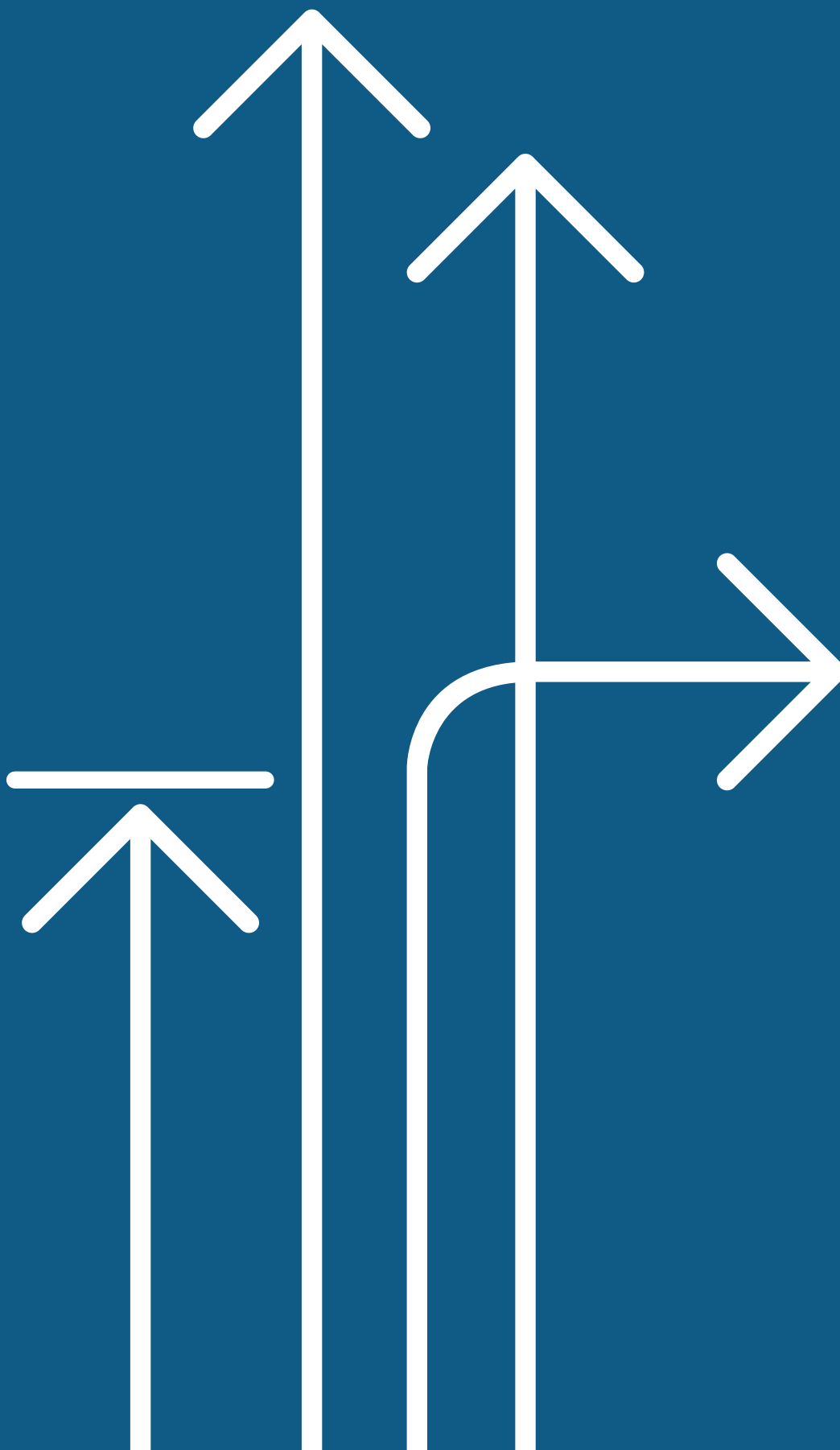




Victorian
Law Reform
Commission

Committals

REPORT MARCH 2020



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 2020.

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

This report reflects the law at 12 March 2020.

Title: Committals: Report / Victorian Law Reform Commission

ISBN 978-0-9943725-6-7

Series: Report (Victorian Law Reform Commission) 41

Ordered to be published
Victorian Government Printer
PP 122, Session 2018–20



CHAIR

The Hon. Anthony M. North QC

COMMISSIONERS

Liana Buchanan

Bruce Gardner PSM

Dr Ian Hardingham QC

Professor Bernadette McSherry

Dan Nicholson

Alison O'Brien PSM

Gemma Varley PSM

The Hon. Frank Vincent AO QC
(until October 2019)

CHIEF EXECUTIVE OFFICER

Merrin Mason

ACTING CEO

Lindy Smith (11 Feb–12 Jul 2019)

REFERENCE TEAM

Michael McKiterick

Team Leader

Dr Emma Larking

Senior Research and Policy Officer

Briana Proud

Senior Research and Policy Officer

Jonathan O'Donohue

Senior Research and Policy Officer

COVER DESIGN

Letterbox

TEXT LAYOUT

GH2 design

Committals

REPORT MARCH 2020



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
www.lawreform.vic.gov.au

Contents

| | |
|---|-------------|
| Preface | vii |
| Terms of reference | ix |
| Glossary | x |
| Executive summary | xiv |
| Recommendations | xvii |
| 1. Introduction | 2 |
| Terms of reference | 2 |
| Scope of the reference | 2 |
| Purposes of committal proceedings..... | 3 |
| Objectives of pre-trial indictable procedure | 3 |
| The value of committal proceedings..... | 4 |
| Reforms in other Australian jurisdictions..... | 4 |
| Recent reforms and reform proposals in Victoria | 6 |
| Terminology..... | 6 |
| The approach of the Commission | 7 |
| Commission Chair | 7 |
| Committals Division | 8 |
| Commission process..... | 8 |
| Reform objectives | 8 |
| Reducing trauma experienced by victims and witnesses..... | 8 |
| Improving efficiency..... | 10 |
| Maintaining the right to a fair trial..... | 10 |
| An overview of the Commission’s conclusions | 12 |
| Statutory sentencing discount schemes | 13 |
| 2. The present committal and pre-trial system | 16 |
| Introduction | 16 |
| Prosecuting indictable offences..... | 16 |
| Figure 1: The present committal and pre-trial system | 17 |
| Direct indictment by the DPP..... | 18 |
| Committal proceedings in the Magistrates’ Court | 19 |
| The purposes of committal proceedings | 19 |

| | |
|---|-----------|
| The component parts of committal proceedings | 19 |
| Filing hearing | 20 |
| Hand-up brief | 20 |
| Election to stand trial | 21 |
| Application for summary jurisdiction | 21 |
| Case direction notice (Form 32)..... | 22 |
| Committal case conference | 22 |
| Committal mention | 23 |
| Committal hearing | 23 |
| Costs orders..... | 24 |
| List management in the Magistrates' Court..... | 24 |
| Pre-trial procedure in the higher courts | 25 |
| Procedure immediately following committal | 25 |
| Filing an indictment..... | 25 |
| Case conferences supervised by the higher courts..... | 26 |
| Pre-trial cross-examination in the higher courts | 26 |
| List management in the County Court | 27 |
| List management in the Supreme Court | 29 |
| 3. Committal system and indictable case data | 32 |
| Introduction | 32 |
| Statistical data relating to indictable cases..... | 32 |
| Disposition of cases in the Magistrates' Court | 33 |
| Cross-examination during committal hearing | 33 |
| Duration of cases | 33 |
| Guilty pleas and other outcomes of cases in the higher courts | 35 |
| Limitations of the available data | 35 |
| Identifying delay | 35 |
| Analysing rates of pre-trial cross-examination..... | 35 |
| Drawing comparisons between Victoria and other jurisdictions | 36 |
| Improving data collection | 37 |
| 4. The test for committal..... | 40 |
| Introduction | 40 |
| The current test for committal | 40 |
| Is the committal test an effective filter?..... | 42 |
| Abolishing the test for committal in other jurisdictions | 43 |
| Stakeholder support for retaining the committal test..... | 44 |
| Stakeholder support for abolishing the committal test..... | 45 |
| Commission's conclusions: Abolish the test for committal | 47 |
| Create a test for discharge | 48 |

| | |
|---|-----------|
| 5. Should the lower courts conduct indictable case management? | 52 |
| Introduction | 52 |
| Case management in the Magistrates' Court: positive features | 53 |
| Magistrates' case management expertise | 53 |
| Services available in the Magistrates' Court | 53 |
| Regional Magistrates' courts | 54 |
| Affordability of the Magistrates' Court | 54 |
| Efficiency of the Magistrates' Court | 55 |
| Case management in the Magistrates' Court: negative features | 56 |
| Duplication and delay | 56 |
| Inconsistent case management practices | 57 |
| Approach to case management in other jurisdictions | 57 |
| Case management in the lower courts: stakeholder views | 58 |
| Commission's conclusions | 59 |
| Retain pre-trial case management in the lower courts for most cases | 59 |
| Commence Supreme Court cases in the Supreme Court | 60 |
| 6. Reforming pre-trial indictable case management: outline of a new system | 64 |
| Introduction | 64 |
| New pre-trial procedures | 64 |
| Commencing indictable proceedings | 64 |
| Figure 2: Proposed pre-trial case management system | 65 |
| Service of hand-up brief | 66 |
| Case direction notice | 66 |
| Court-supervised case conferences | 67 |
| Issues hearing | 68 |
| Specialist lists in the County Court | 70 |
| Case management in the Supreme Court | 70 |
| Resourcing more active case management | 70 |
| Resourcing a system rather than its parts | 71 |
| Current personnel and infrastructure shortfalls | 71 |
| Resource implications of case management recommendations | 72 |
| Resource implications of abolishing committal proceedings | 72 |
| 7. Role of the DPP and defence practitioners | 74 |
| Introduction | 74 |
| Structural problems with committal proceedings | 75 |
| New South Wales reforms | 75 |
| Role of the DPP and defence practitioners: stakeholder views | 76 |
| Prosecution not in a position to negotiate | 76 |
| Inadequate preparation by both parties | 76 |
| Commission's conclusions | 77 |
| Early involvement of the DPP | 77 |
| Early engagement of experienced practitioners | 77 |

| | |
|--|------------|
| 8. Charging practices | 80 |
| Introduction | 80 |
| Current approach to charging | 81 |
| Responsibility for investigating criminal conduct and filing charges | 81 |
| Responsibility for conduct of committal proceedings and charge review | 81 |
| Historical backdrop to current charging practices | 82 |
| Overcharging | 83 |
| What is overcharging? | 83 |
| Is overcharging a problem in Victoria? | 84 |
| Consequences of overcharging | 84 |
| Commission’s conclusions: addressing overcharging | 85 |
| Do not introduce charge certification | 86 |
| Provide charging training for Victoria Police | 86 |
| Require earlier involvement of DPP in charging | 87 |
| Improve disclosure and early engagement | 90 |
| Codify the DPP’s power to withdraw charges | 90 |
| Consulting victims about charging decisions | 91 |
| 9. Disclosure | 94 |
| Introduction | 94 |
| Current disclosure regime | 95 |
| Disclosure at common law | 95 |
| Statutory disclosure requirements | 96 |
| Approaches to disclosure in other jurisdictions | 98 |
| Problems with disclosure | 101 |
| Lack of clarity about objecting to disclosure | 102 |
| Commission’s conclusions: improving disclosure | 102 |
| Strengthen the prosecution’s statutory disclosure obligations | 103 |
| No change to the prosecution’s common law disclosure obligations | 104 |
| Strengthen the informant’s statutory disclosure obligations | 104 |
| A disclosure certificate regime should not be introduced | 108 |
| 10. Forensic reports and delay | 110 |
| Introduction | 110 |
| Forensic services in Victoria | 110 |
| Victoria Police Forensic Services Department | 110 |
| The Victorian Institute of Forensic Medicine | 111 |
| Other providers | 111 |
| Timelines for forensic reports | 111 |
| Delay in the provision of forensic reports: stakeholder views | 112 |
| Causes of delay | 112 |
| Effects of delay | 113 |
| Commission’s conclusions: better resourcing for forensic service providers | 113 |
| Publicise timeframes for the provision of forensic reports | 114 |
| Conferencing with forensic experts | 114 |

| | |
|--|------------|
| 11. Pre-trial cross-examination..... | 118 |
| Introduction | 118 |
| Pre-trial cross-examination in the present system..... | 119 |
| Cross-examination during committal proceedings | 120 |
| Pre-trial cross-examination in the higher courts | 121 |
| Cross-examination in the lower courts..... | 122 |
| Does Victoria have a culture of pre-trial cross-examination? | 122 |
| Trauma associated with cross-examination | 123 |
| Cross-examination and disclosure..... | 125 |
| Cross-examination and early resolution | 126 |
| Other jurisdictions..... | 127 |
| Commission’s conclusion: retain cross-examination in the lower courts | 127 |
| Protecting additional classes of witness from cross-examination | 127 |
| Commission’s conclusion: expand section 123 to some family violence cases | 128 |
| Should the test for leave to cross-examine witnesses in the lower courts be strengthened?..... | 130 |
| Commission’s conclusions: expand application of section 124(5) and better apply the test for leave to cross-examine | 131 |
| Reducing trauma during cross-examination | 131 |
| The OPP’s Victims and Witness Assistance Service | 133 |
| Expanding the use of intermediaries | 133 |
| Alternative arrangements | 135 |
| 12. The Children’s Court..... | 138 |
| Introduction | 138 |
| Committals in the Children’s Court: the present system | 139 |
| The role of the Children’s Court | 139 |
| Current committal process in the Children’s Court | 139 |
| Removing committals from the Children’s Court..... | 140 |
| Children accused of Supreme Court offences | 141 |
| Areas of reform specific to the Children’s Court | 141 |
| Timing of applications for summary jurisdiction | 141 |
| Management of cases involving adult and child co-accused..... | 142 |
| Transfer of related indictable offences to trial court | 142 |
| Appendices..... | 145 |
| Appendix A: Submissions | 146 |
| Appendix B: Consultations..... | 147 |
| Appendix C: Standard Disclosure Material | 148 |
| Bibliography..... | 152 |

Preface

The preparation for trial of indictable offences through the committal process is a most significant matter for the system of criminal justice. The efficient and fair management of that process impacts not only on the direct participants in the criminal proceeding, the accused and the prosecution, but also on victims, witnesses, and the wider circle of citizens who are linked to them. About 3000 indictable cases are initiated each year so the committals process affects many people, and it is critical to get the process right. Minimising the trauma to victims of crime, enhancing the efficiency of the criminal justice system, and maintaining the rights of the accused to a fair trial were critical elements in the terms of reference; the Commission has sought to achieve these goals.

As the Commission explored the issues raised by the reference, several conundrums emerged. The first was the lack of data about the way the committal process was working, whether positive or negative. For instance, it is accepted that in most cases witnesses find it stressful and distressing to be cross-examined more than once during criminal proceedings. Yet there is no data available to show how often this happens. The Commission adopts an evidence-based approach to law reform, so this lack of data presents a barrier to proper consideration for the need for reform, or the direction of it.

The second conundrum arose over the role of the Magistrates' Court in the present committal system. Even though there was a lack of comprehensive data, the Commission has come to the view that the Magistrates' Court has demonstrated that it is able to administer the committal system effectively, particularly if certain suggested improvements are made. However, for the Magistrates' Court to continue to manage indictable offences is contrary to the prevailing notions of optimum case management, according to which view it is generally accepted that cases are best managed by the judge who will hear the trial.

So the question for the Commission was how to make a choice between a system which might be ideal and a system which already functions effectively in the real world. The Commission favoured the existing system, essentially for two reasons. One: the present system is known and working; and two: the cost of change is likely to be significant. The course taken by the Commission shows that law reform is a complex exercise in balancing the ideal with the pragmatic; and there are times when law reform is best achieved through evolution rather than revolution.

Having said this, the Commission has recommended a number of creative reforms which have the potential to make fundamental improvements to the system. To mention a couple: the Commission suggests the abolition of the test for committal and its replacement with the power of the Magistrates' Court to discharge an accused, on an application made by the accused, on the ground that there is no reasonable prospect of conviction. Another innovation is the requirement that an informant give sworn evidence to a magistrate that the disclosure obligations of the prosecution have been met. Both these innovations would act as safeguards of fair trial rights.

The report of the Commission is the product of very hard work by Emma Larking and Briana Proud. The research and policy team was led by Michael McKitterick. Jonathan O'Donohue and Michael Hepworth also contributed. I thank the Commissioners for their diligent work, in particular Bruce Gardner PSM and Dan Nicholson, who constituted the Division on this inquiry. Bruce led the reference until my appointment as Chair in August 2019. The Hon. Frank Vincent AO QC and Liana Buchanan were also members of the Division until October and December 2019 respectively. I acknowledge too the important contribution of the Hon. Philip Cummins AM who was Chair of the Commission from the commencement of this reference until his death in February 2019.

The team benefited from input from a large number of written submissions and from consultations with the wide range of bodies and people involved in and affected by the committal system. Those who made submissions and participated in consultations provided the Commission with the foundations on which the report is based. I express my appreciation for the assistance provided by all of those people and by the bodies for whom they spoke.

The draft report was scrutinised in detail for editorial flaws by Nick Gadd and Gemma Walsh in their usual meticulous way. These acknowledgements would not be complete without a generous thank you to Merrin Mason, the CEO of the Commission, who along with keeping the Commission running smoothly, ensured the wellbeing of staff and kept the team going as a happy committed and functioning group.



The Hon. Anthony M. North QC

Chair, Victorian Law Reform Commission

March 2020

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

| | |
|------------------------------|---|
| Accused | A person charged with a criminal offence or offences who has not yet been found guilty or pleaded guilty. |
| Brief of evidence | The material relied on by the prosecution in a criminal case. |
| Child | In this report, a person who is under 18 years of age. |
| Children’s Court | A specialist court that hears and determines cases involving children and young people. In this report, the term ‘ lower courts ’ may be used to refer to both the Children’s Court and the Magistrates’ Court . |
| Committal | An order of a magistrate that requires an accused to appear in a higher court for sentence or trial. |
| Committal mention | A case management hearing in a committal proceeding . |
| Committal proceedings | The indictable pre-trial procedures conducted in the lower courts that are outlined in Chapter 4 of the <i>Criminal Procedure Act 2009</i> (Vic). |
| Complainant | A term used in criminal cases to refer to a victim of an alleged crime. |
| County Court | The County Court sits above the Magistrates’ Court and below the Supreme Court in the Victorian court hierarchy. In its criminal jurisdiction it hears indictable criminal cases, except for the most serious. Criminal trials in this court are heard by a judge and jury. |
| Cross-examination | When a witness for one party (for example the prosecution) is asked questions in court by the lawyer for the other party (for example the accused) to test the evidence the witness has already given. See also evidence-in-chief . |
| Committal test | The standard applied by a magistrate to determine if the evidence in a case is sufficient to order that the accused be tried or sentenced in a higher court. In the <i>Criminal Procedure Act 2009</i> (Vic), the committal test is referred to as the ‘committal determination’. In this report, the ‘committal test’ may also be used to refer to a magistrate’s application of the test for committal. |
| Defence | The accused person’s case and the lawyers who represent them. |

| | |
|--|---|
| Defendant | A person who is charged with a criminal offence—the accused . |
| Depositions | The transcript of evidence given in a committal proceeding and any statements admitted in evidence in a committal proceeding in accordance with chapter 4 of the <i>Criminal Procedure Act 2009</i> (Vic). |
| Direct indictment | An indictment filed by the Director of Public Prosecutions against an accused where no committal has been held; or the accused has been discharged at committal; or a discontinuance has been filed. Known in some jurisdictions as an ex officio indictment . |
| Directions hearing | A case management hearing in a higher court . |
| Director of Public Prosecutions (DPP) | <p>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 indictable criminal offences under Victorian law. The Office of Public Prosecutions conducts these prosecutions on behalf of the Director of Public Prosecutions.</p> <p>In this report DPP may be used inclusively to reference other prosecuting agencies such as the Commonwealth Director of Public Prosecutions.</p> |
| Director’s Committee | Established under the <i>Public Prosecutions Act 1994</i> (Vic), the Director’s Committee consists of the Director of Public Prosecutions, the Chief Crown Prosecutor and the Solicitor for Public Prosecutions. |
| Discharge | In relation to committal proceedings, where a magistrate determines there is insufficient evidence to support a conviction for an indictable offence and orders that the accused be discharged. |
| Disclosure | Providing information or material to a party as required by law. |
| Discontinue | Where the Director of Public Prosecutions determines not to proceed with charges that have been brought before a court. |
| Ex officio indictment | See Direct indictment . |
| Evidence-in-chief | The evidence given by a witness for the party who called the witness. |
| Hand-up brief | A brief of evidence used in committal proceedings in Victoria. |
| Higher court | In Victoria, the County Court or the Supreme Court . |
| Indictable offence | A serious criminal offence that is usually heard in a higher court before a judge and jury. |
| Indictable offence triable summarily | A less serious indictable offence that can be heard before a magistrate . |
| Indictment | A formal written accusation charging a person with an indictable offence that is to be tried in a higher court. |
| Informant | The person who commences a criminal proceeding in the Magistrates’ Court . Often a member of Victoria Police, but sometimes a representative from another investigating agency such as WorkSafe Victoria. |

| | |
|--|--|
| Investigating agency | The agency investigating a criminal offence. This is often Victoria Police but can also be other agencies such as WorkSafe Victoria. |
| Leave | Permission given by a judge or magistrate to a party during a legal proceeding to take a particular course of action. |
| Legal Aid | Legal aid is legal assistance provided by the government under the <i>Legal Aid Act 1978</i> (Vic) to people who cannot afford it themselves. Victoria Legal Aid is an organisation that provides legal information, advice and representation to people in accordance with the <i>Legal Aid Act 1978</i> (Vic). |
| Local Court | The equivalent of the Magistrates' Court in some Australian jurisdictions. |
| Lower Court | In Victoria, the Children's Court and the Magistrates' Court of Victoria. |
| Magistrate | The person who presides over a case in the Magistrates' Court or in the Children's Court . |
| Magistrates' Court | <p>A lower court that hears less serious matters without a jury. It is responsible for hearing and determining summary offences and some indictable offences triable summarily, and for conducting committal proceedings.</p> <p>In this report, the term 'lower courts' may be used to refer to both the Children's Court and the Magistrates' Court.</p> |
| Mention | A brief court hearing to deal with procedural matters. |
| Offender | A person who has been found guilty or has pleaded guilty to a criminal offence. Until this happens, a person is known as an accused . |
| Office of Public Prosecutions (OPP) | An independent statutory authority that institutes, prepares and conducts criminal prosecutions on behalf of the Director of Public Prosecutions . |
| Order | A binding direction by a court or tribunal in a legal proceeding. |
| Parties | The prosecution and the accused in a criminal proceeding. |
| Plea | When the accused person tells the court whether he or she is guilty or not guilty of the charge. |
| Plea brief | A brief of evidence used when the accused indicates an intention to plead guilty before the hand-up brief has been served. |
| Plea hearing | The hearing in which the prosecution and defence present information that they want the court to take into account when deciding the sentence in the case. |
| Prosecution | In indictable cases, the lawyers, individual (for example, the Director of Public Prosecutions) or statutory authority (for example, the Office of Public Prosecutions) conducting a criminal case before the court on behalf of the investigating agency. A 'prosecution' may also refer to the case against a person accused of a criminal offence. |
| Sentence | The penalty given to an offender by a court. |

| | |
|---------------------------|---|
| Sentencing hearing | See plea hearing . |
| Summary offence | A less serious criminal offence that may be dealt with by a magistrate. |
| Supreme Court | 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. |
| Victim | In criminal proceedings, a person who has suffered harm as a result of the action of an offender . In this report the term applies to a person alleged by the prosecution to be a victim prior to determination of the offender's guilt as well as a person who has suffered due to an offence for which the offender has been found guilty. |
| Withdraw | Where a charge against an accused is no longer prosecuted. |
| Witness | A person who gives evidence in a case. |

Executive summary

- 1 This report is about improving committal and other pre-trial indictable procedures to reduce trauma for victims and witnesses, improve efficiency in the criminal justice system, and ensure fair trial rights.

