal decision is a natural progression following the introduction of the independent office of the Director of Public Prosecutions. This proposal places a greater burden on the Director and Crown Prosecutors to properly assess cases at an earlier stage. While improving efficiency and removing an unnecessary layer of decision making, there are still a number of safeguards to ensure charges are not proceeded with or determined unfairly, namely:

  - the decision of police to file charges
  - the decision of the DPP to indict
  - stay applications
  - no case applications
  - interlocutory decisions regarding the admissibility of evidence
  - trial by jury
  - appeal to the Court of Appeal
  - appeal to the High Court

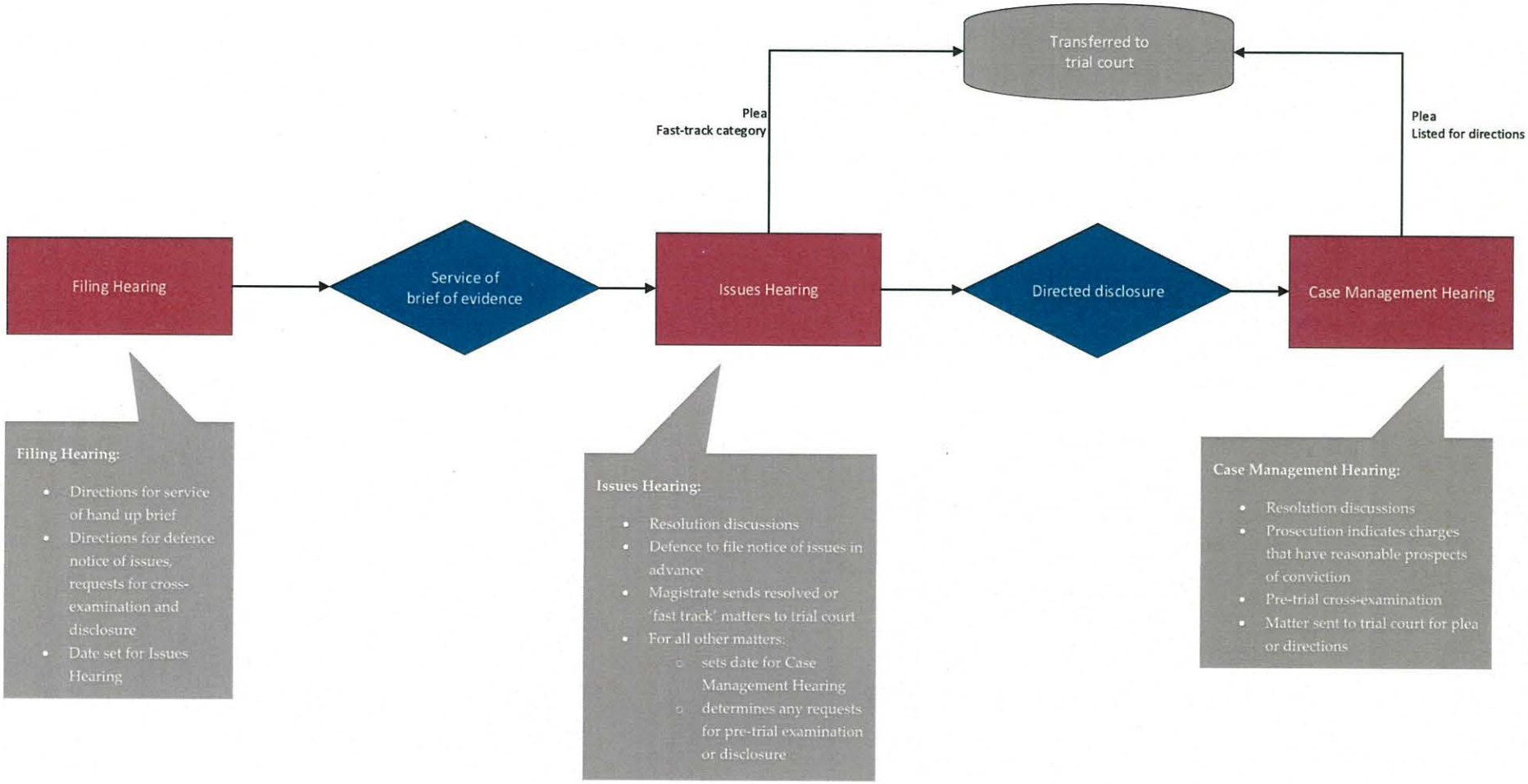
- **The right of the accused to cross-examine witnesses in advance of trial:** This is of limited value. It really just gives defence the opportunity to try to manufacture inconsistent statements from witnesses which, in turn, unnecessarily delays proceedings.[10] Victoria is the only jurisdiction in Australia that gives the accused 'two bites of the cherry'. Of course, being able to cross-examine more than once can benefit the accused. This is not a strong enough reason to allow it to continue. Under this proposal, the accused will still have the appropriate opportunity to conduct a proper cross-examination at trial, or in more limited circumstances pre-trial.
- **The need to ensure the prosecution case is adequately disclosed:** This would be retained and enhanced in the case management process. In fact, it would place a greater onus on the police to fully disclose all available material without the need for defence practitioners to make a request.
- **What about summary jurisdiction applications?** There will be no change to this process.

HOW WE COMPARE TO OTHER STATES

Victoria has a lengthier committal process than other states.[11] Compare the process, and recent reform, in other jurisdictions:

[10] See, e.g, VLRC Report [8.88].

[11] The VLRC report says 'When compared with other jurisdictions surveyed by the Commission, Victoria has the least restrictive threshold test to cross-examine witnesses at committal' [8.78]. See the commentary regarding committal hearings at [8.83]-[8.90].


Transferred to trial court
Plea
Fast-track category
Plea
Listed for directions
Filing Hearing
Service of brief of evidence
Issues Hearing
Directed disclosure
Case Management Hearing
Filing Hearing:
Directions for service of hand up brief
Directions for defence notice of issues, requests for cross-examination and disclosure
Date set for Issues Hearing
Issues Hearing:
Resolution discussions
Defence to file notice of issues in advance
Magistrate sends resolved or 'fast track' matters to trial court
For all other matters:
sets date for Case Management Hearing
determines any requests for pre-trial examination or disclosure
Case Management Hearing:
Resolution discussions
Prosecution indicates charges that have reasonable prospects of conviction
Pre-trial cross-examination
Matter sent to trial court for plea or directions