The present committal and pre-trial system

- 2 Most indictable criminal cases start in the lower courts. They progress through the 'committal stream' until either:
- i) the accused is committed by order of the Magistrates' or Children's Court for trial or sentence in a higher court
 - ii) the matter resolves summarily, or
 - iii) the prosecution is discontinued.
- 3 The *Criminal Procedure Act 2009* (Vic) sets out the role of the lower courts in managing indictable cases. This includes ensuring a fair trial through disclosure of evidence and cross-examination of witnesses; narrowing the issues in contention; determining how the accused proposes to plead and resolving matters where possible.
- 4 This culminates with a magistrate determining if the evidence is of sufficient weight to support a conviction (the test for committal or committal determination).
- 5 The case management conducted by the lower courts and the committal determination together constitute 'committal proceedings'.
- 6 Pre-trial case management also occurs in the higher courts after the accused has been committed for trial.
- 7 The flow chart on page 17 illustrates the main components of the present system.

Committal system and indictable case data

- 8 Each year, approximately 3000 criminal cases go through some form of committal proceeding. Around 30 per cent of these resolve in the Magistrates' Court. Around 60 per cent are committed to the County Court, around half of these for trial, the other half for sentence following a plea of guilty in the Magistrates' Court. A further four per cent are tried or sentenced in the Supreme Court.¹
- 9 Gaps in the data make it difficult to tell how common it is for victims and other civilian witnesses to be cross-examined more than once before trial, or both before trial and again at trial.
- 10 Inadequate data collection also makes it difficult to identify when and why avoidable delay occurs.

-
- 11 Data collection systems should be improved so that the performance of the criminal justice system can be better understood and evaluated.
- 12 Notwithstanding the limitations in the data, it appears that:
- i) delay in indictable matters is no worse in Victoria than in other Australian states and territories, and Victoria compares favourably to most other jurisdictions
 - ii) late guilty pleas are not more of a problem in Victoria than elsewhere.

The test for committal

- 13 Currently, magistrates must consider the evidence to determine if it is of sufficient weight to support a conviction for an indictable offence (the test for committal or committal determination).
- 14 While the rationale for applying a committal test is sound—to provide independent scrutiny of an indictable prosecution—requiring it in all indictable stream matters is unnecessary; therefore the test should be abolished. The lower courts should, however, be empowered to discharge the accused on application by the defence, on the grounds that there is no reasonable prospect of conviction.

Should the lower courts conduct indictable case management?

- 15 It is now generally accepted that best practice case management requires the trial judge to deal with pre-trial case management. That has not, however, been the practice historically in Victoria for indictable matters. Further, the evidence suggests that the lower courts manage committal proceedings effectively and it would not be prudent to change the system at present. The same considerations do not apply to the Supreme Court. It is appropriate for the Supreme Court to deal with indictable offences within its exclusive jurisdiction from inception, consistent with modern case management principles.
- 16 Apart from Children’s Court cases, cases within the exclusive jurisdiction of the Supreme Court should be filed in and managed by that Court, but only if this change is accompanied by adequate resourcing.
- 17 There is scope to improve pre-trial procedure in the lower courts. As well as abolishing the test for committal, changes should be made to other procedures to improve efficiency while also ensuring fair trial rights and reducing trauma for victims and witnesses. These changes are set out in Chapters 6–12.

Reforming pre-trial indictable case management: outline of a new system

- 18 A single issues hearing should replace committal mention hearings and committal hearings. When cases are transferred to the County Court by order of a magistrate (assuming the test for committal is abolished and Supreme Court matters are filed in the Supreme Court), they should be accompanied by an issues hearing report so that judges in the County Court know about issues that arose in the lower court.
- 19 The Director of Public Prosecutions (DPP) should assume formal prosecutorial responsibility in indictable matters at the filing hearing.
- 20 The flow chart on page 65 illustrates the main components of the proposed system.

Role of the DPP and defence practitioners

- 21 To address issues related to charging and disclosure, the DPP should be actively engaged in the conduct of indictable proceedings in the lower courts.
- 22 Measures should also be taken to ensure the early and continuous involvement of prosecution and defence practitioners.

Charging practices

- 23 Overcharging involves unnecessarily filing more charges than are ultimately indicted or pleaded. To address this, the DPP should provide binding charging instructions to informants in cases where there has been an investigation prior to apprehension of the alleged offender. In other cases, the DPP should review the charges within seven days of being provided with the brief of evidence.
- 24 Other measures to reduce overcharging include providing training to Victoria Police officers.
- 25 The prosecution should ensure that victims are informed about and consulted in relation to decisions to withdraw charges or discontinue a prosecution.

Disclosure

- 26 Inadequate early disclosure is a problem. A range of measure should be taken to address it, including making the DPP responsible for disclosure to the accused, and the informant responsible for disclosure to the DPP.
- 27 Other measures include clarifying that the prosecution must disclose the general existence of material that the informant objects to producing in the hand-up brief; further expanding the list of material that the *Criminal Procedure Act 2009* (Vic) specifies must be included in the hand-up brief; and requiring the informant to give disclosure evidence at an issues hearing.

Forensic reports and delay

- 28 Achieving timely disclosure of forensic evidence is difficult and the provision of forensic reports is a major source of delay. Some of this delay may be unavoidable given the time required to conduct some forms of forensic analysis, but better funding of forensic service providers and case conferencing between the parties and forensic analysts should reduce delay.

Pre-trial cross-examination

- 29 Pre-trial cross-examination often contributes to early resolution and better disclosure but it can also be stressful or traumatising for victims and other witnesses. The current test for leave to cross-examine at a committal hearing should be applied more strictly in accordance with its terms, and additional criteria for leave should apply in some cases.
- 30 Existing prohibitions on cross-examination should be extended to include all cases involving family violence where the complainant was a child or person with a cognitive impairment when the proceedings commenced.
- 31 The intermediaries pilot program should be expanded to assist all witnesses with communication difficulties, and alternative arrangements for giving evidence should be used wherever necessary to reduce trauma for victims and witnesses.

Children's Court

- 32 As a specialist jurisdiction the Children's Court should continue to manage committal proceedings, including cases within the exclusive jurisdiction of the Supreme Court.
- 33 The *Children Youth and Families Act 2005* (Vic) should be amended to clarify certain processes in the Children's Court.

Recommendations

Chapter 3 Committal system and indictable case data

- 1 The Magistrates' and Children's Courts should collect detailed data about pre-trial cross-examination.
- 2 The case management systems used by the Magistrates' and Children's Courts should be linked with the higher courts' case management systems to enable the creation of a single electronic case file for indictable cases.

Chapter 4 The test for committal

- 3 The test for committal, which involves a magistrate assessing if the evidence is of sufficient weight to support a conviction for an indictable offence (referred to in chapter 4, part 4.9 of the *Criminal Procedure Act 2009 (Vic)* as the committal determination) should be abolished.
- 4 In place of an order for committal, the mechanism for transfer of indictable charges from the lower courts should be an order of the Magistrates' or Children's Court that the accused either:
 - (a) appear for plea and sentence in a higher court on a date to be determined, or
 - (b) stand trial in a higher court on a date to be determined.
- 5 The *Criminal Procedure Act 2009 (Vic)* should be amended to provide that the accused may apply to the Magistrates' or Children's Court for an order that the accused be discharged and to empower the Magistrates' and Children's Courts to discharge the accused on the relevant indictable charge or charges if satisfied that there is no reasonable prospect of conviction.

Chapter 5 Should the lower courts conduct indictable case management?

- 6 The lower courts should retain a case management function for indictable stream matters that will be heard in the County Court.
- 7 The *Criminal Procedure Act 2009 (Vic)* should be amended to require that matters within the exclusive jurisdiction of the Supreme Court are filed in the Supreme Court, aside from Children's Court matters.

Chapter 6 Reforming pre-trial case management: outline of a new system

- 8 The *Criminal Procedure Act 2009* (Vic) should be amended to require the Director of Public Prosecutions to assume formal prosecutorial responsibility in cases involving indictable offences from the filing hearing onwards.
- 9 The *Criminal Procedure Act 2009* (Vic) should be amended to require that a case direction notice is filed before an issues hearing rather than a committal mention hearing.
- 10 If an application for summary jurisdiction includes an application for a Koori Court hearing, this should be stated in the case direction notice and the Magistrates' Court registrar should list the issues hearing before a Koori Court magistrate.
- 11 Section 127 of the *Criminal Procedure Act 2009* (Vic) should be amended to require that a case conference be conducted during an issues hearing in all indictable cases, regardless of offence type.
- 12 The *Criminal Procedure Act 2009* (Vic) should be amended to replace committal mention hearings and committal hearings with an issues hearing.
- 13 Magistrates should be required to prepare an issues hearing report for transmission to the County Court.
- 14 The courts should be adequately funded to support any changes to their case management role.

Chapter 7 Role of the DPP and defence practitioners

- 15 Experienced practitioners should be engaged at an early stage in proceedings and have continuing responsibility for the case until trial or resolution.
- 16 The Director of Public Prosecutions and Victoria Legal Aid should be provided with additional funding to ensure experienced practitioners have oversight of committal proceedings from the outset and are responsible for the conduct of matters until final resolution, including in the higher courts.
- 17 Fee structures at Victoria Legal Aid and the Office of Public Prosecutions should provide for the early involvement of counsel and to ensure continuity of representation.
- 18 Victoria Legal Aid and the Office of Public Prosecutions should regularly and publicly report, preferably in their annual reports, on:
 - (a) measures used to ensure legal practitioners acting in indictable matters retain responsibility for those matters for the lifetime of the prosecution
 - (b) the success of these measures.

Chapter 8 Charging practices

- 19 Victoria Police officers should receive regular and up-to-date charging training.
- 20 In cases where indictable charges are filed immediately following apprehension, the Director of Public Prosecutions should review the charges within seven days of receipt of the hand-up brief from the informant.
- 21 In cases involving a suspected indictable offence that has been the subject of an ongoing investigation prior to arrest, the investigating agency should prepare an 'initial charge brief'. This should be provided to the Director of Public Prosecutions before any charge sheet is filed.

-
- 22 The Director of Public Prosecutions should review any 'initial charge brief' received and provide charge instructions to the informant. Charge instructions should be binding on the informant.
- 23 The *Criminal Procedure Act 2009* (Vic) should be amended to give the Director of Public Prosecutions the power to withdraw, amend or file charges in the Magistrates' and Children's Courts.

Chapter 9 Disclosure

- 24 While the informant should be required to prepare the brief of evidence, the *Criminal Procedure Act 2009* (Vic) should be amended to require the Director of Public Prosecutions (DPP) to file and serve the brief and assume all obligations of disclosure to the accused currently imposed by the Act on the informant. The DPP should ensure the existence of material that the informant objects to producing is communicated to the accused.
- 25 The *Criminal Procedure Act 2009* (Vic) should be amended to specify that the Director of Public Prosecutions' disclosure obligations continue from the filing hearing until the death of the accused, regardless of the outcome of the prosecution.
- 26 The *Public Prosecutions Act 1994* (Vic) should be amended to empower the Director of Public Prosecutions to make enquiries of the informant in relation to disclosure, and to require the informant to respond to those enquiries.
- 27 Additional resources should be provided to the Office of Public Prosecutions to allow it to manage its increased disclosure obligations.
- 28 Part 4.4 of the *Criminal Procedure Act 2009* (Vic) should be amended to make it clear that the informant has a continuing obligation of disclosure to the Director of Public Prosecutions (DPP). This obligation commences at the filing hearing and includes preparation of the hand-up brief, which must be provided to the DPP before the date specified by the Magistrates' Court at the filing hearing for service of the hand-up brief on the accused.
- 29 The *Criminal Procedure Act 2009* (Vic) should be amended to specify that the informant's disclosure obligations continue from the filing hearing until the death of the accused, regardless of the outcome of the prosecution.
- 30 The *Criminal Procedure Act 2009* (Vic) should be amended to specify that informants have an obligation to retain potentially disclosable material for as long as their disclosure obligations continue.
- 31 Systems should be established at investigating agencies to ensure that:
- (a) informants are made aware of, or able to obtain information concerning, potentially disclosable material that exists or is known about within other parts of the agency
 - (b) potentially disclosable material is retained and not destroyed.
- 32 The *Criminal Procedure Act 2009* (Vic) should be amended to require the informant, unless excused by the court, to appear at the issues hearing and provide evidence that:
- (a) all available relevant material has been disclosed to the Director of Public Prosecutions
 - (b) all reasonable enquiries have been made by the informant to determine if there is any additional relevant material in existence.

-
- 33 The *Criminal Procedure Act 2009* (Vic) should be amended to provide that the informant's disclosure obligations to the Director of Public Prosecutions (DPP) apply regardless of claims of privilege, public interest immunity, or statutory immunity, but where such claims are made, the material that is the subject of these claims need not be produced to the DPP. The informant must indicate to the DPP the grounds on which the objection to production is made.
- 34 Section 110 of the *Criminal Procedure Act 2009* (Vic) should be amended to require reference in the hand-up brief to the general existence of material that the informant objects to producing and the grounds for the objection.
- 35 The Magistrates' Court Rules 2019 should be amended to clarify that the list of contents that must accompany the hand-up brief and be signed by the informant (currently Magistrates' Court Form 30) includes a field noting the existence of material, if any, that the informant objects to producing.
- 36 Section 110 of the *Criminal Procedure Act 2009* (Vic) should be amended to include a section explaining that a hand-up brief must disclose all relevant material, including all information, documents or other things obtained during the investigation that are exculpatory or might reasonably be expected to:
- (a) undermine the case for the prosecution or
 - (b) assist the case for the accused.
- 37 Section 110 of the *Criminal Procedure Act 2009* (Vic) should be amended to include, in addition to the other materials that a hand-up brief must contain, a list of the materials contained in the list of 'Standard Disclosure Material' currently set out in Magistrates' Court Practice Direction No 3 of 2019.

Chapter 10 Forensic reports and delay

- 38 Funding for forensic service providers should be increased to support faster preparation of forensic reports.
- 39 Forensic service providers should publicise current turnaround times for the provision of reports and the courts should have regard to these when setting dates for the service of reports.
- 40 Forensic case conferencing between forensic experts and the prosecution, based on the existing model used in clandestine laboratory drug cases, should be adopted in all cases where forensic evidence is in issue.
- 41 Forensic case conferencing between forensic experts and defence practitioners should be encouraged in cases where forensic evidence is in issue.

Chapter 11 Pre-trial cross-examination

- 42 Section 123 of the *Criminal Procedure Act 2009* (Vic) should be amended to prohibit cross-examination in the lower courts of any witnesses in cases where the complainant was a child or person with a cognitive impairment when the proceedings commenced and where the conduct constituting the offence involves family violence within the meaning of the *Family Violence Protection Act 2008* (Vic).
- 43 Any amendments to expand section 123 to include family violence offences should be accompanied by appropriate resourcing of the Courts, the Office of Public Prosecutions, Victoria Police and Victoria Legal Aid.

-
- 44 There should be a formal evaluation of the operation of the scheme created by sections 123 and 198A of the *Criminal Procedure Act 2009* (Vic) to determine if it is operating in the best interests of victims and witnesses, and its broader resource implications.
- 45 Section 124(5) of the *Criminal Procedure Act 2009* (Vic) should be amended to require that the considerations in the section also apply to applications for leave to cross-examine witnesses with a cognitive impairment, and victims in cases involving sexual or family violence.
- 46 Section 124 of the *Criminal Procedure Act 2009* (Vic) should be amended to require a magistrate to provide written reasons why, with reference to sections 124(3) – (5), leave was granted to cross-examine witnesses.
- 47 The *Criminal Procedure Act 2009* (Vic) should be amended to allow for an intermediary to be appointed to assess any witness with communication difficulties following an application by a party or on the court’s own motion.
- 48 Division 4 of part 8.2 of the *Criminal Procedure Act 2009* (Vic) should be amended to provide that the court may make directions for alternative arrangements for taking the evidence of any witness where the interests of justice so require, and taking into account the need to minimise trauma for victims and witnesses.

Chapter 12 Children’s Court

- 49 The *Children, Youth and Families Act 2005* (Vic) should be amended to require applications for summary jurisdiction be made prior to, or at, the issues hearing. Applications for summary jurisdiction should only be made after an issues hearing in exceptional circumstances.
- 50 The *Children, Youth and Families Act 2005* (Vic) and the *Criminal Procedure Act 2009* (Vic) should be amended to permit issues hearings to be held jointly in cases involving child and adult co-accused.
- 51 The *Children, Youth and Families Act 2005* (Vic) should be amended to allow the Children’s Court to transfer related indictable offences for hearing and determination in the County or Supreme Courts, in cases that are uplifted from its jurisdiction.

Introduction

- 2** Terms of reference
- 2** Scope of the reference
- 7** The approach of the Commission
- 8** Reform objectives
- 12** An overview of the Commission's conclusions

1. Introduction

Terms of reference

- 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 Victoria's committal system.
- 1.2 The terms of reference are set out on page ix.

Scope of the reference

- 1.3 The Commission is asked to recommend any legislative, procedural or administrative changes to the committal system that could:
 - reduce trauma experienced by victims and witnesses
 - improve efficiency in the criminal justice system
 - ensure fair trial rights.
- 1.4 The committal system incorporates all pre-trial criminal procedures conducted in the Magistrates' or Children's Courts (the lower courts¹) in respect of indictable offences.² The elements of committal proceedings are set out in chapter four of the *Criminal Procedure Act 2009* (Vic) (CPA) and described in Chapter 2 of this report. They include various court events such as filing and committal hearings, and other procedural requirements such as disclosure by the prosecution of relevant materials.
- 1.5 Each year around 3000 cases commence in the committal stream of the Magistrates' Court and pass through some or all parts of a committal proceeding.³ Of these cases:
 - roughly 30 per cent are heard and determined summarily⁴
 - another 30 per cent are committed to the County Court for sentence⁵
 - another 30 per cent are committed to the County Court for trial⁶
 - roughly four per cent are committed to the Supreme Court for sentence or trial.⁷

1 Throughout this report, the Magistrates' and Children's Courts are collectively referred to as the lower courts, and the County and Supreme Courts are referred to as the higher courts.

2 See Chapter 2 and glossary for an explanation of what constitutes an indictable offence.

3 Magistrates' Court of Victoria, *Committal Data Requested by VLRC* (24 April 2019). Statistics for the past five years are available at Victorian Law Reform Commission, *Committals* (Issues Paper, June 2019) 15 [3.24]. For data on the number of cases dealt with in the committal stream of the Children's Court, see Chapter 12.

4 Magistrates' Court of Victoria, *Committal Data Requested by VLRC* (24 April 2019). In order for indictable stream matters to be determined summarily in the Magistrates' Court, the prosecution must withdraw all indictable charges with the approval of the Magistrates' Court: *Criminal Procedure Act 2009* (Vic) s 30.

5 County Court of Victoria, *Case Data Requested by VLRC* (October 2019).

6 County Court of Victoria, *Case Data Requested by VLRC* (October 2019).

7 Supreme Court of Victoria, *Case Data Requested by VLRC* (September 2019). The percentages cited in this paragraph do not total 100% because they are a rough approximation only.

Purposes of committal proceedings

- 1.6 The purposes of committal proceedings are listed in the CPA:
- To determine whether a charge for an offence is appropriate to be heard and determined summarily.
 - To determine whether there is evidence of sufficient weight to support a conviction for the offence charged.
 - To determine how the accused proposes to plead to the charge.
 - To ensure a fair trial, if the matter proceeds to trial, by—
 - ensuring the prosecution case against the accused is adequately disclosed in the form of depositions
 - enabling the accused to hear or read the evidence against them and to cross-examine prosecution witnesses
 - enabling the accused to put forward a case at an early stage if the accused wishes to do so
 - enabling the accused to adequately prepare and present a case
 - enabling the issues in contention to be adequately defined.⁸
- 1.7 To those unfamiliar with indictable criminal procedure in common law jurisdictions, the practice of commencing proceedings in a lower court before conducting a trial or sentencing an offender in a higher court may appear complicated and inefficient.
- 1.8 The practice has roots in a different historical context—a time when citizens could accuse fellow citizens of serious crimes and when independent police forces and prosecution agencies did not exist.⁹ Having an independent arbiter review the evidence in the case was designed to act as a filter,¹⁰ ensuring that people accused of serious crimes were not faced with the cost and stress of defending themselves in the higher courts against prosecutions that were ‘wanton or misconceived’.¹¹
- 1.9 The purposes of committal proceedings have evolved over time and are now more various.¹² Each of the purposes currently listed in the CPA represents an important objective of pre-trial indictable procedure, although their relative value and how they should be realised is debated.
- 1.10 A review of these purposes is implicit in the terms of reference, which request the Commission to consider, among other things, ‘whether Victoria should maintain, abolish, replace or reform the present committal system’.

Objectives of pre-trial indictable procedure

- 1.11 Numerous submissions to this reference identify the most important objectives of pre-trial criminal procedure as being to:
- achieve early resolution where possible, including by securing appropriate early guilty pleas
 - provide disclosure and thereby to ensure the accused understands the prosecution’s case and can present a defence, which is essential for fair trial rights

⁸ *Criminal Procedure Act 2009* (Vic) s 97.

⁹ See Victorian Law Reform Commission, *Committals* (Issues Paper, June 2019) 6–7 [2.4]–[2.8].

¹⁰ Originally the evidence was reviewed by ‘grand juries’ of citizens whose role was to decide 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: Victorian Law Reform Commission, *Committals* (Issues Paper, June 2019) 6 [2.5].

¹¹ Patrick Devlin, *The Criminal Prosecution in England* (Oxford University Press, 1960) 92.

¹² For a discussion of some of the changes, see David Brereton and John Willis, ‘Evaluating the Committal’ in Julia Vernon (ed), *The Future of Committals* (Australian Institute of Criminology, January 1991).

- narrow the issues in dispute and ensure the case is ready for trial, if it goes to trial
- minimise trauma for victims and witnesses.¹³

1.12 These objectives are central to Victoria’s criminal justice system, whether they are achieved under the rubric of committal proceedings or in the jurisdiction of the lower or higher courts. The objectives are reflected in the terms of reference.

1.13 The Commission has interpreted the terms of reference broadly to include review of all pre-trial indictable criminal procedure including committal proceedings and procedures conducted prior to trial in the higher courts. Higher court pre-trial procedures are relevant because they are designed to achieve the same underlying objectives as committal proceedings. Moreover, many of the submissions to this reference advocated for reforms that would affect pre-trial procedures in the higher courts.

The value of committal proceedings

1.14 There has been long-standing debate in all common law jurisdictions about the value of committal proceedings in modern criminal justice systems. Some consider committal proceedings to be a ‘vital cog in the machinery of the criminal law’,¹⁴ essential to a fair trial,¹⁵ and central to achieving early resolution of cases.¹⁶ Others view committal proceedings as a source of delay and unnecessary duplication between the lower and higher courts.¹⁷

Reforms in other Australian jurisdictions

1.15 In recent decades, all Australian jurisdictions have made changes to their committal systems. No two systems are perfectly comparable, but there are common elements.¹⁸ In all states and territories, an indictable criminal case commences in the lower courts. In some instances, these cases are moved quickly into the higher courts¹⁹ while in others they go through a more involved process in the lower courts before being transferred to the higher courts.²⁰

1.16 Some jurisdictions require a magistrate to consider the evidence in a case before committing the accused to a higher court²¹ while in other jurisdictions the test for committal has been abolished.²²

1.17 The availability of cross-examination during committal proceedings also varies between jurisdictions. Some have abolished or severely restricted it²³ while in others it is available but is not often requested or permitted.²⁴ In Victoria, leave to cross-examine witnesses at committal hearings is granted relatively frequently.²⁵ In all jurisdictions, there is a prohibition on cross-examining witnesses during committal proceedings who may be particularly vulnerable and there are additional protections for some other witnesses (see Chapter 11).

13 Submissions 9 (Australian Lawyers for Human Rights), 11 (Criminal Bar Association (Victoria)), 12 (Neville Rudston), 13 (Victoria Legal Aid), 14 (Magistrates’ Court of Victoria), 19 (Victorian Aboriginal Legal Service), 20 (County Court of Victoria), 22 (Supreme Court of Victoria), 24 (Law Institute of Victoria); Consultation 18 (Academic roundtable).

14 John Coldrey, *Report of Advisory Committee on Committal Proceedings* (Victorian Government Printer, February 1986) 2; Submission 11 (Criminal Bar Association (Victoria)).

15 Submissions 9 (Australian Lawyers for Human Rights), 11 (Criminal Bar Association (Victoria)), 14 (Magistrates’ Court of Victoria), 15 (Liberty Victoria), 19 (Victorian Aboriginal Legal Service).

16 Submissions 9 (Australian Lawyers for Human Rights), 11 (Criminal Bar Association (Victoria)), 13 (Victoria Legal Aid), 14 (Magistrates’ Court of Victoria), 15 (Liberty Victoria), 19 (Victorian Aboriginal Legal Service), 24 (Law Institute of Victoria).

17 Submissions 4 (Director of Public Prosecutions (Victoria)), 7 (knowmore), 10 (Rape and Domestic Violence Services Australia), 18 (Name withheld), 20 (County Court of Victoria) (but note that the County Court is divided in its evaluation of committal proceedings), 22 (Supreme Court of Victoria), 23 (Victims of Crime Commissioner), 25 (Victoria Police); Consultations 3 (CASA Forum), 31 (Supreme Court of Victoria).

18 See the comparative table in Victorian Law Reform Commission, *Committals* (Issues Paper, June 2019) 74.

19 Western Australia and Tasmania.

20 Victoria, South Australia, Queensland and New South Wales.

21 Victoria, South Australia, Queensland, Northern Territory and Australian Capital Territory.

22 New South Wales, Tasmania and Western Australia.

23 Western Australia and Tasmania.

24 South Australia and New South Wales.

25 See paragraph 11.34 of this report.

- 1.18 Recent changes to committal proceedings in New South Wales and South Australia are of particular interest.
- 1.19 In 2018, New South Wales introduced reforms designed to encourage appropriate early guilty pleas.²⁶ The reforms abolished the test for committal and established a new case management process and sentencing discount scheme. Funding was provided to the Director of Public Prosecutions (New South Wales) and Legal Aid New South Wales to ensure continuity of legal representation in criminal matters, allowing senior lawyers to act from the start of proceedings until finalisation.²⁷
- 1.20 The New South Wales reforms also introduced disclosure and charge certification requirements.²⁸ The disclosure requirements involve informants initially preparing a simplified brief of evidence. This should include all relevant material in the possession of the informant but the evidence does not need to be in admissible form.²⁹ The informant and their senior officer must both sign a disclosure certificate confirming the investigation is complete and that the informant's disclosure obligations have been complied with.³⁰ A senior prosecutor must then review the evidence and file a charge certificate in the Local Court (the equivalent of Victoria's Magistrates' Court) confirming the charges that will proceed to trial and identifying any charges that should be withdrawn.³¹ Until a charge certificate is filed, the accused is not able to enter a plea.
- 1.21 Also in 2018, South Australia introduced reforms to facilitate early resolution of major indictable matters³² and reduce delay.³³ The reforms provide for a tiered disclosure process, with South Australia Police providing a preliminary brief of evidence to the South Australian Director of Public Prosecutions.³⁴ The Director must make a charge determination before the commencement of committal proceedings.³⁵ The charge determination requirement was designed to reduce the number of charges withdrawn at a late stage in proceedings.³⁶ Until a charge determination is made by the Director of Public Prosecutions, South Australia Police have conduct of a case and advise magistrates of the time required to compile the brief of evidence.³⁷ Statutory time frames for providing the brief of evidence have been abolished to create a more flexible system with fewer hearing dates.³⁸ As well as these procedural reforms, South Australia established a sentencing discount scheme.³⁹

26 See Justice Legislation Amendment (Committals and Guilty Pleas) Bill 2017 (NSW), containing amendments to the *Criminal Procedure Act 1986* (NSW) and the *Crimes (Sentencing Procedure) Act 1999* (NSW). The reforms implemented many of the recommendations from New South Wales Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas* (Report No 141, December 2014).

27 Consultations 33 (Director of Public Prosecutions (New South Wales)), 34 (Legal Aid New South Wales).

28 *Criminal Procedure Act 1986* (NSW) ch 3 divs 3, 4.

29 New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 October 2017, 7 (Mark Speakman, Attorney-General); *Criminal Procedure Act 1986* (NSW) ss 61, 62. The legislation does not refer to a 'simplified brief' but specifies that the material need not be in admissible form (s 62(2)).

30 *Director of Public Prosecutions Act 1986* (NSW) s 15A.

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

32 With some exceptions, major indictable offences are those offences that attract a maximum term of imprisonment exceeding five years: *Criminal Procedure Act 1921* (South Australia) ss 4, 5(3).

33 South Australia, *Parliamentary Debates*, Legislative Council, 2 March 2017, 6235–6247 (Kyam Maher). See also Brian Ross Martin, *Review of the Major Indictable Reforms—Criminal Procedure Act 1921 (As Amended by the Summary Procedure (Indictable Offences) Amendment Act 2017* (Report, 13 September 2019) 2–4.

34 South Australia, *Parliamentary Debates*, Legislative Council, 2 March 2017, 6235–6247 (Kyam Maher).

35 South Australia, *Parliamentary Debates*, Legislative Council, 2 March 2017, 6235–6247 (Kyam Maher); *Criminal Procedure Act 1921* (South Australia), s 106. The preliminary brief must be also provided by the police to the accused as soon as practicable: *Criminal Procedure Act 1921* (South Australia) s 106(1)(c).

36 South Australia, *Parliamentary Debates*, Legislative Council, 2 March 2017, 6235–6247 (Kyam Maher).

37 *Criminal Procedure Act 1921* (SA) ss 105(5) and 106. This is also the case in New South Wales.

38 Brian Ross Martin, *Review of the Major Indictable Reforms—Criminal Procedure Act 1921 (As Amended by the Summary Procedure (Indictable Offences) Amendment Act 2017* (Report, 13 September 2019) 3 [4].

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

Recent reforms and reform proposals in Victoria

- 1.22 The terms of reference ask the Commission to report on Victoria’s committal system in light of ‘legislative reforms, public consultations on an early case management model, and other efforts in recent years to address challenges in the committal system’.
- 1.23 Since the introduction of the *Magistrates’ Court Act 1989* (Vic) and the CPA in 2009, amendments to pre-trial criminal procedure in Victoria have focused on reducing delay and on providing better protections for victims and witnesses. Throughout this period, although the value of committal proceedings generally has been debated, two central elements have been retained: the ability to cross-examine some witnesses, and the test for committal.
- 1.24 Recently, the desirability of allowing cross-examination during committal proceedings was considered by:
- the Commission’s inquiry, *The Role of Victims of Crime in the Criminal Trial Process*, which recommended restricting cross-examination during committal proceedings⁴⁰
 - the Department of Justice and Community Safety (DJCS) 2017 review that sought input from criminal justice stakeholders on reforming criminal procedure to minimise trauma for victims and witnesses and to reduce delay.⁴¹
- 1.25 The Role of Victims of Crime in the Criminal Trial Process inquiry prompted the most significant reform of committal proceedings in recent years—the expansion of section 123 and the introduction of section 198A of the CPA⁴² (see Chapter 11). Section 123 now prohibits cross-examination during committal proceedings of *any* witness in cases involving a sexual offence where the complainant was a child or person with a cognitive impairment when proceedings commenced. Section 198A allows for pre-trial cross-examination in the higher courts of witnesses *other than the complainant* in these cases.
- 1.26 In 2017, the Supreme Court proposed reforms to allow it to manage cases within its jurisdiction from the point of charge, or shortly thereafter, through to trial. The Supreme Court claimed that ‘a rigid separation between the committal process and pre-trial management [in a higher court], no longer accords with modern case management practice’.⁴³

Terminology

The definition of ‘committals’

- 1.27 ‘Committal proceedings’ are a species of pre-trial procedure. They are distinguished from other pre-trial procedures because they occur only in the lower courts, and before the accused has been ordered (‘committed’) to stand trial in a higher court. A ‘committal’ is the decision by a magistrate to commit an accused for trial or sentence in a higher court.
- 1.28 During this inquiry, stakeholders commonly used the expression ‘committals’ as shorthand for the entire committal proceedings. The term ‘committals’ was also used to refer to an event within a committal proceeding such as the committal hearing.⁴⁴

40 Recommendations 37 and 38: Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 213.

41 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).

42 *Justice Legislation Miscellaneous Amendment Act 2018* (Vic).

43 The Court’s ‘flexible early case management proposal’ was not published independently but is summarised in the DJCS Discussion Paper: 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) 10. The mention of ‘public consultation on an early case management model’ in the current terms of reference relates to the Supreme Court’s proposal as it is canvassed in the DJCS Discussion Paper.

44 The expression is used in this way by David Brereton and John Willis in their article, ‘Evaluating the Committal’, which begins, ‘...the future of the committal hearing is now under something of a cloud’. Throughout the article the authors tend to conflate references to committal hearings and committal proceedings more generally: David Brereton and John Willis, ‘Evaluating the Committal’ in Julia Vernon (ed), *The Future of Committals—Proceedings of a Conference Held 1–2 May 1990* (Australian Institute of Criminology, January 1991) 5.

- 1.29 In order to avoid ambiguity, the Commission uses the term ‘committal’ on its own solely with reference to the magistrate’s decision to commit the accused for trial or sentence. Specific court events such as the committal hearing are referred to in full, and where the Commission is referring to committal proceedings in their entirety, it uses the expression ‘committal proceedings’.⁴⁵
- 1.30 A consequence of the Commission’s recommendation that the test for committal be abolished (see Chapter 4), is that the language associated with pre-trial indictable procedure in the lower courts will need to change. References to ‘committal’ and ‘committal proceedings’ will be redundant. Many component parts of current committal proceedings will, however, remain in somewhat different form.
- 1.31 A benefit of changing the terminology associated with pre-trial indictable procedure in the lower courts will be to remove language that is opaque to people who do not have experience in the criminal justice system.

The term ‘victims’

- 1.32 For some survivors of criminal attacks or criminal offending, the word ‘victim’ is a pejorative.⁴⁶ As the Commission stated in *The Role of Victims of Crime in the Criminal Trial Process: Report*, the word:
- can connote strength, fortitude, resilience and dignity, yet its use is commonly avoided on the basis that it can reduce a person to their experience of victimisation and connote weakness rather than the attributes of a survivor.⁴⁷
- 1.33 The law attaches its own meaning to the word, generally using it to refer to the subject of alleged offending only after a finding of guilt in respect of that offending has been made. Before this, the term ‘complainant’ is used to refer to the person whom the prosecution claims is the victim of an alleged offence. The word ‘complainant’ also has derogatory associations for many survivors of crime.⁴⁸
- 1.34 Despite its negative associations for some, the Commission has decided to follow the Judicial College of Victoria and use the word ‘victim’ in this report:
- as a single term to cover any person who has, or is alleged to have, suffered harm as the result of unlawful action...⁴⁹
- 1.35 The word ‘complainant’ is used occasionally where necessary for consistency with the CPA and other legislation.

The approach of the Commission

Commission Chair

- 1.36 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.
- 1.37 On 4 March 2019, Bruce Gardner PSM was appointed Acting Chair of the Commission. Mr Gardner led the reference until the appointment of the Hon. Anthony North QC as Chair of the Commission on 30 August 2019.

45 In instances in which the term ‘committal’ is employed differently by a stakeholder, it is retained regardless of this for the purposes of direct quotes.

46 Consultation 3 (CASA Forum).

47 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 3 [1.9].

48 Consultation 3 (CASA Forum).

49 Judicial College of Victoria, *Victims of Crime in the Courtroom: A Guide for Judicial Officers* (2019) 1.

Committals Division

- 1.38 In accordance with section 13(1)(b) of the *Victorian Law Reform Commission Act 2000* (Vic), a Division was constituted to guide and oversee the conduct of the reference. Bruce Gardner PSM and Dan Nicholson have been members of the Division throughout the reference. The Hon. Frank Vincent AO QC was a member until his resignation from the Commission in October 2019. Liana Buchanan was a member until she stepped down from the Division in December 2019.

Commission process

- 1.39 The Commission requested and received data from the Magistrates' Court of Victoria, the County Court of Victoria, the Supreme Court of Victoria, Court Services Victoria and the Office of Public Prosecutions. An overview of the available data and a discussion of its limitations is provided in Chapter 3.
- 1.40 An issues paper was published on 24 June 2019.⁵⁰ The Commission sought submissions on 21 questions included in the paper. It received 27 submissions, listed in Appendix A.
- 1.41 The Commission engaged in consultations in Melbourne, Geelong, Bendigo, Shepparton and Morwell with, among others, representatives of courts, prosecuting agencies, Victoria Legal Aid, legal practitioners, forensic agencies, victims, and witnesses and victims' advocacy groups. The consultations are listed in Appendix B.
- 1.42 The Commission had the opportunity to observe several committal mentions, committal case conferences, and committal hearings in the Melbourne Magistrates' Court and Bendigo Magistrates' Court.
- 1.43 The Commission examined reforms conducted in other jurisdictions and consulted with members of the justice sectors in New South Wales and South Australia.

Reform objectives

- 1.44 The terms of reference ask the Commission to recommend changes that could:
- reduce trauma experienced by victims and witnesses
 - improve efficiency in the criminal justice system
 - ensure fair trial rights.
- 1.45 These objectives are interconnected and may be mutually reinforcing, although there is potential for tension between them. The recommendations in this report provide strategies for reducing trauma for victims and other witnesses while also promoting efficiency and fair trial rights.

Reducing trauma experienced by victims and witnesses

- 1.46 Although victims and witnesses are not parties to criminal proceedings, they are important participants.⁵¹ They have an inherent interest in the criminal justice system's response to crime and should be treated with courtesy, respect, and dignity.⁵²
- 1.47 The *Victims' Charter Act 2006* (Vic) (Victims' Charter) recognises the impact of crime on victims and seeks to reduce the likelihood of secondary victimisation by the criminal justice system.⁵³ It applies to all agencies that investigate and prosecute crimes and that

50 Victorian Law Reform Commission, *Committals* (Issues Paper, June 2019).

51 *Victims' Charter Act 2006* (Vic) s 4(1)(ba), see also Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 12 [2.4], 15 [2.21]–[2.34].

52 *Victims' Charter Act 2006* (Vic) ss 4(1)(ba), 6(1), 7A(a). See also Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 24 [3.20]–[3.21].

53 *Victims' Charter Act 2006* (Vic) s 4(1). The objects of the Victims' Charter are based on *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UN Doc A/Res/40/34 (29 November 1985); *Victims' Charter Act 2006* (Vic) s 4(2).

provide victims' services.⁵⁴ These agencies should take into account the particular needs of victims, including with respect to their:

- age
- racial or religious background
- sex or gender identity
- disability
- location in regional or rural areas.⁵⁵

1.48 The Victims' Charter states that all victims should be provided with information about and referrals to relevant support services.⁵⁶ They should be kept informed about the course of an investigation and prosecution and about the court process.⁵⁷ In some instances their views about a prosecution must be sought and taken into account.⁵⁸

1.49 Despite efforts to improve their experience,⁵⁹ many victims and witnesses continue to find their involvement in criminal proceedings unpleasant and stressful. For victims and witnesses who have experienced trauma, involvement in the adversarial criminal justice system can be a particularly difficult and damaging experience.⁶⁰ The criminal process may require them to relive traumatic events that they wish to leave behind and that trigger distress and anxiety.⁶¹ Some describe it as more distressing than the crime itself.⁶² CASA Forum told the Commission that for victims of sexual assault:

[their] general experience of engagement with the criminal justice system is that it is confusing, disempowering, and re-traumatising.⁶³

1.50 The submissions received by the Commission converge in acknowledging that the criminal process can be traumatic for victims and witnesses.⁶⁴ Cross-examination is a particular concern, but delay and failures by the prosecution to communicate what is happening in a case are also described as frequent problems.⁶⁵

1.51 A trauma-informed approach was recommended as a way of mitigating the harm that victims and witnesses may suffer as a result of their involvement in the criminal justice process.⁶⁶ Domestic Violence Victoria describes a trauma-informed approach as:

processes that don't place victims in a position of being re-traumatised and don't treat them as objects of blame or instruments of evidence. Currently, the process often doesn't deliver a sense of justice ... this doesn't necessarily require a conviction.⁶⁷

54 *Victims' Charter Act 2006* (Vic) s 1(a).

55 *Ibid* ss 6, 7A, 7B.

56 *Ibid* s 7.

57 *Ibid* ss 8, 9, 9A, 11.

58 *Ibid* s 9B.

59 See Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice* (Consultation Paper, September 2016) 11, 76; *Victims and Other Legislation Amendment Act 2018* (Vic), containing amendments to: *Victims Charter Act 2006* (Vic), *Victims of Crime Commissioner Act 2015* (Vic), *Sentencing Act 1991* (Vic), *Jury Directions Act 2015* (Vic), *Children, Youth and Families Act 2005* (Vic).

60 Consultations 2 (Victims of Crime Consultative Committee), 3 (CASA Forum), 5 (Victims of Crime Commissioner), 14 (Domestic Violence Victoria); Submissions 7 (knowmore), 9 (Australian Lawyers for Human Rights), 10 (Rape and Domestic Violence Services), 13 (Victoria Legal Aid), 19 (Victorian Aboriginal Legal Service), 23 (Victims of Crime Commissioner); Judicial College of Victoria, *Victims of Crime in the Courtroom: A Guide for Judicial Officers* (2019) 4; Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 25 [3.24], 33 [3.75], 34 [3.78], 196 [8.1].

61 Judicial College of Victoria, *Victims of Crime in the Courtroom: A Guide for Judicial Officers* (2019) 3–4; Consultations 3 (CASA Forum), 5 (Victims of Crime Commissioner), 14 (Domestic Violence Victoria).

62 Consultation 3 (CASA Forum), with reference to committal proceedings in particular; Judicial College of Victoria, *Victims of Crime in the Courtroom: A Guide for Judicial Officers* (2019) 3.

63 Consultation 3 (CASA Forum).

64 Submissions 4 (Director of Public Prosecutions (Victoria)), 6 (Office of the Public Advocate), 7 (knowmore), 9 (Australian Lawyers for Human Rights), 10 (Rape and Domestic Violence Services), 13 (Victoria Legal Aid), 19 (Victorian Aboriginal Legal Service), 23 (Victims of Crime Commissioner), 24 (Law Institute of Victoria), 25 (Victoria Police).

65 Submissions 7 (knowmore), 10 (Rape and Domestic Violence Services), 23 (Victims of Crime Commissioner); Consultations 3 (CASA Forum), 5 (Victims of Crime Commissioner), 14 (Domestic Violence Victoria).

66 Submissions 4 (Director of Public Prosecutions (Victoria)), 6 (Office of the Public Advocate), 7 (knowmore), 9 (Australian Lawyers for Human Rights), 10 (Rape and Domestic Violence Services), 13 (Victoria Legal Aid), 19 (Victorian Aboriginal Legal Service), 23 (Victims of Crime Commissioner), 24 (Law Institute of Victoria), 25 (Victoria Police). Consultations 3 (CASA Forum), 5 (Victims of Crime Commissioner), 14 (Domestic Violence Victoria).

67 Consultation 14 (Domestic Violence Victoria).

- 1.52 The concept of trauma is expansive and the word is variously defined.⁶⁸ As well as physical harm, it can encompass a psychological wound or injury caused by very frightening or distressing events.⁶⁹ This may result from directly experiencing or witnessing distressing events; learning that someone close is affected; or repeated or extreme exposure to details of the events.⁷⁰
- 1.53 A trauma-informed approach recognises the barriers that witnesses and victims who have been through traumatic events may confront during their participation in criminal proceedings, such as difficulties discussing the traumatic events, impaired recollection, fear of being blamed or not believed, and distrust of authority figures.⁷¹ If judicial officers and court staff are aware of these barriers and trained to assist victims and witnesses to navigate them, this may limit the potential for further trauma.⁷² The Judicial College of Victoria's guide for judicial officers provides strategies to reduce trauma for victims and witnesses (see Chapter 11 of this report). The Commission has sought to adopt a trauma-informed approach in its discussion and recommendations.

Improving efficiency

- 1.54 Criminal processes should be streamlined, avoid duplication and delay, and be cost-efficient. This is consistent with the rights of the accused to trial without undue delay⁷³ and assures victims and witnesses that they will not be caught up in overly long proceedings.
- 1.55 Efforts to increase efficiency in the criminal process must not be at the cost of the rights of those involved. Not all delay is 'unreasonable delay' and any reforms must ensure that measures to speed up the process do not undermine the rights of the accused. In particular, the rights of the accused to be informed in detail of the nature and evidentiary basis for the charge and to have adequate time to prepare their defence must be respected during pre-trial proceedings.⁷⁴
- 1.56 This report focuses on avoidable delay and makes recommendations to reduce the time that cases spend 'queuing' for various court events, including trial hearings.⁷⁵
- 1.57 As requested in the terms of reference, the Commission has considered the resource implications of its recommendations. It has identified areas where existing capacity and resource constraints need to be addressed and when recommendations to change the system require additional funding.

Maintaining the right to a fair trial

- 1.58 Everyone accused of criminal offending is entitled to a fair hearing.⁷⁶ In Victoria, the right to a fair trial in the *Charter of Rights and Responsibilities Act 2006* (Vic) recognises that the accused has, among other things, rights to:
- be informed promptly and in detail of the nature of the charge
 - be tried without unreasonable delay
 - be provided with legal aid in some instances
 - examine witnesses unless otherwise provided for by law.⁷⁷

68 Judicial College of Victoria, *Victims of Crime in the Courtroom: A Guide for Judicial Officers* (2019) 3.

69 Australian Psychological Society, 'Trauma', *Psychology Topics* (Web Page, 2020) <<https://www.psychology.org.au/for-the-public/Psychology-topics/Trauma>>.

70 Marie-Eve Leclerc et al, *Assessing and Treating Traumatic Stress in Crime Victims* (Research Brief, February 2017).

71 Judicial College of Victoria, *Victims of Crime in the Courtroom: A Guide for Judicial Officers* (2019) 4.

72 Ibid. See also Jo-Anne Wemmers, 'Victims' Experiences in the Criminal Justice System and Their Recovery from Crime' (2013) 19(3) *International Review of Victimology* 221.

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

74 Ibid ss 25(2)(a), (b).

75 See Submissions 20 (County Court of Victoria), 22 (Supreme Court of Victoria).

76 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(1).

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

- 1.59 Criminal cases necessarily involve the power of the State being deployed against an individual.⁷⁸ Procedural rules have been developed that:
- reflect two obvious propositions: that the power and resources of the State as prosecutor are much greater than those of the individual accused and that the consequences of conviction are very serious.⁷⁹
- 1.60 The inherent potential for imbalance between the State and the accused in the criminal justice system is exacerbated by the profile of many alleged offenders. Victoria Legal Aid funds over 80 per cent of all criminal trials in the state. To be eligible for legal aid, strict means tests apply and only the most disadvantaged in the community qualify.⁸⁰ Victoria Legal Aid describes those it assists as ‘the most disadvantaged people in Victoria’.⁸¹ In addition to many of its criminal law clients having ‘themselves been the victims of crime, trauma or abuse’, Victoria Legal Aid states that in 2017-18:
- five per cent of its clients were of Aboriginal or Torres Strait Islander background
 - 22 per cent were from culturally and linguistically diverse backgrounds
 - 26 per cent disclosed having a disability or mental illness
 - five per cent were experiencing homelessness
 - 29 per cent had no income.⁸²
- 1.61 Some stakeholders urged the Commission to keep the potential vulnerability of accused people in mind. Professor Felicity Gerry suggested there was a need within the criminal justice system to recognise that ‘everyone is vulnerable to some degree’ and ‘the starting point [has to be] protecting everyone in the system—how can we ensure everyone trusts the integrity of the system?’⁸³ Professor Gideon Boas explained:
- I act for both the accused and for victims and *both* feel very similar [about their participation in the criminal trial]—they feel as if they are not involved in the process, that they are not well informed, that it is not meaningful to them.⁸⁴
- 1.62 At common law, committal proceedings have been characterised as playing an important role in ensuring the rights of the accused. Forty years ago, in *Barton v R*, Chief Justice Gibbs and Justice Mason (with Justice Aickin agreeing) described the effects of depriving an accused person of committal proceedings:
- In such a case the accused is denied (1) knowledge of what the Crown witnesses say on oath; (2) the opportunity of cross-examining them; (3) the opportunity of calling evidence in rebuttal; and (4) the possibility that the magistrate will hold that there is no prima facie case or that the evidence is insufficient to put him on trial or that there is no strong or probable presumption of guilt.⁸⁵
- 1.63 In *Barton*, the judges concluded that committal proceedings:
- constitute such an important element in the protection of the accused that a trial held without antecedent committal proceedings, unless justified on strong and powerful grounds, must necessarily be considered unfair.⁸⁶

78 *R v Carroll* [2002] HCA 55, 6 (2002) 213 CLR 635, 643 (Gleeson CJ, Hayne J).

79 *R v Carroll* [2002] HCA 55, 6 (Gleeson CJ, Hayne J).

80 Victoria Legal Aid notes that some people who may not be able to afford private legal representation still do not qualify for legal aid. Victoria Legal Aid, ‘12—Means Test’, *VLA Handbook for Lawyers* (Online Handbook, 2 January 2020) <<https://handbook.vla.vic.gov.au/handbook/12-means-test>>. The means test requires an applicant to earn less than \$360 per week and to have less than \$1,095 worth of assessable assets in order for their case to be fully aided. Applicants who earn more than this or who have more assets will be required to contribute to the costs of their defence (ibid). To put this in perspective, the national minimum wage is currently \$740 per week: Fair Work Ombudsman, Australian Government ‘Minimum Wages’, *Pay* (Web Page, 2020) <<https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/minimum-workplace-entitlements/minimum-wages#what-is-the-national-minimum-wage-order>>.

81 Submission 13 (Victoria Legal Aid).

82 Ibid.

83 Consultation 18 (Academic Roundtable).

84 Ibid.

85 *Barton v The Queen* (1980) 147 CLR 75, 99 (Gibbs ACJ and Mason J).

86 Ibid 100 (Gibbs ACJ and Mason J).

- 1.64 In the same case, Justice Stephen described committal proceedings as ‘an important part of the protection ordinarily afforded to an accused.’⁸⁷
- 1.65 More recent decisions explain that any unfairness resulting from the absence of committal proceedings may be rectified by the trial court. Whether this is possible will depend on the particular circumstances of the case.⁸⁸ The measures available to trial courts to prevent unfairness where an accused is being tried without antecedent committal proceedings include voir dire hearings and the ability to grant leave to cross-examine witnesses under section 198B of the CPA (see Chapter 11).⁸⁹

An overview of the Commission’s conclusions

- 1.66 In the following chapters, the Commission outlines the reasons for arriving at the conclusions which are now briefly summarised.
- 1.67 The Commission considered proposals from some stakeholders to abolish committal proceedings and replace them with pre-trial case management in the higher courts. It recognises the advantages of a ‘docket system,’ in which a single judge has oversight of a case from start to finish and is likely to have a keener interest in progressing the case than another judge who will not hear the trial.
- 1.68 However, aside from the test for committal, which should be abolished, many of the current elements of committal proceedings are essential to ensuring fair trials, promoting early resolution of cases, narrowing the issues before trial, and reducing trauma for victims and witnesses. Subject to some procedural changes, and putting to one side matters within the exclusive jurisdiction of the Supreme Court, the main elements of committal proceedings should be retained in the lower courts in Victoria.
- 1.69 Introducing a docket system in indictable criminal cases would require a substantial departure from current practice. With the exception of Supreme Court matters, such a radical change is not the most effective approach to advancing the objectives of this reference. Victoria’s lower courts currently filter indictable cases effectively, with around a third of all indictable stream cases resolving in the lower courts and another third committed to the higher courts following a plea of guilty.
- 1.70 The County Court hears most indictable cases in which an accused is committed for trial, with only around 100 cases committed to the Supreme Court each year. Transferring the bulk of pre-trial indictable case management to the County Court would be costly and there is a danger it would increase delay.⁹⁰
- 1.71 While still costly, there is less danger of exacerbating delay by moving all pre-trial management of cases within the Supreme Court’s exclusive jurisdiction into the Supreme Court. Therefore, aside from Children’s Court matters, charges for indictable offences that fall within the Supreme Court’s exclusive jurisdiction should be filed in the Supreme Court.
- 1.72 Comprehensive information is not currently available about the impact of abolishing elements of committal proceedings in other jurisdictions. For example, New South Wales has invested heavily in the reforms discussed earlier, but it is too soon to say whether they have streamlined processes and reduced delay, had positive outcomes for fair trials or reduced trauma for victims and witnesses.⁹¹

87 *Barton v The Queen* (1980) 147 CLR 75, 105 (Stephen J).

88 *R v Dupas* [2006] VSC 481; (2006) 14 VR 228; *Cook v The Queen* [2019] VSCA 87.

89 *R v Dupas* [2006] VSC 481; *Cook v The Queen* [2019] VSCA 87.

90 See paragraphs 5.26–5.27 and 5.34–5.36 of this report.

91 The Commission was told that the New South Wales Bureau of Crime Statistics and Research (BOCSAR) is undertaking an evaluation of the reforms: Consultation 32 (Local Court of New South Wales). The BOCSAR study has not been publicised. Professor Jeremy Gans urged the Commission to consider the impact of the New South Wales reforms before recommending ‘sweeping changes’ to Victoria’s committal system: Consultation 18 (Academic roundtable).

- 1.73 While the outcomes of abolishing committal proceedings in their entirety are currently uncertain, the Commission’s recommendations address existing concerns about inefficiency and unnecessary trauma for victims and witnesses. The Commission’s recommendations include:
- Replacing the test for committal with a new procedure called a discharge application. The Court will have the power to discharge charges where it finds there is no reasonable prospect of conviction. Such an application would be initiated by the accused.
 - Earlier active involvement of the DPP in prosecuting indictable stream matters. This should include providing charging instructions or reviewing charges at an early stage and taking ultimate responsibility for disclosure to the accused.
 - Earlier and continuing involvement of experienced practitioners.
 - Replacing committal mention hearings and committal hearings with ‘issues hearings.’ While the opportunity to cross-examine witnesses in the Magistrates’ Court should—with some exceptions—be retained, the Court should more strictly apply the test for leave to cross-examine in accordance with its terms; apply additional criteria for leave to cross-examine in some cases; and carefully monitor the conduct of cross-examination. The issues hearing will allow for greater flexibility in the scheduling of cross-examination and reduce delay.
- 1.74 The Commission’s recommendations do not preclude future consideration of whether committal proceedings should be further reformed. Victoria should continue to study pre-trial systems in other jurisdictions and particularly the outcomes, when available, of evaluations such as that currently being undertaken by the Bureau of Crime Statistics and Research in New South Wales.⁹²
- 1.75 The effectiveness of Victoria’s pre-trial criminal justice system should continue to be evaluated and data collection strengthened to inform future reform decisions.

Statutory sentencing discount schemes

- 1.76 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.⁹³ The Act does not prescribe specific discounts linked to the timing of guilty pleas.
- 1.77 New South Wales and South Australia have introduced statutory sentencing discount schemes as part of their recent reforms. The schemes specify the amount by which a sentence should be reduced, depending on the timing of the plea.⁹⁴
- 1.78 In its report on statutory sentence reductions for early guilty pleas, Tasmania’s Sentencing Advisory Council cited arguments that legislated sentence reductions are contrary to the presumption of innocence because they penalise offenders who proceed to trial. The Council continued:
- Concerns have also been expressed that [prescribed sentence reductions] may place undue pressure on an innocent [person] 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.⁹⁵

92 See note 91, above.

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

94 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25D; *Sentencing Act 2017* (SA) s 40.

95 Sentencing Advisory Council Tasmania, *Statutory Sentencing Reductions for Pleas of Guilty* (Final Report No 10, October 2018) 82.

- 1.79 Legal Aid New South Wales shares these concerns, telling the Commission in the course of the current reference that strict statutory sentencing discount schemes are:
- unfair in ways that you can't always predict. The [NSW] scheme is incredibly complicated because it tries to incorporate every single matter ... none of the debates have been had yet about how it will play out.⁹⁶
- 1.80 In the report cited above, Tasmania's Sentencing Advisory Council endorsed Victoria's sentencing regime.⁹⁷ There were no stakeholders who advocated during the current reference for introduction of legislatively prescribed sentence discounts in Victoria. The Commission is not recommending any changes to the existing sentencing discount scheme.

The present committal and pre-trial system

- 16** Introduction
- 16** Prosecuting indictable offences
- 17** Figure 1: The present committal and pre-trial system
- 19** Committal proceedings in the Magistrates' Court
- 25** Pre-trial procedure in the higher courts

2. The present committal and pre-trial system

Introduction

- 2.1 This chapter provides an overview of pre-trial indictable procedure in Victoria, including committal proceedings in the Magistrates' Court. It describes current procedures from the filing of charges to trial or sentence. The procedures described here are generally followed for indictable offences filed in the Children's Court but issues specific to the Children's Court are discussed in Chapter 12.
- 2.2 The flow chart on page 17 shows how indictable matters proceed through the jurisdiction of the Magistrates' Court.

Prosecuting indictable offences

- 2.3 Criminal offences are categorised as either 'indictable' or 'summary'.
- 2.4 Indictable offences are serious crimes that are heard and determined before a judge and jury in the County or Supreme Courts¹—although in some circumstances, less serious indictable offences may be dealt with in the Magistrates' Court ('indictable offences triable summarily').²
- 2.5 Summary offences are less serious offences that are heard and determined in the Magistrates' Court by a magistrate alone.³
- 2.6 Although indictable offences are prosecuted and sentenced in the County or Supreme Courts, charges for these offences are usually filed in the Magistrates' Court by the investigating officer (often a police officer), who is known as 'the informant'.⁴ The Magistrates' Court registrar lists these matters in the committal stream of the Magistrates' Court. They only enter the jurisdiction of a higher court after some preliminary procedural matters are dealt with in the Magistrates' Court. These procedures are set out in chapter four of the *Criminal Procedure Act 2009* (Vic) (CPA) and together constitute a 'committal proceeding'.

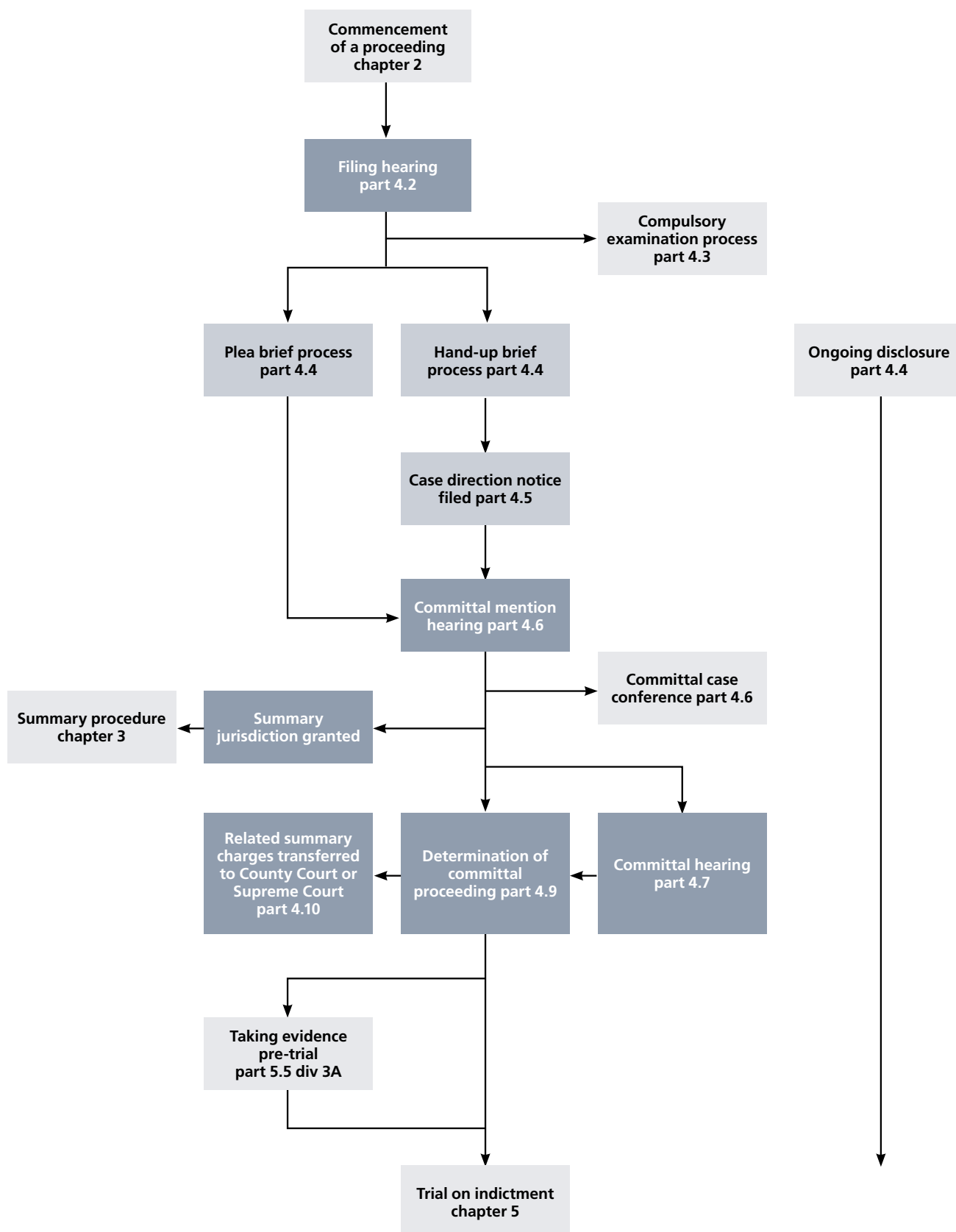
1 The majority of indictable offences are listed in: *Crimes Act 1958* (Vic) s 2B; *Wrongs Act 1958* (Vic) s 2A. Offences in other legislation that are described as being level 1–6 or punishable by level 1–6 imprisonment, fine or both are presumed to be indictable offences unless the contrary intention appears: Judicial College of Victoria, '2.5 Summary and Indictable Offences', *Victorian Criminal Proceedings Manual* (Online Manual, 1 November 2019) [3] <<https://www.judicialcollege.vic.edu.au/eManuals/VCPM/indexpage.htm#27318.htm>>.

2 *Criminal Procedure Act 2009* (Vic) s 28 specifies that the following indictable offences may be heard and determined summarily, unless the contrary intention appears in the *Criminal Procedure Act* or other legislation or subordinate instruments: level 5 or level 6 offences; offences punishable by level 5 or level 6 imprisonment, fine or both; offences punishable by a term of imprisonment of not more than 10 years, a fine of not more than 1200 penalty units or both; or offences listed in schedule 2 of the Act. Such offences can only be heard summarily if the Magistrates' Court considers that it is appropriate to hear and determine the charge summarily and the accused consents to a summary hearing, *Criminal Procedure Act 2009* (Vic) s 29. The informant or the accused may apply for a summary hearing, or the Magistrates' Court may offer a summary hearing without any application being made, *Criminal Procedure Act 2009* (Vic) s 30.

3 The procedure for prosecuting summary offences is set out in chapter three of the *Criminal Procedure Act 2009* (Vic).

4 Note that a charge sheet need not be filed with a registrar of the Magistrates' Court—if an accused was arrested without warrant and released on bail, the charge sheet may be filed with a bail justice. Criminal proceedings may also be commenced by a police officer or public official signing a charge sheet if a summons to answer a charge is at the same time issued by that person. The charge sheet and summons must be filed with a registrar of the Magistrates' Court within 7 days of signing the charge sheet: *Criminal Procedure Act 2009* (Vic) ss 5, 6.

Figure 1: The present committal and pre-trial system⁵



Source: Department of Justice, Victoria. This is an updated version of a flowchart that appeared in Criminal Procedure Act 2009—Legislative Guide, February 2010, 118.

- 2.7 Committal proceedings in the Magistrates' Court must be held in all cases involving charges for an indictable offence, unless:
- the accused elects to stand trial after service of the brief of evidence⁶
 - the indictable offence can be heard summarily
 - the DPP files a direct indictment.⁷
- 2.8 After committal, another charging document called an 'indictment' must be filed by the Director of Public Prosecutions (DPP) in the higher court as the basis for proceedings in that court.⁸ The indictment does not, however, commence a new criminal proceeding against the accused: the proceedings in the higher court are a continuation of the proceedings that commenced in the Magistrates' Court with the filing of a charge sheet.⁹

Direct indictment by the DPP

- 2.9 A direct indictment may be filed even though an accused has been discharged at committal,¹⁰ no committal has been held,¹¹ or a discontinuance has been filed.¹²
- 2.10 Except where the accused person consents to the filing of a direct indictment, the decision to do so is a special decision that must be made by the Director's Committee in accordance with specified guidelines.¹³ These provide that a direct indictment should only be filed where there are strong grounds for justifying a trial without a committal proceeding, and the resulting trial would not be unfair to the accused.¹⁴
- 2.11 While the exercise of the power to file a direct indictment is not subject to judicial review,¹⁵ a court may order a stay of proceedings or make other orders—such as for a voir dire hearing—where necessary to prevent a miscarriage of justice flowing from the use of the direct indictment and to ensure a fair trial.¹⁶
- 2.12 As well as filing a direct indictment without a prior committal proceeding, the DPP may file a direct indictment after a magistrate has declined to commit an accused for trial if, in the opinion of the Director's Committee, the magistrate made an error in discharging the accused.¹⁷
- 2.13 Direct indictments are rare—just 19 were filed in 2017–18.¹⁸ Of these, seven were filed following discharge of one or more charges at a committal hearing.¹⁹ In 2018–19, the DPP filed 15 direct indictments, five following discharge of one or more charges at a committal hearing.²⁰

6 The accused may elect to stand trial at any time after service of a hand-up brief (which contains the evidence in the case): *Criminal Procedure Act 2009* (Vic) s 143. See sub-heading below, 'Election to stand trial'.

7 See *Criminal Procedure Act 2009* (Vic) s 5 ('a criminal proceeding is commenced by— ... (b) filing a direct indictment in accordance with section 159'), *Criminal Procedure Act 2009* (Vic) s 96 ('a committal proceeding must be held in all cases in which the accused is charged with an indictable offence, except where—(a) a direct indictment is filed; or (b) the charged is heard and determined summarily'); *Criminal Procedure Act 2009* (Vic) s 159 ('DPP or Crown Prosecutor may file an indictment'), *Criminal Procedure Act 2009* (Vic) s 161 ('Direct indictment commences criminal proceeding') and the definition of 'direct indictment' in section 3 of the *Criminal Procedure Act 2009* (Vic). *Criminal Procedure Act 2009* (Vic) s 159. A Crown Prosecutor may file an indictment in the name of the DPP. Section 163 imposes time limits for the filing of indictments following committal for trial in various classes of cases.

9 *Criminal Procedure Act 2009* (Vic) s 162.

10 Ibid ss 159, 161. See also Director of Public Prosecutions, Office of Public Prosecutions Victoria, *Policy of the Director of Public Prosecutions for Victoria* (17 December 2019) 4 [7] <<http://www.opp.vic.gov.au/Resources/Policies>>.

11 *Criminal Procedure Act 2009* (Vic) ss 159, 161. See also Director of Public Prosecutions, Office of Public Prosecutions Victoria, *Policy of the Director of Public Prosecutions for Victoria* (17 December 2019) 5 [8]–[9] <<http://www.opp.vic.gov.au/Resources/Policies>>.

12 *Criminal Procedure Act 2009* (Vic) ss 159, 161. See also Director of Public Prosecutions, Office of Public Prosecutions Victoria, *Policy of the Director of Public Prosecutions for Victoria* (17 December 2019) 5 [10] <<http://www.opp.vic.gov.au/Resources/Policies>>.

13 See section 3 ('definitions') and *Public Prosecutions Act 1994* (Vic) ss 45B–45H.

14 Director of Public Prosecutions, Office of Public Prosecutions Victoria, *Policy of the Director of Public Prosecutions for Victoria* (17 December 2019) 5 [8] <<http://www.opp.vic.gov.au/Resources/Policies>>.

15 *Cook v The Queen* [2019] VSCA 87, [22].

16 *Barton v The Queen* (1980) 147 CLR 75; *R v Dupas* [2006] VSC 481; (2006) 14 VR 228; *Cook v The Queen* [2019] VSCA 87.

17 The Director's Committee must also be satisfied that the DPP's criteria governing the decision to prosecute are satisfied and there has not been unreasonable delay between the accused being discharged and the decision to directly indict: Director of Public Prosecutions, Office of Public Prosecutions Victoria, *Policy of the Director of Public Prosecutions for Victoria* (17 December 2019) 4 [7] <<http://www.opp.vic.gov.au/Resources/Policies>>.

18 Office of Public Prosecutions Victoria, *Response to VLRC Request for Statistics—Review of Committals* (24 April 2019). See also: Victorian Law Reform Commission, *Committals* (Issues Paper, June 2019) 24 [3.80].

19 Email from Office of Public Prosecutions Victoria to Victorian Law Reform Commission, 9 January 2020.

20 Ibid.

Committal proceedings in the Magistrates' Court

The purposes of committal proceedings

- 2.14 The statutory purposes of committal proceedings, set out in section 97 of the CPA, are:
- to determine whether a charge for an offence is appropriate to be heard and determined summarily²¹
 - to determine whether there is evidence of sufficient weight to support a conviction for the offence charged²²
 - to determine how the accused proposes to plead to the charge²³
 - to ensure a fair trial, if the matter proceeds to trial, by—
 - ensuring that the prosecution case against the accused is adequately disclosed in the form of depositions
 - enabling the accused to hear or read the evidence against the accused and to cross-examine prosecution witnesses
 - enabling the accused to put forward a case at an early stage if the accused wishes to do so
 - enabling the accused to adequately prepare and present a case
 - enabling the issues in contention to be adequately defined.²⁴
- 2.15 These statutory purposes are consistent with how the courts have characterised the functions of committal proceedings at common law.²⁵

The component parts of committal proceedings

- 2.16 Court appearances in a committal proceeding may include:
- a filing hearing
 - a special mention hearing²⁶
 - a compulsory examination hearing²⁷
 - a committal mention hearing
 - a committal case conference
 - a committal hearing—although not in cases involving a charge for a sexual offence where the complainant was a child or a person with a cognitive impairment when the proceeding commenced.²⁸
- 2.17 Aside from special mention and compulsory examination hearings, each of these hearings is described below, along with the associated procedural requirements.

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

22 *Ibid* s 97(b).

23 *Ibid* s 97(c).

24 *Ibid* s 97(d)(i)-(v).

25 *Grassby v The Queen* (1989) 168 CLR 1, 15 (Dawson J); *Barton v The Queen* (1980) 147 CLR 75, 99 (Gibbs ACJ and Mason J).

26 A special mention hearing may be held at any time during committal proceedings to allow the court to: amend the date for a hearing in the proceedings; make orders or directions that the court considers appropriate for the management of the proceedings; immediately conduct a committal mention hearing and determine whether to discharge or commit the accused, or automatically commit for trial an accused who has elected to stand trial: *Criminal Procedure Act 2009* (Vic) s 153.

27 At any stage after filing a charge but before a committal hearing, the informant may seek an order requiring a person to attend court for examination, or to produce a document or some other thing: *Criminal Procedure Act 2009* (Vic) ss 103-4. 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 hand-up brief.

28 *Criminal Procedure Act 2009* (Vic) s 100(1A).

Filing hearing

- 2.18 A filing hearing must be held soon after charges are filed.²⁹ At the filing hearing, a solicitor from the Office of Public Prosecutions (OPP) or, in regional areas, a police prosecutor appears on behalf of the prosecution.
- 2.19 A magistrate establishes a timetable for the committal proceedings, including setting dates for service of the hand-up brief (containing the evidence in support of the charges) and the committal mention hearing. The magistrate also considers any application for bail, unless the case involves charges for treason or murder.³⁰

Hand-up brief

- 2.20 If the accused indicates an intention to plead guilty and provides written consent to the service of a plea brief, the informant may serve a plea brief, which is less substantial than a hand-up brief.³¹
- 2.21 Unless a plea brief has been served and the accused pleads guilty to the charge, the informant must serve on the accused a hand-up brief.³²
- 2.22 A hand-up brief must include³³:
- a notice in Magistrates' Court Form 29 containing information about committal proceedings, including:
 - the purpose of the various stages
 - the date of the committal mention hearing
 - the importance of the accused obtaining legal representation and advising them of their right, if eligible, to legal aid³⁴
 - the requirement that the parties have discussions before the committal mention hearing. The purposes of these discussions include finding out how the accused proposes to plead; and if the accused wants to inspect materials listed in the hand-up brief but the informant objects to that inspection.³⁵
 - a copy of the charge sheet
 - a statement of the material facts relevant to the charge
 - any information, document or thing on which the prosecution intends to rely in the committal proceedings, including copies of:
 - any record of the accused's interview with police or statement signed by the accused, or other evidentiary material in the possession of the informant relating to a confession or admission made by the accused
 - witness statements
 - transcripts of compulsory examination hearings or examinations under part 4 of the *Major Crime (Investigative Powers) Act 2004* (Vic)
 - documents that the prosecution intends to produce as evidence
 - a list of things the prosecution intends to tender as exhibits.
 - a description of any forensic procedure that has not yet been completed and on which the prosecution intends to rely

29 Within seven days if the accused has been arrested and either remanded in custody or granted bail, and within 28 days if a summons to answer charge has been issued: *Criminal Procedure Act 2009* (Vic) s 102.

30 *Criminal Procedure Act 2009* (Vic) s 101. Only the Supreme Court can grant bail to a person accused of treason, and only the Supreme Court or a lower court at the time of committing the person for trial, may grant bail to a person accused of murder: *Bail Act 1977* (Vic) s 13.

31 *Criminal Procedure Act 2009* (Vic) ss 107(2), 116. A plea brief must contain a copy of the charge sheet, a statement of the material facts relevant to the charge, statements signed by the accused or records of interview of the accused in the informant's possession: *Criminal Procedure Act* (Vic) s 117.

32 *Criminal Procedure Act 2009* (Vic) s 107.

33 *Ibid* s 110.

34 *Criminal Procedure Act 2009* (Vic) s 110(a); *Magistrates' Court Criminal Procedure Rules 2019* (Vic) r 57(1).

35 *Magistrates' Court Criminal Procedure Rules 2019* (Vic) r 57(1), Form 29.

- any other information, document or thing in the possession of the prosecution that is relevant to the alleged offence, including a list of persons who have made statements which the prosecution does not intend to tender at the committal hearing and copies of those statements, and copies of reports or tests carried out on behalf of the prosecution but on which it does not intend to rely
- if the committal proceeding relates to a charge for a sexual offence, a copy of every statement made by the complainant to any police officer that relates to the alleged offence and contains an acknowledgement of its truthfulness
- a copy or list of any other information, documents or things required by the rules of court to be included in the hand-up brief. The rules of court specify that these include witnesses' prior convictions, surveillance logs, crime scene notes, exhibit logs and diaries.³⁶

2.23 The hand-up brief must be accompanied by a list of its contents, signed by the informant, in Magistrates' Court Form 30.³⁷

Time frame for service of the hand-up brief

2.24 The time frame for service on the accused of the hand-up brief is not directly specified in the CPA, but parameters are imposed by the requirements that:

- a committal mention hearing must be held within six months of the commencement of proceedings or within three months if a sexual offence is involved,³⁸ unless it is in the interests of justice to extend this time³⁹
- the hand-up brief must be served on the accused at least 42 days before the committal mention hearing, unless the Magistrates' Court fixes another period for service or the accused gives written consent to a lesser period.⁴⁰

2.25 A magistrate will consider the circumstances of the case when fixing the date for service of the hand-up brief. The standard time for service is usually six weeks after the filing hearing.⁴¹

Election to stand trial

2.26 At any time after service of the hand-up brief, the accused may elect to stand trial without a committal proceeding by filing a notice to this effect with the court and serving a copy on the informant.⁴² As soon as practicable, the Magistrates' Court must have the accused attend before it and if it considers that the accused understands the nature and consequences of the election, it must commit the accused for trial.⁴³

Application for summary jurisdiction

2.27 If all strictly indictable charges in a case are withdrawn by the prosecution, leaving only indictable charges that are triable summarily or summary charges, the Magistrates' Court may offer or the accused may make an application for summary jurisdiction.⁴⁴ If granted, the remaining charges will be determined by a magistrate.⁴⁵

36 *Magistrates' Court Criminal Procedure Rules 2019* (Vic) r 57(2), Form 30. Magistrates' Court Practice Direction 3 of 2019 sets out additional 'Standard Disclosure Material' (Form 32A) that must be served with the hand-up brief in all section 123 matters, involving a sexual offence where the complainant was a child or person with a cognitive impairment at the time the proceeding commenced.

37 *Magistrates' Court Criminal Procedure Rules 2019* (Vic) r 57(2), Form 30.

38 *Criminal Procedure Act 2009* (Vic) s 126.

39 *Ibid* s 126(2).

40 *Ibid* s 108(1). Within seven days after service of the brief on the accused, a copy must be filed with the Magistrates' Court registrar and, if the DPP is conducting the committal proceeding, forwarded to the DPP: *Criminal Procedure Act 2009* (Vic) s 109.

41 Submission 14 (Magistrates' Court of Victoria).

42 *Criminal Procedure Act 2009* (Vic) s 143. The notice must be in Magistrates' Court Form 38: *Magistrates' Court Criminal Procedure Rules 2019* (Vic) r 66.

43 *Criminal Procedure Act 2009* (Vic) s 143(3).

44 *Ibid* 125(1)(b).

45 In accordance with the procedure set out in *Criminal Procedure Act 2009* (Vic) s 30.

Case direction notice (Form 32)

- 2.28 A 'case direction notice', known as a 'Form 32',⁴⁶ must be filed jointly by the parties and signed by or on behalf of the accused and the DPP or, if the DPP is not conducting the committal proceeding, the informant.⁴⁷
- 2.29 The purpose of the case direction notice is to require the parties to engage in discussions to explore early resolution of the case, identify the issues in the case and identify the witnesses, if any, whom the accused will seek leave to cross-examine.⁴⁸
- 2.30 If the accused is unrepresented, the DPP (or if the DPP is not conducting the committal proceeding, the informant) files the case direction notice and informs the court that 'the accused has not participated in any discussion or other activity in connection with the preparation' of the notice.⁴⁹
- 2.31 The case direction notice must be filed seven days before the committal mention hearing⁵⁰ and must include:
- the procedure proposed for dealing with the matter, or if an adjournment of the committal mention hearing would assist the parties in determining how the matter should be dealt with⁵¹
 - any application for summary jurisdiction⁵²
 - if the parties have not reached agreement, details of the issues in contention⁵³
 - details of any applications to cross-examine witnesses.⁵⁴
- 2.32 The case direction notice may also include a statement that the accused:
- requires the production of specified items in the hand-up brief⁵⁵
 - requires copies of things that the accused believes should have been included in the hand-up brief⁵⁶
 - is prepared, or is not prepared, to proceed with the committal hearing while a forensic procedure, examination or test described in the hand-up brief remains incomplete.⁵⁷
- 2.33 If the accused seeks the production of material listed in the hand-up brief and the informant objects, the items must be described in the case direction notice and the informant's grounds for objecting must be listed.⁵⁸

Committal case conference

- 2.34 Section 127 of the CPA provides that the Magistrates' Court may direct the parties to appear at a committal case conference conducted by a magistrate.⁵⁹ Where practicable, the committal case conference should be conducted on the same day as the committal mention hearing.⁶⁰ See paragraph 2.52 below for further information about how the court conducts these case conferences.
- 2.35 What is said or done at the committal case conference, and documents prepared solely for its purposes, are not subsequently admissible as evidence except with the agreement of all the parties to the conference.⁶¹

46 *Magistrates' Court Criminal Procedure Rules 2019* (Vic) r 59; Form 32—Case Direction Notice.

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

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

49 *Criminal Procedure Act 2009* (Vic) s 118(2) and see Form 32.

50 *Ibid* s 118(1).

51 *Ibid* s 119(b).

52 *Magistrates' Court Form 32, paragraph 3, Magistrates' Court Criminal Procedure Rules 2019* (Vic), r 59.

53 *Magistrates' Court Form 32, paragraph 2, Magistrates' Court Criminal Procedure Rules 2019* (Vic), r 59.

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

55 *Ibid* s 119(e)(i).

56 *Ibid* s 119(e)(ii).

57 *Ibid* s 119(f).

58 *Magistrates' Court Form 32, paragraph 7 (Magistrates' Court Criminal Procedure Rules 2019* (Vic), r 59.

59 *Criminal Procedure Act 2009* (Vic) s127(1).

60 *Ibid* s 127(2).

61 *Ibid* s 127(3).

- 2.36 In practice, committal case conferences are confined to matters involving an offence against the person, robbery, armed robbery or aggravated burglary.⁶²

Committal mention

- 2.37 The committal mention is the central case management hearing in committal proceedings.⁶³ As well as conducting committal case conferences, the Magistrates' Court may make any orders it considers appropriate,⁶⁴ and may:
- immediately determine the committal proceeding⁶⁵
 - offer a summary hearing or determine an application for a summary hearing⁶⁶
 - hear and determine applications for leave to cross-examine⁶⁷
 - hear and determine any objection to disclosure of material⁶⁸
 - fix another date for a committal mention⁶⁹
 - fix a date for a committal hearing—although not in matters involving a sexual offence where the complainant was a child or person with a cognitive impairment at the time the proceedings commenced.⁷⁰

Committal hearing

- 2.38 At a committal hearing, if one is held, the Magistrates' Court considers whether to commit the accused to stand trial based on the material in the hand-up brief and any other evidence given during the hearing.⁷¹
- 2.39 After the cross-examination of witnesses, if any, the Magistrates' Court must ask the accused whether they plead guilty or not guilty,⁷² and must inform the accused that the sentencing court may take into account a plea of guilty and its timing.⁷³

Cross-examination of witnesses

- 2.40 Witnesses, including complainants, may be cross-examined at the committal hearing where leave to cross-examine has previously been granted.⁷⁴

Test for committal

- 2.41 Before committing the accused to a higher court for trial or sentence, the Magistrates' Court must determine if the evidence is of sufficient weight to support a conviction for an indictable offence.⁷⁵ This involves assessing whether a reasonable jury could convict the accused on the evidence available.⁷⁶

62 Pursuant to Magistrates' Court of Victoria, *Practice Direction No 7 of 2013: Committal Case Conference*, 10 October 2013. Offences against the person are listed: *Crimes Act 1958* (Vic) ss 15–34A. While originally introduced as a nine month pilot, court supervised case conferencing in these matters has continued.

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

64 *Criminal Procedure Act 2009* (Vic) s 125(g).

65 *Ibid* s 125(1)(a).

66 *Ibid* s 125(1)(b).

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

68 *Ibid* s 125(1)(e).

69 *Ibid* s 125(1)(f).

70 *Ibid* s 125(1)(d).

71 *Ibid* s 141.

72 *Ibid* s 144(1)(a).

73 *Ibid* s 144(1)(b).

74 *Ibid* s 130. The conditions for the grant of leave to cross-examine are set out in s 124 and in Chapter 11 of this report. As noted earlier, leave cannot be granted in cases involving a charge for a sexual offence where the complainant was a child or a person with a cognitive impairment when the proceeding commenced: s 123.

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

76 Judicial College of Victoria, '4.4.5 Determination of Committal Proceeding', *Victorian Criminal Proceedings Manual* (Online Manual, 1 November 2019) [7].

- 2.42 The prosecution case should be taken at its highest,⁷⁷ and:
the magistrate need not consider whether a jury *should* or *would* be satisfied beyond reasonable doubt, but merely whether a jury *could* be so satisfied.⁷⁸
- 2.43 The committal test has been described as a task requiring:
a committing magistrate ... essentially to sift the wheat from the chaff: cases so weak that a jury properly instructed could not possibly convict the defendant and cases where it could.⁷⁹
- 2.44 If the Magistrates' Court determines the evidence is not of sufficient weight to support a conviction for *any* indictable offence, it must discharge the accused.⁸⁰
- 2.45 If the Court determines the evidence is of sufficient weight to support a conviction for the offence with which the accused is charged, it must commit the accused for trial.⁸¹
- 2.46 If the Court determines the evidence is of sufficient weight to support a conviction for an indictable offence *other than* the offence with which the accused is charged, it may adjourn the committal proceeding to allow the informant to file a charge sheet in respect of that other offence and:
- if the charge sheet is filed, must commit the accused for trial,⁸² or
 - if the informant does not file a charge sheet for the other offence within the period of adjournment, must discharge the accused.⁸³
- 2.47 Where an accused is charged with summary offences that are related to the indictable offence in respect of which the accused has been committed for trial, the Magistrates' Court must order that the related summary offences are transferred to the trial court.⁸⁴

Costs orders

- 2.48 The Magistrates' Court has an unfettered discretion to make costs orders in criminal proceedings within its jurisdiction.⁸⁵ If the Magistrates' Court awards costs against an informant who is a police officer, the order must be made against the Chief Commissioner of Police.⁸⁶
- 2.49 In exercising its discretion to make costs orders, the Magistrates' Court may take into account any unreasonable act or omission by, or on behalf of, a party to the proceeding that the court is satisfied resulted in prolonging the proceeding.⁸⁷

List management in the Magistrates' Court

- 2.50 The Melbourne Magistrates' Court has a group of dedicated committal list magistrates led by the criminal supervising magistrate. In regional areas all sitting magistrates may be called on to manage committal stream matters.
- 2.51 The Magistrates' Court emphasises that it manages committal proceedings proactively from the outset, with the aim of achieving resolution or ensuring proper preparation for trial as quickly and efficiently as possible.⁸⁸

77 *Forsyth v Rodda* (1988) 37 A Crim R 50, 68-69; *Forsyth v Rodda* (1989) 87 ALR 699.

78 *Thorpe v Abbotto* (1992) 34 FCR 366, [24] per Gummow J (with whom O'Loughlin J agreed), emphasis added.

79 *Thorpe v Abbotto* (1992) 34 FCR 366; [28] per Lockhart J, with whom O'Loughlin J also agreed.

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

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

82 *Ibid* s 141(4)(c).

83 *Ibid* s 141(5).

84 *Ibid* s 145. Section 242 of the *Criminal Procedure Act* (Vic) provides that the County Court and Supreme Court have jurisdiction to hear summary matters founded on the same set of facts as the indictable offence in respect of which the accused has been committed.

85 *Criminal Procedure Act 2009* (Vic) s 401(1).

86 *Ibid* s 401(5).

87 *Ibid* s 401(2) While the High Court has made it clear that an award of costs is an indemnity for a successful party and is not intended to punish the unsuccessful party, or to censure its conduct in the proceeding, this does not limit the power of the court to order costs where it is just and reasonable to do so: *Latoudis v Casey* (1990) 170 CLR 534.

88 Submission 14 (Magistrates' Court of Victoria).

- 2.52 At the committal mention, magistrates may give the parties a frank assessment of the strength of the evidence. During case conferences, which in the Melbourne Magistrates' Court are usually conducted by the criminal supervising magistrate, parties are required to explain their attitudes to the issues in the case and any barriers to resolution. Around half of the indictable stream matters that resolve within the jurisdiction of the Magistrates' Court resolve at the committal mention and/or case conference.⁸⁹
- 2.53 About 40 per cent of all matters that resolve within the jurisdiction of the Magistrates' Court resolve at a committal hearing.⁹⁰ In some instances, matters resolve part way through a committal hearing, removing the need to call all witnesses in relation to whom leave to cross-examine has been granted.⁹¹ Magistrates also engage actively with the parties at the hearing to encourage resolution. The Commission was told, however, that some regional magistrates are less proactive in this regard.

Pre-trial procedure in the higher courts

Procedure immediately following committal

- 2.54 Following committal, a Magistrates' Court registrar forwards to the DPP the materials from the committal proceedings including the transcript of evidence given and any statements admitted in evidence ('the depositions').⁹² The DPP must file the depositions in the County or Supreme Court as soon as practicable after committal,⁹³ and serve them on the accused.⁹⁴

Filing an indictment

Time limits for filing an indictment

- 2.55 Assuming that the DPP decides to pursue the prosecution, which they are not required to do,⁹⁵ they must file an indictment against a person committed for trial:
- for non-sexual offence matters: within six months after the date of committal⁹⁶
 - for sexual offence matters in which the complainant was *not* a child or person with a cognitive impairment when the criminal proceedings commenced: at least 28 days before the day on which the trial is listed to commence⁹⁷
 - for sexual offence matters in which the complainant was a child or person with a cognitive impairment when the criminal proceedings commenced: within 14 days after the date of committal.⁹⁸
- 2.56 The periods for filing an indictment may be extended or abridged by order of the Court if it believes that this is in the interests of justice.⁹⁹

89 Victorian Law Reform Commission, *Committals* (Issues Paper, June 2019) 18 [3.47], Table 3.

90 *Ibid.*

91 Submissions 14 (Magistrates' Court of Victoria), 24 (Law Institute of Victoria).

92 *Criminal Procedure Act 2009* (Vic) s 146.

93 County Court of Victoria, *Criminal Division Practice Note PNCR 1-2015*, 12 July 2019, para 5.1.

94 *Criminal Procedure Act 2009* (Vic) s 147.

95 *Ibid* s 156(b). As well as being free to choose whether to indict post-committal, the DPP may also discontinue a prosecution at any time except during trial, whether or not an indictment against the accused has been filed: *Criminal Procedure Act 2009* (Vic) s 177.

96 *Ibid* s 163(1).

97 *Ibid* s 163 (3).

98 *Ibid* s 163 (2).

99 *Ibid* ss 163(1)(b), 163(2)(b), 163(3)(b), 247.

Choice of Supreme or County Court

- 2.57 The DPP may choose to file an indictment in the Supreme Court, or in the County Court if all the indictable offences alleged in the indictment are within the County Court's jurisdiction.¹⁰⁰ The County Court has jurisdiction over all offences except treason and misprision of treason; murder and child destruction; attempted murder; and unlawful combinations or conspiracies to commit any offence that, when committed by an individual acting alone, could only be tried in the Supreme Court.¹⁰¹
- 2.58 Matters outside the County Court's jurisdiction are described as being within the 'exclusive jurisdiction' of the Supreme Court. The Supreme Court has jurisdiction in all Victorian cases but is not required to exercise its jurisdiction if jurisdiction has also been given to another court.¹⁰²
- 2.59 When deciding which court to file an indictment in, the DPP must have regard to:
- the complexity of the case¹⁰³
 - the seriousness of the alleged offence¹⁰⁴
 - any particular importance attaching to the case¹⁰⁵
 - any other consideration that the DPP considers relevant.¹⁰⁶

Case conferences supervised by the higher courts

- 2.60 As in the Magistrates' Court, court-supervised case conferencing in the higher courts currently occurs in some but not all matters.
- 2.61 In the County Court, court-supervised case conferencing is being trialled in the Long Trial List and as part of the Active Case Management System (ACMS). In the ACMS, a distinction is drawn between matters that can be managed administratively and matters that require intensive case management. The former will generally be cases that arrive in the County Court's jurisdiction ready to go to trial, without outstanding disclosure, and with the issues for trial clearly identified by the parties and not susceptible to resolution.¹⁰⁷ The latter might be cases where there are issues in dispute that can be refined, substantial pre-trial legal issues, or multiple accused.¹⁰⁸ In these matters, a case conference will generally be listed within 8-10 weeks of the committal hearing.¹⁰⁹ The case conference will be conducted by a judge.¹¹⁰
- 2.62 In the Supreme Court, the Principal Judge directs appropriate cases to participate in case conferencing, which is overseen by reserve judges.¹¹¹

Pre-trial cross-examination in the higher courts

- 2.63 In some circumstances, leave may be given to cross-examine witnesses within the jurisdiction of the trial court but prior to the trial itself (see Chapter 11).

100 Ibid s 160.

101 *County Court Act 1958* (Vic) s 36A.

102 *Constitution Act 1975* (Vic) ss 85, 87(1).

103 *Criminal Procedure Act 2009* (Vic) s 160(2)(a).

104 Ibid s 160(2)(b).

105 Ibid s 160(2)(c).

106 Ibid s 160(2)(d).

107 County Court of Victoria, *Practice Note PNCR 2-2019: Criminal Division—Active Case Management*, 2 December 2019, para 35.

108 Ibid para 37.

109 Ibid para 45.

110 Ibid para 44.

111 Consultation 31 (Supreme Court of Victoria). The *Supreme Court (Criminal Procedure) Rules 2017*, r 4.07(1) provide that the Judicial Registrar—Criminal Division may conduct a case conference at any time before trial.

List management in the County Court

- 2.64 Cases are allocated to particular lists within the County Court’s Criminal Division, including a general list, a list for matters involving sexual offences, the Long Trial List, the special hearing list for sexual offence matters where the complainant was a child or person with a cognitive impairment when the proceedings commenced, and the ACMS which is currently being piloted.¹¹²
- 2.65 Until the inauguration of the ACMS in December 2019, most matters were listed for an initial directions hearing (IDH) in the County Court on the next sitting day following committal.¹¹³
- 2.66 ACMS matters are not listed for a directions hearing until 14 days after committal,¹¹⁴ and this directions hearing may be vacated where the judicial registrar managing the list makes an assessment that the matter can be listed for trial immediately.¹¹⁵ In such cases, a trial date will be provided and a directions hearing listed four weeks before this date.¹¹⁶
- 2.67 Trial material will generally have to be filed within eight to ten weeks of the committal.¹¹⁷ This material includes:
- depositions
 - the indictment
 - summary of prosecution opening and notice of pre-trial admissions
 - Evidence Act and/or Jury Directions Act notices
 - defence response to the prosecution opening
 - notice of pre-trial admissions sought.¹¹⁸
- 2.68 The County Court’s Practice Note for the ACMS requires parties to be ‘in a position to meaningfully progress the matter’ whenever they appear before the court.¹¹⁹ It states ‘Practitioner compliance with Court directions ... is critical’ and notes that the Court will list a matter for Mention before the Judicial Registrar in order to address non-compliance.¹²⁰
- 2.69 For matters in the County Court’s general and sexual offences lists (excluding matters involving a sexual offence where the complainant was a child or person with a cognitive impairment when the proceedings commenced), an IDH is held on the next sitting day following the committal hearing.¹²¹

112 See County Court of Victoria, *Practice Note PNCR 2-2019: Criminal Division—Active Case Management*, 2 December 2019; County Court of Victoria, *Criminal Division Practice Note PNCR 1-2015*, 12 July 2019.

113 County Court of Victoria, *Criminal Division Practice Note PNCR 1-2015* (12 July 2019), para 2.1.

114 County Court of Victoria, *Practice Note No 2 of 2019: Active Case Management System (Criminal Division Reform)* 3 December 2019, para 22.

115 This will be where the matter appears incapable of resolution; there are only straightforward pre-trial legal issues, if any; there is no outstanding disclosure; and the estimate trial length is reasonable and is agreed between the parties: County Court of Victoria, *Practice Note No 2 of 2019: Active Case Management System (Criminal Division Reform)* 3 December 2019, para 35.

116 County Court of Victoria, *Practice Note No 2 of 2019: Active Case Management System (Criminal Division Reform)*, 3 December 2019, para 36.

117 *Ibid* para 36.3.

118 County Court of Victoria, *Practice Note No 2 of 2019: Active Case Management System (Criminal Division Reform)*, 3 December 2019, paras 36.3.1-5.

119 *Ibid* para 8.

120 *Ibid* para 57.

121 The defence must file and serve a ‘Notice that Legal Practitioner Acts’ on the day of the IDH. The practitioner who appeared at the committal must appear at the IDH, and ‘both parties must be fully familiar with the matter.’ The accused must also appear at the IDH, by video link if he or she is in custody: County Court of Victoria, *Criminal Division Practice Note PNCR 1-2015*, 12 July 2019, paras 2.6–2.7, 2.10.

- 2.70 Parties must come to an IDH prepared to answer a list of questions set out by the County Court in its Criminal Division Practice Note, such as:
- What are the factual issues in dispute?
 - What is not in dispute?
 - How can the parties narrow the issues in dispute?
 - Are there any outstanding disclosure issues?
 - Do any applications need to be made?¹²²
- 2.71 All sexual offence cases involving a complainant who was a child or person with a cognitive impairment when proceedings commenced are listed in the County Court's Special Hearing Rolling List, which sits fortnightly.¹²³
- 2.72 These cases are not listed for an IDH until at least 28 days after the date of committal.¹²⁴ The prosecution must file and serve trial materials no later than 14 days after committal.¹²⁵
- 2.73 If an application is made for pre-trial cross-examination of witnesses under section 198A (see Chapter 11), the parties must jointly file a Form 198A, 'Application for Pre-Trial Cross-Examination', no later than seven days before the IDH.¹²⁶
- 2.74 If confidential communications are sought by the defence, the relevant applications and draft subpoenas must be filed and served no less than seven days before the IDH.¹²⁷
- 2.75 At the IDH, both parties must be fully familiar with the matter and be able to make decisions as to its future conduct.¹²⁸
- 2.76 Parties must come to an IDH prepared to answer similar questions to those set out in paragraph 2.70. In addition, they should be prepared to say if pre-trial cross-examination will assist in resolution of the matter, and if so, how long this cross-examination will take.¹²⁹
- 2.77 At the conclusion of the IDH, the proceeding will either be adjourned for:
- section 198A pre-trial cross-examination hearing
 - final directions hearing
 - special hearing
 - trial.¹³⁰
- 2.78 If the matter is listed for a final directions hearing, the court will generally make orders for the filing of documents before the final directions hearing.¹³¹

122 County Court of Victoria, *Criminal Division Practice Note PNCR 1-2015*, 12 July 2019, para 2.11.

123 Ibid para 3.1.

124 Ibid paras 2.4, 3.2.

125 Ibid para 3.4.

126 County Court of Victoria, *Criminal Division Practice Note PNCR 1-2015*, 12 July 2019, para 3.6.

127 Ibid para 3.7. Confidential communications are defined by section 32C of the *Evidence (Miscellaneous Provisions) Act 1958 (Vic)*.

128 County Court of Victoria, *Criminal Division Practice Note PNCR 1-2015*, 12 July 2019, para 3.8.

129 Ibid para 3.12. The accused must appear at the IDH, by video link if he or she is in custody: County Court of Victoria, *Criminal Division Practice Note PNCR 1-2015*, 12 July 2019, para 3.11.

130 County Court of Victoria, *Criminal Division Practice Note PNCR 1-2015* 12 July 2019, para 3.13

131 Ibid para 3.14.

County Court regional matters

- 2.79 When an accused is committed for trial to a regional (circuit) location, the matter will be listed for a circuit directions hearing (CDH) in the next CDH list for that particular location.¹³²
- 2.80 At the CDH, both parties are required to be fully familiar with the matter.¹³³
- 2.81 Parties may appear from Melbourne or from a regional court location for all such hearings.¹³⁴ Video links are automatically arranged between courts for all CDHs. All accused on bail must attend the CDH but can appear via video link from any County Court location. Accused in custody who are legally represented are not required to attend either in person or via video link unless the Court orders otherwise or at the written request of the parties.¹³⁵
- 2.82 Additional pre-trial listings may be made as the case requires.¹³⁶

List management in the Supreme Court

- 2.83 Supreme Court matters are listed for post-committal directions hearing (PCDH) within 24 hours of committal if the committal proceedings were conducted in Melbourne, or within five days if the committal proceedings were conducted in a regional area.¹³⁷
- 2.84 A trial date is usually set at the PCDH.
- 2.85 Following the PCDH, the Supreme Court conducts case management of matters through the Principal Judge. Court-supervised case conferences currently occur on an ad hoc basis.

132 Ibid para 4.1.

133 Ibid para 4.8.

134 County Court of Victoria, *Criminal Division Practice Note PNCR 1-2015*, 12 July 2019, para 4.10. If seeking to appear from any other Victorian court location, parties must contact the relevant circuit registry to confirm that a video link can be accommodated para 4.11. Leave is required to appear at a Circuit directions hearing from a non-Victorian court or interstate location para 4.12.

135 County Court of Victoria, *Criminal Division Practice Note PNCR 1-2015*, 12 July 2019, paras 4.13-4.14.

136 Ibid para 4.18.

137 Supreme Court of Victoria, *Practice Note SC CR 1 (First Revision): Case Management Procedure for Criminal Trials*, 1 January 2019, paras 4.1, 4.7.

Committal system and indictable case data

- 32** Introduction
- 32** Statistical data relating to indictable cases
- 35** Limitations of the available data
- 37** Improving data collection

3. Committal system and indictable case data

Introduction

- 3.1 During this reference the Commission requested and received data from the Magistrates' Court of Victoria, the County Court of Victoria, the Supreme Court of Victoria, Court Services Victoria and the Office of Public Prosecutions. Other stakeholders referenced or provided additional data in their submissions. As well as these sources of data, the Commission's recommendations are based on publicly available statistical data.
- 3.2 In this chapter the original sources of data are referenced. On occasion, references are to the issues paper, in which the available data is set out more fully.¹ The year that is referred to may vary depending on the most recent data available or provided to the Commission.
- 3.3 This chapter provides an overview of what the statistical data reveals about indictable cases, discusses the availability of useful data and its limitations, and makes recommendations about how data can be better captured in indictable criminal cases. While there are shortcomings with the available data that make it difficult to draw accurate comparisons between Victoria and other Australian jurisdictions, the data supports the following general conclusions:
- Delay in indictable matters is no worse in Victoria than in other Australian states and territories, and Victoria compares favourably to most other jurisdictions.
 - Late guilty pleas are not more of a problem in Victoria than elsewhere and again, Victoria compares relatively favourably to other jurisdictions.

Statistical data relating to indictable cases

- 3.4 Each year around 3000 criminal cases commence in the committal stream of the Magistrates' Court and pass through some or all parts of a committal proceeding.²
- 3.5 Of these cases, roughly:
- 30 per cent are heard and determined summarily³ in the Magistrates' Court⁴
 - 30 per cent are committed to the County Court for sentence, following a plea of guilty⁵

1 Victorian Law Reform Commission, *Committals* (Issues Paper, June 2019).

2 In the five years from 2013–14 to 2017–18, an average of 3,091 cases per year commenced in the committal stream of the Magistrates' Court: see Victorian Law Reform Commission, *Committals* (Issues Paper, June 2019) 15 [3.24].

3 A case can only be determined summarily if all indictable charges are withdrawn or discharged, and a magistrate grants an application for summary jurisdiction, which, if granted, means the case will be determined according to the procedure outlined in *Criminal Procedure Act 2009* (Vic) s 30.

4 Victorian Law Reform Commission, *Committals* (Issues Paper, June 2019) 15 [3.24].

5 In 2017–18, 1069 cases were committed to the County Court following a guilty plea at committal. In 2018–19 this number was 1017: County Court of Victoria, *Case Data Requested by VLRC* (October 2019).

- 30 per cent are committed to the County Court for trial, following a plea of not guilty⁶
- four per cent are committed to the Supreme Court. Of the cases committed to the Supreme Court, approximately 14 per cent are committed for sentence following a plea of guilty.⁷

Disposition of cases in the Magistrates' Court

3.6 Of those committal stream matters that were finalised summarily in the Magistrates' Court in 2017–18, approximately:

- seven per cent resolved at the filing hearing
- 40 per cent resolved at the committal mention hearing
- seven per cent resolved at the committal case conference
- 40 per cent resolved at the committal hearing⁸

Rates of discharge at committal hearing

3.7 Between one and two per cent of all committal stream cases per year have at least one charge discharged by a magistrate. In 2017–18, 57 cases had at least one charge discharged, and ten cases had at least one charge discharged and none committed.⁹

Cross-examination during committal hearing

3.8 The Commission is unable to determine from the available data how frequently witnesses are cross-examined during committal hearings. In 2017–18, leave to cross-examine at least one witness was granted in 46 per cent of all committal stream cases—a total of 1,569 cases.¹⁰

3.9 The shortcomings of this data are discussed below.

Duration of cases

Magistrates' Court

3.10 In 2017–18, the average time between first hearing and committal in the Magistrates' Court was 36 weeks for death-related and general offences, and 29 weeks for sexual offences.¹¹

3.11 Data is not available to show the average time between filing hearing and finalisation in the Magistrates' Court for those committal stream matters that resolve summarily.

3.12 Figures provided by the Australian Bureau of Statistics provide a point of comparison for the time taken to finalise matters in the Magistrates' Court of Victoria by comparison with Magistrates' or Local Courts in other Australian states and territories, but these figures capture both summary and indictable cases.

6 In 2017–18, 1019 cases were committed to the County Court for trial following a plea of not guilty. In 2018–19, this number was 1175: County Court of Victoria, *Case Data Requested by VLRC* (October 2019).

7 In 2016–17, 106 cases were committed to the Supreme Court. In 2017–18, this number was 115: Supreme Court of Victoria, *Case Data Requested by VLRC* (September 2019). The data provided by the Supreme Court covers cases initiated in financial years 2016–17, 2017–18 and 2018–19. Of the case data provided for 2018–19, roughly 60 per cent of cases were not yet finalised. Accordingly, the Commission has not relied on the 2018–19 data in this report.

8 Magistrates' Court of Victoria, *Committal Data Requested by VLRC* (24 April 2019). See also Victorian Law Reform Commission, *Committals* (Issues Paper, June 2019) 18 [3.47] for figures spanning 2013–14 to 2017–18.

9 Magistrates' Court of Victoria, *Committal Data Requested by VLRC* (24 April 2019). See also Victorian Law Reform Commission, *Committals* (Issues Paper, June 2019) 19 [3.55] for figures spanning 2013–14 to 2017–18.

10 Magistrates' Court of Victoria, *Committal Data Requested by VLRC* (24 April 2019). See also Victorian Law Reform Commission, *Committals* (Issues Paper, June 2019) 17 [3.44]. Note that data obtained by the Commission in 2016 shows that in 2015, one or more witness was cross-examined in 46 per cent of matters that proceeded through a committal hearing: Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016), 210 [8.86].

11 Court Services Victoria, *Committal Data requested by VLRC* (2019), figure 15.

Table 1: Time taken (weeks) for finalisation of criminal cases in the Magistrates' or Local Courts in Australian jurisdictions, 2017–18

| | Vic ¹² | NSW ¹³ | QLD ¹⁴ | SA ¹⁵ | WA ¹⁶ | TAS ¹⁷ | NT ¹⁸ | ACT ¹⁹ |
|---------------------|-------------------|-------------------|-------------------|------------------|------------------|-------------------|------------------|-------------------|
| Mean (weeks) | 19 | 11 | 15 | 34 | 11 | 64 | 21 | 20 |

3.13 Given these figures relate to summary as well as indictable proceedings, it is difficult to rely on them as a performance indicator for courts' management of indictable stream cases. What is clear, however, is that criminal cases in the Victorian Magistrates' Court are being finalised in a comparable way to most other jurisdictions, with South Australia and Tasmania taking much longer to finalise matters than other jurisdictions.

County and Supreme Courts

3.14 In the higher courts in 2018–19:

- 71 per cent of cases in the County Court and 61 per cent of cases in the Supreme Court were finalised within 12 months
- 96 per cent of cases in the County Court and 97 per cent of cases in the Supreme Court were finalised within 24 months.²⁰

3.15 These figures capture pleas and sentencing matters as well as trials.²¹

3.16 Table 2 outlines the time taken to finalise criminal cases in the higher courts across Australia. The figures capture average disposition times across both higher courts (County/District and Supreme) in the states. The Australian Capital Territory and the Northern Territory only have one higher court.

Table 2: Time taken (weeks) for finalisation of criminal cases in higher courts in Australian jurisdictions, 2017–18

| | Vic ²² | NSW ²³ | QLD ²⁴ | SA ²⁵ | WA ²⁶ | TAS ²⁷ | NT ²⁸ | ACT ²⁹ |
|---------------------|-------------------|-------------------|-------------------|------------------|------------------|-------------------|------------------|-------------------|
| Mean (weeks) | 38 | 52 | 50 | 51 | 37 | 58 | 25 | 42 |

3.17 This data indicates that the higher courts in Victoria are finalising criminal cases more quickly than most other Australian jurisdictions.

12 Australian Bureau of Statistics, *Criminal Courts, Australia* (Catalogue No 4513.0, 27 February 2019) table 20.

13 Ibid table 16.

14 Ibid table 24.

15 Ibid table 28.

16 Ibid table 32.

17 Ibid table 36.

18 Ibid 40.

19 Ibid table 44.

20 Productivity Commission, Australian Government, *Report on Government Services 2020* (Report, 2020), Table 7A.22 <<https://www.pc.gov.au/research/ongoing/report-on-government-services/2020/justice/courts>>. These figures relate to non-appeal criminal cases in each court.

21 Ibid.

22 Australian Bureau of Statistics, *Criminal Courts, Australia* (Catalogue No 4513.0, 27 February 2019) table 20.

23 Ibid table 16.

24 Ibid table 24.

25 Ibid table 28.

26 Ibid table 32.

27 Ibid table 36.

28 Ibid table 40.

29 Ibid table 20.

Guilty pleas and other outcomes of cases in the higher courts

- 3.18 In 2017–18, roughly 2100 cases were committed to the County Court.³⁰ Of these, just over half were committed following a plea of guilty, and in another approximately 25 per cent a plea was entered prior to trial.³¹ Of the remaining 25 per cent of cases where a plea of guilty was not entered, roughly 16 per cent proceeded to trial with the remaining cases either discontinued or transferred to another court.³²
- 3.19 Of the cases that proceeded to trial, the accused was found or pleaded guilty in roughly 63 per cent of cases, was found not guilty in 33 per cent of cases and was found not guilty by reason of mental impairment in four per cent of cases.³³
- 3.20 In 2017–18, 115 cases were committed to the Supreme Court. Only 14 per cent of cases were committed following a guilty plea.³⁴ In another 31 per cent of cases, a plea of guilty was entered between committal and trial, including during trial.³⁵ Roughly 30 per cent of cases proceeded to trial, with the remaining 25 per cent either being not yet finalised, discontinued or transferred to the County Court.³⁶
- 3.21 Of the cases that proceeded to trial in the Supreme Court, the accused was either found or pleaded guilty in approximately 80 per cent of cases and was found not guilty (or unfit to stand trial) in 20 per cent of cases.³⁷

Limitations of the available data

- 3.22 The available data relating to pre-trial indictable procedure in Victoria and other Australian jurisdictions is limited in several respects. This makes it difficult to:
- identify at which points in the criminal justice system delay is occurring and why
 - know the profile of witnesses who are cross-examined prior to trial, and how common it is for witnesses to be cross-examined both before trial and at trial
 - draw comparisons between the pre-trial criminal justice systems in Victoria and other Australian states and territories, and internationally.
- 3.23 These issues are discussed further below.

Identifying delay

- 3.24 It is difficult to pinpoint causes of delay in indictable criminal matters. The lower and higher courts use different case management systems and do not share information. As a result, it is difficult to obtain system-wide, representative data that captures the full lifecycle of all indictable matters.³⁸

30 County Court of Victoria, *Case Data Requested by VLRC* (October 2019).

31 In 2017–18, the County Court finalised 2088 cases, 1069 of which were committed following a plea of guilty. In another 509 cases, a plea was entered following committal but prior to trial. In 32 cases a plea was entered during trial: County Court of Victoria, *Case Data Requested by VLRC* (October 2019).

32 In 2017–18, 337 cases proceeded to trial, 98 cases were discontinued, four were stayed and 57 were transferred to the Magistrates' Court: County Court of Victoria, *Case Data Requested by VLRC* (October 2019).

33 Ibid.

34 In 2017–18, 16 cases were committed to the Supreme Court following a plea of guilty at committal: Supreme Court of Victoria, *Case Data Requested by VLRC* (September 2019).

35 In 2017–18, a plea of guilty was entered between committal and trial in 28 cases and a plea of guilty was entered during trial in 8 cases: Supreme Court of Victoria, *Case Data Requested by VLRC* (September 2019).

36 In 2017–18, 34 cases proceeded to trial, seven were discontinued, seven were transferred to the County Court and 23 were not yet finalised: Supreme Court of Victoria, *Case Data Requested by VLRC* (September 2019).

37 In 2017–18, the accused was convicted of at least one offence in 19 cases, pleaded guilty in eight cases, was acquitted of all offences in two cases, was found not guilty by reason of mental impairment in four cases and was found to be unfit in one case: Supreme Court of Victoria, *Case Data Requested by VLRC* (September 2019). Unlike the defence of mental impairment, which concerns the accused person's mental condition at the time of the offence, unfitness to stand trial relates to the accused person's mental condition at the time they are involved in court proceedings: see Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Consultation Paper, May 2013) 52 [4.1].

38 In order to track the lifecycle of indictable matters between jurisdictions, it is necessary to manually scrutinise and cross-reference disparate records.

- 3.25 According to the Director of Public Prosecutions' *Annual Report 2017–18*, the average time to complete an indictable prosecution that year was 15.5 months, down from a five-year average of 19.9 months.³⁹

Analysing rates of pre-trial cross-examination

- 3.26 The availability of cross-examination at a committal hearing is frequently criticised, in part because it means some witnesses may be cross-examined multiple times—not only in the lower courts but also prior to trial in the higher courts and subsequently at a trial.
- 3.27 The Commission cannot satisfactorily measure how often this happens due to the way the Magistrates' Court captures data relating to cross-examination. In particular, the Magistrates' Court does not record:
- the number of witnesses per case for whom leave to cross-examine was granted
 - how many witnesses per case were cross-examined at a committal hearing
 - the class of witness for whom leave to cross-examine was granted, such as informants or other professional witnesses, and civilian witnesses.⁴⁰
- 3.28 The higher courts do not uniformly capture this information either. Since August 2019, however, the County Court has been manually capturing data relating to pre-trial cross-examination pursuant to section 198A of the CPA.
- 3.29 The Magistrates' Court has provided data about the number of cases in which leave to cross-examine at least one witness was granted.⁴¹ The Commission is cautious about relying on this data as indicative of overall cross-examination rates at committal hearings because:
- Leave may have been granted in cases that resolve or in which a witness is ultimately not required.
 - Leave may have been granted in cases involving co-accused, which will result in leave being recorded in three separate cases, even though a witness is cross-examined only once.
 - Classes of witness are not identified, so it is impossible to know if potentially vulnerable witnesses were cross-examined.

Drawing comparisons between Victoria and other jurisdictions

- 3.30 It is difficult to draw meaningful comparisons between Victoria and other jurisdictions because of differences such as population size and criminal case load, and variations in indictable criminal procedure. The Australian Bureau of Statistics cautions that direct comparisons may be misleading because:
- data systems used by the courts are designed for the administration of court business, not to provide data for the purposes of nation-wide statistical analysis
 - variability in data systems and the methodologies used to extract/compile data
 - refinements over time to data quality procedures
 - legislative or operational differences across states and territories (e.g. differences in the types of sentencing options available to the courts).⁴²

Improving data collection

- 3.31 The Magistrates' and Children's Courts are currently developing a new case management system. It is expected that this system will be operational by 2022.⁴³
- 3.32 It is important that the Courts' new case management system captures information to address the deficiencies discussed above, including detailed information about how many and what classes of witnesses are cross-examined in the lower courts.
- 3.33 The new system should also directly link with case management systems used in the higher courts, so that indictable stream cases commenced in the Magistrates' Court can be tracked in the higher courts, and the higher courts can easily gain an understanding of how the case was managed in the lower courts and any issues that arose there. This will allow for collection of reliable data about the time frame for finalising indictable matters and the specific points during proceedings at which undue delay occurs.
- 3.34 Ideally, a single electronic case file should be created in respect of an indictable case to ensure that information is not either lost or duplicated between the lower courts and the higher courts.
- 3.35 If the Commission's recommendation for case management in the Supreme Court from the commencement of proceedings is adopted, this linkage between electronic case management systems in the Magistrates' Court and the Supreme Court will be unnecessary. It will remain necessary in respect of the Children's Court, however, which should continue to case manage indictable stream cases where the accused is a child.

Recommendations

- 1 The Magistrates' and Children's Courts should collect detailed data about pre-trial cross-examination.
- 2 The case management systems used by the Magistrates' and Children's Courts should be linked with the higher courts' case management systems to enable the creation of a single electronic case file for indictable cases.

The test for committal

- 40** Introduction
- 40** The current test for committal
- 42** Is the committal test an effective filter?
- 47** Commission's conclusions: Abolish the test for committal

4. The test for committal

Introduction

- 4.1 This chapter analyses the role of magistrates in reviewing the evidence to decide if the accused should be committed for trial in a higher court. Although this decision is referred to in the *Criminal Procedure Act 2009* (Vic) (CPA) as the ‘committal determination’,¹ in this discussion the widely recognised phrase ‘committal test’ or ‘test for committal’ is used instead.²
- 4.2 The chapter begins by describing the current test for committal and how it has been interpreted by the courts, and the process involved in its application. It provides an overview of the ongoing debate about whether the test operates as an effective filter, before surveying stakeholders’ arguments in support of retaining the test and those in support of abolishing it.
- 4.3 The Commission concludes that the test for committal should be abolished and cases transferred from the jurisdiction of the lower courts by a magistrate making an order that the accused appear in a higher court for trial or sentence. Magistrates will no longer be required to apply a test for committal based on the evidence in a case. Instead of this, the accused should be able to apply for a discharge and the lower courts empowered to discharge the accused if the Court is satisfied that there is no reasonable prospect of conviction.
- 4.4 An outcome of the proposed change is that the language of committal will no longer play a role or be necessary. In place of the present test for committal, a case would move from a lower court to a higher court by an order of the lower court that the accused:
- appear for plea and sentence in a higher court on a date to be determined, or
 - stand trial in a higher court on a date to be determined.

The current test for committal

- 4.5 Before committing the accused to a higher court for trial or sentence, a magistrate must determine if the available evidence is of sufficient weight to support a conviction for an indictable offence.³ This involves assessing whether a reasonable jury could convict the accused on the evidence available.⁴

1 *Criminal Procedure Act 2009* (Vic) pt 4.9.

2 To be clear, the phrase ‘committal test’ is often used expansively in this chapter to refer to the lower courts’ role in reviewing the evidence, rather than to the specific content of the test, which has changed over the years. When the content of the test is being discussed, this is obvious from the surrounding context.

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

4 Judicial College of Victoria, ‘4.4.5 Determination of Committal Proceeding’, *Victorian Criminal Proceedings Manual* (1 November 2019) [7].

- 4.6 The current test for committal was adopted in 1987, replacing an earlier test that required an assessment of whether the evidence was of sufficient weight ‘to put the accused on trial’.⁵ The earlier test had been interpreted as requiring the prosecution to establish a prima facie case.⁶ It was characterised by a committee led by Victoria’s then Director of Public Prosecutions (DPP), John Coldrey QC, as an insufficient filter for ‘unwarranted prosecutions.’⁷ Its replacement was recommended by the same committee and described by Coldrey as a stronger test that has ‘the virtue of simplicity’, while also ensuring a magistrate’s decision to commit is not perceived as ‘pre-empting the ultimate jury verdict.’⁸
- 4.7 The current test requires a magistrate to take the prosecution case at its highest.⁹ A magistrate ‘need not consider whether a jury *should* or *would* be satisfied beyond reasonable doubt, but merely whether a jury *could* be so satisfied’.¹⁰ A magistrate is expected ‘to sift the wheat from the chaff’, distinguishing between ‘cases so weak that a jury properly instructed could not possibly convict the defendant and cases where it could’.¹¹
- 4.8 If the Magistrates’ Court determines the evidence is not of sufficient weight to support a conviction for *any* indictable offence, it must discharge the accused.¹²
- 4.9 If the Court determines the evidence is of sufficient weight to support a conviction for the offence with which the accused is charged, it must commit the accused for trial.¹³
- 4.10 If the Court determines the evidence is of sufficient weight to support a conviction for an indictable offence *other than* the offence with which the accused is charged, it may adjourn the committal proceeding to allow the informant to file a charge sheet in respect of that other offence and
- if the charge sheet is filed, must commit the accused for trial,¹⁴ or
 - if the informant does not file a charge sheet for the other offence within the period of adjournment, must discharge the accused.¹⁵
- 4.11 The power to commit an accused person for trial or sentence in a higher court is administrative rather than judicial. Committal to stand trial does not prejudice the question of the accused’s guilt or innocence, which is for a jury to decide.¹⁶

5 The test involved the application of two different standards of proof, but ‘the key test’ was ‘whether the evidence was “sufficient to put the accused upon trial for any indictable offence”’: David Brereton and John Willis, ‘Evaluating the Committal’ in Julia Vernon (ed), *The Future of Committals* (Australian Institute of Criminology, January 1991) 5, 11, with reference to the *Magistrates (Summary Proceedings) Act 1975* (Vic) (s 59(7)).

6 John Coldrey, ‘Committal Proceedings: The Victorian Perspective’ in Julia Vernon (ed), *The Future of Committals—Proceedings of a Conference Held 1-2 May 1990* (Australian Institute of Criminology, January 1991) 3.

7 Ibid 3. See also *Forsyth v Rodda* (1988) 37 A Crim R 50, 68-69.

8 John Coldrey, ‘Committal Proceedings: the Victorian Perspective’ in Julia Vernon (ed), *The Future of Committals—Proceedings of a Conference Held 1-2 May 1990* (Australian Institute of Criminology, January 1991) 3. See also David Brereton and John Willis, ‘Evaluating the Committal’ in Julia Vernon (ed), *The Future of Committals—Proceedings of a Conference Held 1-2 May 1990* (Australian Institute of Criminology, January 1991) 8.

9 *Forsyth v Rodda* (1988) 37 A Crim R 50, 68-69; *Forsyth v Rodda* (1989) 87 ALR 699.

10 *Thorp v Abbotto* (1992) 34 FCR 366; [24] per Gummow J (with whom O’Loughlin J agreed), emphasis added.

11 *Thorp v Abbotto* (1992) 34 FCR 366; [28] per Lockhart J, (with whom O’Loughlin J also agreed).

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

13 Ibid s 141(4)(b).

14 Ibid s 141(4)(c).

15 Ibid s 141(5).

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

Is the committal test an effective filter?

- 4.12 Requiring that a magistrate assess the evidence in a case before committing an accused for trial was originally justified as a way to protect citizens ‘from being prosecuted on inadequate evidence, by filtering out ... unmeritorious cases’.¹⁷
- 4.13 The threshold for committal is relatively low, even after the test was strengthened in Victoria in 1987. Although discharge rates initially increased following the introduction of the new test, from around four per cent of indictable matters in 1984 to around 10 per cent in 1989–1990,¹⁸ they have since dropped to between one and two per cent in Victoria per year.¹⁹
- 4.14 The decline in discharge rates may reflect a more careful attitude to charging on the part of the prosecution, fostered by the desire to avoid having a matter discharged at committal. Another factor that may have influenced the decline of discharge rates after 1990 is the adoption by DPPs across Australia in 1989–90 of uniform guidelines for the exercise of the prosecutorial discretion.²⁰ This is unlikely to have had a significant influence, however, given the DPP in Victoria does not generally take an active role in charge review until after committal.²¹ Another explanation for the decline might be that magistrates do not apply the test with consistent rigour but tend to commit the accused as a matter of course.
- 4.15 In any event, doubts persist about the contribution the committal test makes to ensuring manifestly weak cases are not pursued to trial.²² For example, in 2007 the Australian Institute of Criminology questioned:
- the efficacy of the committal procedure to ensure that sufficient evidence exist[s] to proceed with the prosecution as many deficiencies in evidence are not identified until well after the committal process.²³
- 4.16 The accused is acquitted in roughly 30 per cent of cases that go to trial in the County Court.²⁴ This suggests that the role played by the test as a filter for cases with insufficient evidence to convict the accused could be improved.
- 4.17 Another source of doubt about the value of the committal test as a filter for unmeritorious charges is the DPP’s power to directly indict even if a magistrate has discharged the charges.²⁵ In 2017–18, the DPP filed a direct indictment in 19 cases.²⁶ Of these, seven were filed following discharge of one or more charges by a magistrate.²⁷ In 2018–19, the DPP filed a direct indictment in 15 cases, five following discharge of one or more charges by a magistrate.²⁸

17 Bronwyn Naylor, ‘Justiciability of Decisions in the Criminal Process: Review of Committal Proceedings in the Federal Court’ (1990) 19 *Federal Law Review* 352, 353. See also John Coldrey, ‘Committal Proceedings: the Victorian Perspective’ in Julia Vernon (ed), *The Future of Committals—Proceedings of a Conference Held 1-2 May 1990* (Australian Institute of Criminology, January 1991) 2; Asher Flynn, ‘A Committal Waste of Time? Reforming Victoria’s Pre-trial Process: Lessons From Other Jurisdictions’ (2013) 37 *Criminal Law Journal* 175, 176.

18 David Brereton and John Willis, ‘Evaluating the Committal’ in Julia Vernon (ed), *The Future of Committals—Proceedings of a Conference Held 1-2 May 1990* (Australian Institute of Criminology, January 1991) 11. See also John Coldrey, ‘Committal Proceedings: the Victorian Perspective’ in Julia Vernon (ed), *The Future of Committals—Proceedings of a Conference Held 1-2 May 1990* (Australian Institute of Criminology, January 1991) 3.

19 According to data provided by the Magistrates’ Court, there are on average approximately 10 cases per year where a magistrate discharges all offences and another 65 cases where some charges are discharged and others are committed: Magistrates’ Court of Victoria, *Committal Data Requested by VLRC* (24 April 2019).

20 Damian Bugg, ‘The Role of the DPP in the 20th Century’ (Speech, Judicial College of Australia Colloquium, 1999) 9.

21 See the discussion in Chapter 8.

22 There is a long tradition of questioning the efficacy of the committal determination: see David Brereton and John Willis, ‘Evaluating the Committal’ in Julia Vernon (ed), *The Future of Committals* (Australian Institute of Criminology, January 1991) 5, 8; Bronwyn Naylor, ‘Justiciability of Decisions in the Criminal Process: Review of Committal Proceedings in the Federal Court’ (1990) 19 *Federal Law Review* 352. In these articles the authors themselves argue the committal determination *does* represent an effective filter.

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

24 County Court of Victoria, *Case Data Requested by VLRC* (October 2019). A much lower percentage (six per cent in 2017–18), are acquitted in the Supreme Court: Supreme Court of Victoria, *Case Data Requested by VLRC* (September 2019).

25 The Director’s power applies even where charges have been discharged at committal.

26 Office of Public Prosecutions Victoria, *Response to VLRC Request for Statistics—Review of Committals* (24 April 2019).

27 Email from Office of Public Prosecutions to Victorian Law Reform Commission, 9 January 2020.

28 Ibid.

- 4.18 Reform bodies and commentators argue that the professionalisation of modern policing and the creation of independent public prosecutors removes the need for the committal test.²⁹ The underlying assumption of this argument is that criminal prosecutions will not be pursued where there is insufficient evidence; to advance biased or political agendas; or for malicious or vindictive purposes.
- 4.19 While this assumption should be treated with caution, the test for committal does not appear to be operating effectively as a filter for prosecutions founded on insufficient evidence.

Abolishing the test for committal in other jurisdictions

- 4.20 The committal test has been abolished in England and Wales, and in Australia in Tasmania, Western Australia, and most recently, in New South Wales.
- 4.21 In 1999, the Law Reform Commission of Western Australia recommended abolishing preliminary hearings, Western Australia's equivalent of committal proceedings. The Commission considered that the DPP's power to directly indict, regardless of the outcome of the test for committal, meant the role of the determination as a mechanism for screening charges was virtually redundant. The Commission did, however, recommend that a power should be conferred on the courts to examine and, where appropriate, penalise late decisions to withdraw or alter indictments.³⁰ This recommendation was adopted and became law in 2002.³¹
- 4.22 In 2014, the New South Wales Law Reform Commission noted that magistrates in New South Wales discharged only around one per cent of cases.³² It posited that abolishing the test for committal would not lead to an increase in unsubstantiated matters proceeding, provided that court supervised case management operated to 'ensure the prosecution gives timely consideration to the charges.'³³ The test for committal was abolished as part of the wider package of reforms introduced in New South Wales in 2018.
- 4.23 The effects of abolishing the test in Western Australia, New South Wales, and elsewhere are unclear. While delay continues to be a problem in the New South Wales Local Court, this has been attributed to the new charge certificate requirement and failure by New South Wales Police to provide adequate disclosure to the New South Wales DPP.³⁴ It is impossible to quantify the time saved by dispensing with the test. Nor is evidence available to show whether unmeritorious prosecutions are proceeding to trial because the test is no longer applied. The experience of other jurisdictions such as Western Australia and the United Kingdom suggests that disclosure failures may be a greater contributor to trials being adjourned or aborted than the absence of the test in the lower courts.³⁵ Again, the Commission does not have reliable data on wrongful convictions and their causes in these jurisdictions.

29 Department of Justice and Attorney-General (Qld), *Reform of the Committal Proceedings Process* (Discussion Paper, 2008) 5; John Coldrey, 'Committal Proceedings: the Victorian Perspective' in Julia Vernon (ed), *The Future of Committals—Proceedings of a Conference Held 1-2 May 1990* (Australian Institute of Criminology, January 1991) 194-5; Director of Public Prosecutions, Office 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>>; New South Wales Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas* (Report No 141, December 2014); John Johnson, 'A Case for Abolition' in Julia Vernon (ed), *The Future of Committals—Proceedings of a Conference Held 1-2 May 1990* (Australian Institute of Criminology, January 1991) 89, 94.

30 Western Australia Law Reform Commission, *Review of the Criminal and Civil Justice System* (Report No 92, 1999) 245-6, see also recommendations 307, 308. Note that preliminary hearings were not routine procedure in Western Australia, even at the time of the WA Law Reform Commission's report. They were available upon election by an accused person and held in only around ten per cent of indictable matters: Western Australia Law Reform Commission, *Review of the Criminal and Civil Justice System* (Report No 92, 1999) 245.

31 *Criminal Law (Procedure) Amendment Act 2002* (WA) ss 11, 17, inserting new ss 102-106 in the *Justices Act 1902* (WA) and ss 611B-611C of the *Criminal Code* (WA) respectively. These provisions were largely replicated when the *Criminal Procedure Act 2004* (WA) was adopted.

32 New South Wales Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas* (Report No 141, December 2014) 177, 182.

33 *Ibid* 195.

34 Consultations 32 (Local Court of New South Wales), 33 (Director of Public Prosecutions (New South Wales)).

35 In relation to the United Kingdom, see the discussion in Chapter 9, on disclosure, and in relation to Western Australia, see paragraphs 11.63-11.64.

Stakeholder support for retaining the committal test

- 4.24 Stakeholders who support retaining the test for committal include the Magistrates' Court, some County Court judges, Victoria Legal Aid, the Victorian Aboriginal Legal Service, the Criminal Bar Association (Victoria), and Australian Lawyers for Human Rights.³⁶
- 4.25 These stakeholders emphasise the contribution that application of the test for committal makes to fair trial rights. They argue it is an effective inducement for the prosecution to review its case at an early stage in proceedings. They also highlight the benefits for the small number of accused people whose cases are discharged and who would otherwise have had to endure the stress and anxiety of a trial, often while remanded in custody.
- 4.26 Other benefits attributed to the committal test include encouraging an accused person to enter an early guilty plea where there is strong evidence in support of the charges.
- 4.27 The Criminal Bar Association (Victoria) told the Commission there is little apparent reason for abolishing the test 'Other than the fact that it has been removed in other jurisdictions (without any clear assessment of the impact)'.³⁷ In favour of retaining the committal determination, the Criminal Bar Association submitted:
- the possibility of discharge in open court, and the risk of costs being awarded against the police, is ... a real incentive for the DPP to be in a position to properly consider the charge in advance of a committal hearing. It is common for the prosecution on the day of the hearing to substantially revise charges and add or withdraw charges against an accused.³⁸
- 4.28 The Criminal Bar Association also pointed to the application of the committal test as a 'powerful indicator to the accused' regarding the strength of the case either for the prosecution or the defence.³⁹
- 4.29 The Law Institute of Victoria suggested:
- The prospect of a discharge and the risk of an award of costs provides the prosecution with a substantial incentive to review the case and to decide whether to amend the charges or consider resolution in the summary jurisdiction.⁴⁰
- 4.30 The Victorian Aboriginal Legal Service argued:
- 3.7% of cases that went to a committal hearing in 2017–2018 resulted in either charges being withdrawn or discharged by the Magistrate. Whilst this is a small percentage of the overall number of matters, it represents 89 matters where the accused rightly avoided trial, and where the cost implications of proceeding with the trial in a higher court were avoided.⁴¹
- 4.31 Victoria Legal Aid claimed that:
- independent scrutiny of the prosecution case by a judicial officer is an essential component of a fair system. Scrutiny of the case and the ability to hold parties to account is as relevant at the pre-trial stage as during trial proceedings.
- Furthermore, now that Prasad directions have been held to be contrary to law, committal proceedings are one of the last independent protections against prosecuting misconceived or weak cases.⁴²

36 Submissions 9 (Australian Lawyers for Human Rights), 11 (Criminal Bar Association (Victoria)), 13 (Victoria Legal Aid), 14 (Magistrates' Court of Victoria), 19 (Victorian Aboriginal Legal Service), 20 (County Court of Victoria).

37 Submission 11 (Criminal Bar Association (Victoria)).

38 Ibid.

39 Ibid.

40 Submission 24 (Law Institute of Victoria).

41 Submission 19 (Victorian Aboriginal Legal Service) 4–5.

42 Submission 13 (Victoria Legal Aid). A Prasad direction is when the trial Judge at the end of the prosecution case informs—in response to an invitation by the prosecution or an application by the defence—the jury that they have the right to acquit the accused at any time from then on, including without hearing the case put by the accused (if any), or the closing submissions or the Judge's summary and directions relating to law. The High Court ruled that the practice of giving a Prasad direction is unlawful in *Director of Public Prosecutions Reference No 1 of 2017* [2019] HCA 9, (2019) 364 ALR 407.

- 4.32 Australian Lawyers for Human Rights endorsed the view, put by the Law Society of NSW in 2014, that:
- the committal decision provides transparency and impartiality that could not be achieved if the OPP were given sole responsibility for filtering out weak prosecutions.⁴³
- 4.33 County Court judges who support retaining the committal test view it as bolstering fair trial rights and holding both parties to criminal prosecutions to account. These judges suggested that:
- Removing a magistrate’s assessment of the strength of the prosecution case takes away a critical opportunity for the parties to be exposed to an impartial and independent view of the case.⁴⁴
- 4.34 The Magistrates’ Court told the Commission: ‘There is no downside to allowing the evidence to be the subject of independent scrutiny by a judicial officer when [a] safety net, if needed exists in the form of a direct presentment’.⁴⁵ The Court suggested that the committal test operates as a mechanism for ensuring charges are appropriate. It cited anecdotal evidence from practitioners and barristers that ‘the DPP is reluctant to exercise its power to discontinue prosecutions on an assessment of the likely prospects of conviction but rather tends to let matters go to trial’.⁴⁶ It pointed out that:
- [It] does not further the interests of witnesses or accused if the prosecution persevere with charges that are later abandoned or which result in a verdict of acquittal at trial. Nor does it enhance the expeditious and timely administration of the criminal justice system.⁴⁷
- 4.35 According to the Magistrates’ Court:
- What does influence the DPP is the prospect that a matter may be discharged at committal with consequent cost orders. Thus, at contested committal the DPP may often propose the withdrawal of charges but invariably with an attached condition that defence do not apply for costs.⁴⁸

Stakeholder support for abolishing the committal test

- 4.36 Stakeholders who argue the test for committal should be abolished include the Supreme Court, some County Court judges, the DPP, Victoria Police, and the Victims of Crime Commissioner.⁴⁹ These stakeholders suggest the test for committal is now redundant and that fair trial rights are adequately protected by alternative mechanisms. They say application of the test contributes to unnecessary duplication and delay.
- 4.37 The Victims of Crime Commissioner submitted:
- such a small proportion of matters are discharged by magistrates at the committal stage that this original [filtering] purpose alone cannot be a valid rationale for the continuation of this procedure.⁵⁰
- 4.38 Those judges of the County Court who argued the committal test should be abolished claimed its role in filtering weak cases had been surpassed:
- The current bifurcated approach [to indictable prosecutions] is no longer necessary in the context of an independent DPP and where charges can be appropriately filtered by increased interaction between prosecutors and Victoria Police.⁵¹

43 Submission 9 (Australian Lawyers for Human Rights).

44 Submission 20 (County Court of Victoria).

45 Submission 14 (Magistrates’ Court of Victoria).

46 Ibid.

47 Ibid.

48 Ibid.

49 Submissions 4 (Director of Public Prosecutions (Victoria)), 20 (County Court of Victoria), 22 (Supreme Court of Victoria), 23 (Victims of Crime Commissioner), 25 (Victoria Police).

50 Submission 23 (Victims of Crime Commissioner).

51 Submission 20 (County Court of Victoria).

- 4.39 These judges also pointed out that the Magistrates' Court when applying the test and the trial court subsequently must both familiarise themselves with the case, 'resulting in a duplication of effort.'⁵²
- 4.40 The Supreme Court similarly argued that removing the test for committal would avoid duplication and allow for more integrated case management, which would be capable of 'adapt[ing] readily to the needs of individual cases.'⁵³
- 4.41 Victoria Police viewed the test for committal as unnecessarily duplicating the functions of the DPP, which 'already makes a decision as to the sufficiency of the evidence in deciding whether to pursue charges.'⁵⁴
- 4.42 According to the DPP, abolishing the test for committal will make indictable proceedings less complex and 'will also remove confusion about the significance of a magistrate's committal decision'.⁵⁵ As noted earlier, a magistrate's decision to commit is an administrative rather than judicial finding.
- 4.43 The DPP suggested that the power of the court to stay a proceeding 'including a direct indictment, even at a very early stage,'⁵⁶ removed the need for the committal test to ensure fair trial rights. The DPP added that the power to stay proceedings 'is in addition to the many safeguards that exist during a trial proceeding.'⁵⁷ The implication is that the power of the trial court to issue a stay can appropriately substitute for the committal test's role filtering cases with insufficient evidence to support a conviction.
- 4.44 The Victorian Court of Appeal said recently that:
- the power to grant a permanent stay is one to be exercised only in the most exceptional circumstances, and only in circumstances where there is a fundamental defect confronting the trial such that nothing the trial judge can do in the conduct of the trial can relieve against its unfair consequences.⁵⁸
- 4.45 While it is true that an application for a permanent stay may be made at an early stage in proceedings—and generally before the prosecution leads any evidence in a trial—this is because the merits of the application will usually be based on facts that are independent of the evidence supporting the Crown case.⁵⁹
- 4.46 By comparison, the test for committal specifically involves assessing the sufficiency of the evidence to support the charges.

52 Ibid.

53 Submission 22 (Supreme Court of Victoria). The Supreme Court's comments are confined to matters within its exclusive jurisdiction and where either the prosecution or defence seek to forgo the test for committal.

54 Submission 25 (Victoria Police).

55 Submission 4 (Director of Public Prosecutions (Victoria)).

56 Ibid.

57 Ibid.

58 *Cook v The Queen* [2019] VSCA 87, [27] (Priest and Beach JJA). For the proposition that the power may only be exercised in exceptional circumstances, the Court cited *Williams v Spautz* (1992) 174 CLR 509, 529 (Mason CJ, Dawson, Toohey and McHugh JJ); and for the proposition that the power should only be exercised where there is nothing the trial judge can do in the conduct of the trial to remedy its unfairness, the Court cited *Barton v the Queen* (1980) 147 CLR 75, 111 (Wilson J); *Jago v District Court of New South Wales* (1989) 168 CLR 23 (Mason CJ); *R v Glennon* (1992) 173 CLR 592 (Mason CJ and Toohey J); *Dupas v The Queen* [2010] HCA 20, [17]-[18], (2010) 241 CLR 237.

59 *Edebone v Allen* [1991] 2 VR 659 [25].

Commission’s conclusions: Abolish the test for committal

4.47 For a magistrate to consider the evidence in a case requires time and effort, even if some magistrates tend to commit the accused as a matter of course. In complex cases the time required may be considerable. In *Forsyth v Rodda*, the Full Court of the Federal Court quoted the committing magistrate’s reasons in which he referred to having spent ‘many hours’ analysing the evidence.⁶⁰ After detailed consideration of the magistrate’s reasons, the Federal Court concluded that:

Not only did [the committing magistrate] weigh the evidence; he was at pains to weight it most carefully and anxiously before reaching his conclusion.⁶¹

4.48 *Forsyth v Rodda* demonstrates that applying the test for committal can be a serious impost on a magistrate’s time. This impost translates to costs for the parties and the criminal justice system.

4.49 Even so, the original rationale for requiring the lower courts to assess at an early stage the strength of the evidence in indictable proceedings remains sound. When the charges are weak or misconceived, an accused should not be subjected to the stress and anxiety of a trial. It is equally important for victims and witnesses that such charges are not pursued to trial, as a decision to discontinue at a late stage, or a verdict of not guilty, will likely cause distress.⁶² The costs for the justice system of unwarranted prosecutions are also high.

4.50 Moreover, the capacity of investigating and prosecuting agencies to ensure the integrity of all prosecutions may be limited in ways that are difficult to foresee. While there has been reform over many years to enhance the independence of these agencies, the establishment of the Royal Commission into the Management of Police Informants suggests there is a need for continual vigilance.⁶³

4.51 The role of the test for committal as a filter for unwarranted prosecutions should, however, be served by alternative mechanisms that preserve the fair trial rights of the accused and are less costly in terms of time and resources.

4.52 The benefits of the committal test—providing independent scrutiny of indictable charges at an early stage and in a relatively inexpensive jurisdiction—will be better achieved by:

- providing magistrates with a new power to discharge charges, upon application by the defence, on the grounds that there is no reasonable prospect of conviction⁶⁴
- strengthening other case management procedures in the lower courts to ensure ongoing judicial oversight of prosecutions.

4.53 The combination of more effective case management and the availability of a discharge application will ‘create a risk that forces the OPP to consider the case’.⁶⁵ It will ensure an accused charged on spurious grounds has an early opportunity for redress, without requiring magistrates to expend unnecessary time considering the evidence in *all* cases.

4.54 Active case management and the availability of a discharge application should produce other benefits commonly attributed to the committal test, including providing an indication from the bench to the accused of the strength of the evidence,⁶⁶ promoting early guilty pleas where appropriate, and encouraging both parties to review their cases.

60 *Forsyth v Rodda* (1989) 87 ALR 699, 219.

61 *Ibid* 220.

62 See the discussion in Chapter 8.

63 The Royal Commission into the Management of Police Informants was established on 13 December 2018 to inquire into and report on Victoria Police’s relationship with former criminal barrister, Nicola Gobbo, and matters relating to Victoria Police’s use and management of human sources with legal obligations of confidentiality or privilege.

64 See discussion below under ‘Create a test for discharge’.

65 Thibaut Clamart, a practitioner working for Victoria Legal Aid in Shepparton, advocated for retaining the current test for committal on the basis that it serves this purpose: Consultation 13 (Goulburn Valley practitioners).

66 See the Criminal Bar Association’s contention that ‘Comments from a magistrate on the strengths of the evidence are often made. At times this assist[s] with resolution, where an accused hears that the evidence is strong or the prosecutors hear from a judicial officer of their concerns.’ Submission 11 (Criminal Bar Association (Victoria)).

Recommendations

- 3 The test for committal, which involves a magistrate assessing if the evidence is of sufficient weight to support a conviction for an indictable offence (referred to in chapter 4, part 4.9 of the *Criminal Procedure Act 2009* (Vic) as the committal determination) should be abolished.
- 4 In place of an order for committal, the mechanism for transfer of indictable charges from the lower courts should be an order of the Magistrates' or Children's Court that the accused either:
 - (a) appear for plea and sentence in a higher court on a date to be determined, or
 - (b) stand trial in a higher court on a date to be determined.

Create a test for discharge

- 4.55 When there appears to be no reasonable prospect of conviction, magistrates should be able to discharge indictable charges on application by the accused. This will provide a safeguard against unwarranted prosecutions.
- 4.56 The Commission recommends adopting a test for discharge that has a higher threshold than the current test for committal. This is meant to ensure that discharge applications are made and granted only when charges are highly unlikely to result in a finding of guilt at trial.
- 4.57 The proposed discharge test will require a magistrate, on application by the accused, to assess if there is a reasonable prospect of conviction, taking into account:
 - all the evidence in the hand-up brief and depositions, if any
 - the apparent reliability and credibility of the evidence
 - any defence available on the basis of the evidence
 - whether the prosecution witnesses are available, competent and compellable
 - how the witnesses are likely to present in court.⁶⁷
- 4.58 If the magistrate concludes that there is no reasonable prospect of conviction, the magistrate should discharge the accused on the relevant charge or charges.
- 4.59 The proposed test for discharge does not pre-empt the role of the jury as the ultimate arbiter of facts if a discharge application is unsuccessful and a trial goes ahead. In many cases, juries will be unaware of whether an application for discharge was made. To the degree to which a jury may arrive at a perception of guilt based on the outcome of a discharge application or failure to make such an application, this concern applies equally to the current test for committal. The Commission is satisfied that the danger of a jury allowing the discharge test to influence its deliberations can be appropriately mitigated, in instances where it arises, by the trial judge directing the jury that the test should have no bearing on its deliberations.
- 4.60 The Commission proposes that applications for discharge be made by the accused following service of the hand-up brief or after cross-examination of any witnesses.

67

These are also measures used by the DPP to decide whether to prosecute an offence: Director of Public Prosecutions, Office of Public Prosecutions Victoria, *Policy of the Director of Public Prosecutions for Victoria* (17 December 2019) 1 [1]–[2] <<http://www.opp.vic.gov.au/Resources/Policies>>.

- 4.61 In order to apply for a discharge, the defence should be required to file a document explaining why there is no reasonable prospect of conviction. In response, the prosecution should be required to file an outline of its case, including information about witness availability and compellability; any possible reasons for doubt about the reliability and credibility of the evidence; and any insights it has about how witnesses are likely to present in court.
- 4.62 The magistrate should have the power to either refuse the application on the papers or hear oral submissions from the parties.
- 4.63 There is some risk that discharge applications will be made routinely and absorb as much court time as is currently spent applying the test for committal. This reform will require a cultural change in the legal profession. The court's ability to refuse an application on the papers will operate as a control on groundless applications. In time, defence practitioners will come to appreciate that the test sets a high bar. Combined with early involvement of the OPP in the prosecutorial process, this means it will only be in exceptional cases that discharge applications are successful.
- 4.64 Consistent with its existing discretion in relation to costs orders, the Magistrates' Court may order costs against the OPP where discharge applications are granted or against the defence if an application for discharge is refused.
- 4.65 A decision by the Magistrates' Court to discharge charges would, like the current test, be characterised as administrative. It should not interfere with the DPP's existing powers to directly indict.

Recommendation

- 5 The *Criminal Procedure Act 2009* (Vic) should be amended to provide that the accused may apply to the Magistrates' or Children's Court for an order that the accused be discharged and to empower the Magistrates' and Children's Courts to discharge the accused on the relevant indictable charge or charges if satisfied that there is no reasonable prospect of conviction.

Should the lower courts conduct indictable case management?

- 52** Introduction
- 53** Case management in the Magistrates' Court: positive features
- 56** Case management in the Magistrates' Court: negative features
- 57** Approach to case management in other jurisdictions
- 58** Case management in the lower courts: stakeholder views
- 59** Commission's conclusions

5. Should the lower courts conduct indictable case management?

Introduction

- 5.1 This chapter considers the most appropriate venue for pre-trial indictable procedure by surveying some of the advantages and disadvantages of the present committal system.
- 5.2 Management of committal proceedings is undertaken by the lower courts in cases ultimately heard by the higher courts. On its face, this is at odds with modern case management principles. It is widely accepted that cases are best and most efficiently managed by the judge who is to hear the trial. That judge has ownership of determining the case and will likely have a keener interest in progressing it than judges who will not hear the trial.
- 5.3 Although presenting a challenge to modern case management principles, the committal system has a considerable history and has been reformed over the years. The question is whether dismantling this system in obedience to modern case principles is justified. The answer lies in an assessment of how the committal system operates.
- 5.4 The following discussion identifies benefits of the committal system, including early resolution, regional coverage, affordability, and efficiency. The role of committal proceedings in advancing early disclosure is touched on here but dealt with in more detail in Chapters 9 and 11.
- 5.5 After outlining positive features of case management in the Magistrates' Court, the discussion traverses negative features of the committal system, including the potential for duplication and delay, and some isolated instances of inadequate case management. Next, indictable case management in other jurisdictions and the model that has been adopted in Western Australia for dealing with Supreme Court cases are discussed. The following section canvasses stakeholders' views of lower court indictable case management.
- 5.6 The Commission concludes that the present system of case management is operating satisfactorily, although the Commission makes recommendations for reform in later chapters. Except for matters within the Supreme Court's exclusive jurisdiction, the lower courts should retain a case management function in indictable criminal cases.
- 5.7 Charges for offences within the Supreme Court's exclusive jurisdiction should be filed in the Supreme Court, allowing the application there of modern case management principles. This recommendation is made subject to the provision of adequate funding.
- 5.8 The recommendation is also made with the qualification that all Children's Court indictable stream matters should continue to be initiated and managed in the Children's Court, even those within the exclusive jurisdiction of the Supreme Court (see Chapter 12). Throughout this chapter, the focus is on case management in the Magistrates' Court. Much of this discussion is relied on to support the recommendations in Chapter 12 concerning the Children's Court.

Case management in the Magistrates' Court: positive features

Magistrates' case management expertise

- 5.9 The Magistrates' Court is experienced in managing committal proceedings to achieve disclosure, early resolution where possible, and appropriate preparation for trial.
- 5.10 The Court has engaged in considerable reform over many years to case manage committal proceedings more efficiently, and to strengthen oversight of cross-examination.¹
- 5.11 The Magistrates' Court told the Commission that:
- Over a number of years, the Court, with a proactive bench, has developed a rigorous culture in the committal stream. Foreseeable delay is addressed at [the] filing hearing, where the parties are urged to engage in resolution discussions prior to committal mention and defence must properly justify any cross-examination of a witness.²
- 5.12 The Court also told the Commission that magistrates use the filing hearing to give directions to the prosecution about obtaining relevant forensic reports and progressing other matters that might otherwise contribute to delay.³
- 5.13 The expertise and engagement of committal magistrates at the Melbourne Magistrates' Court and in some regional centres is demonstrated by the outcomes in committal stream cases: around a third are resolved within the jurisdiction of the lower courts and of those cases committed to the higher courts, almost half are committed for sentencing following a guilty plea in the lower courts.⁴ Moreover, rates of summary resolution have increased steadily, from 20 per cent in 2008-09.⁵
- 5.14 There appears, however, to be some variability in case management in regional areas, which is discussed further below.⁶

Services available in the Magistrates' Court

- 5.15 The Magistrates' Court is well equipped to deal with preliminary aspects of indictable procedure that are outside the scope of the higher courts' current work and that the higher courts are not presently equipped to manage. Bail applications, in particular, occupy considerable court time. In most cases, bail applications must be determined by the Magistrates' Court.⁷
- 5.16 The Court Integrated Services Program (CISP⁸), located within Magistrates' Courts, and the Court Remand Outreach Pilot (CROP⁹) provide intensive support to many people seeking bail—this includes case management, referral to support services, and progress reporting to the judicial officer who granted bail. Housing services and other support agencies are often co-located with Magistrates' Courts and also provide support and advice to accused people seeking bail and to judicial officers determining bail applications.
- 5.17 Significant resources would be required to make these services available on a comparable scale in the higher courts.

1 Submissions 11 (Criminal Bar Association (Victoria)), 14 (Magistrates' Court of Victoria), 24 (Law Institute of Victoria).

2 Submission 14 (Magistrates' Court of Victoria).

3 Ibid.

4 See paragraph 3.5 of this report.

5 Court Services Victoria, *Committal Data requested by VLRC (2019)*, figure 15.

6 See paragraphs 5.44–5.45 of this report.

7 Only the Supreme Court has the jurisdiction to hear bail applications in treason cases, and in murder cases only the Supreme Court or a magistrate at the time of committal may hear bail applications: *Bail Act 1977* (Vic) s 13.

8 See Magistrates' Court of Victoria, 'Bail Support (CISP)', *Find Support* (Web Page, 4 July 2019) <<https://www.mcv.vic.gov.au/find-support/bail-support-cisp>>.

9 CROP works alongside CISP, but while CISP workers are based in Magistrates' Courts, CROP workers are based in remand prisons. CROP workers assess people on remand for their suitability for the CISP program if they are granted bail. If granted bail, a CISP worker will be allocated. In some limited circumstances, CROP workers provide ongoing case management to a person on bail.

Regional Magistrates' courts

- 5.18 The Magistrates' Court has good coverage in regional areas, and it sits throughout the year in major regional centres.¹⁰ By comparison, the County and Supreme Courts send judges from Melbourne to sit in regional areas for limited periods each year.¹¹
- 5.19 In 2018–19, nearly 28 per cent of criminal cases heard by the County Court were heard in regional courts.¹²
- 5.20 The complexities associated with transferring regional pre-trial case management to the higher courts were raised by numerous stakeholders. Victoria Legal Aid points out that any such transfer 'would create particular challenges in regional areas' given the 'limited presence of higher courts'.¹³
- 5.21 A regional practitioner suggested that if pre-trial case management is transferred to the higher courts, it will be 'difficult to maintain consistency' in relation to particular cases, given judges only sit in regional areas for four weeks at a time, 'especially if you're asking [the circuit] judge to keep on top of disclosure. The temptation will be to transfer the matter back to Melbourne with that judge'.¹⁴
- 5.22 From the perspective of this practitioner, transferring regional matters to Melbourne 'goes against the concept of open justice, transparency, proper venue and proper forum'.¹⁵
- 5.23 People living in regional areas can face greater barriers accessing the courts and justice system than those living in metropolitan Melbourne. According to the Law Council's *Access to Justice Report*, 'As well as cost, distance and lack of public transport, poor technological access and/or capability are also common access to justice barriers' in the regions.¹⁶ The Law Council observes that:
- a decline in local court circuit services in [regional] communities ... significantly exacerbates distance, transport and cost barriers for residents. In some cases, this means they give up on attending court despite the personal costs. In certain contexts, the delay in having their matter heard effectively means that their case is already lost.¹⁷
- 5.24 During consultation, some County Court judges said that moving pre-trial case management away from the Magistrates' Court would be a real problem in regional areas and would require 'significant resourcing'.¹⁸ Other members of the Court pointed to its increased use of video link facilities as a way of reaching those in regional areas, but acknowledged this is not a solution in all cases and for all types of hearing. As well as the need for more judges to attend regional areas on circuit, access to physical courtrooms can be a barrier to providing more regular court services to regional areas.¹⁹

Affordability of the Magistrates' Court

- 5.25 The Magistrates' Court estimates that each day across Victoria six magistrates and around 20 other Magistrates' Court staff deal with committal proceedings, at a cost of approximately \$6 million per annum: \$3 million for the magistrates and \$3 million for the other staff.²⁰

10 In addition to the ten metropolitan Magistrates' Courts, the Court sits in 41 locations across regional Victoria. Smaller locations are serviced by the Magistrates' Court on a weekly, fortnightly or monthly basis.

11 The County Court sits at eleven regional courts ('circuit locations') and the Supreme Court at twelve. Each year there are 'a number of four or five-week sitting periods ... at each circuit location': County Court of Victoria, 'Circuit Courts', *Court Divisions* (Web Page, 27 November 2019) <<https://www.countycourt.vic.gov.au/learn-about-court/court-divisions/circuit-courts>>.

12 1,501 of a total of 5,393 criminal cases (cases committed and appeals) commenced in the County Court's regional locations in 2018–19. County Court of Victoria, *Annual Report 2018–19* (Report, 2019) 7, 48–49.

13 Submission 13 (Victoria Legal Aid).

14 Consultation 38 (Victoria Legal Aid regional practitioners).

15 Ibid.

16 Law Council of Australia, *The Justice Project Final Report* (Report, August 2018) 3.

17 Ibid 4.

18 Consultation 30 (County Court of Victoria).

19 Ibid.

20 Consultation 15 (Magistrates' Court of Victoria). These figures were provided by Chief Magistrate Lauritsen. His Honour said that while they were an approximation, he felt they captured the reality quite closely and demonstrated the cost effectiveness of pre-trial management in the Magistrates' Court.

- 5.26 According to Victoria Legal Aid’s submission, moving pre-trial proceedings from the Magistrates’ to the higher courts ‘would be tremendously expensive’.²¹ It highlighted the risk that:
- without adequate investment, the early resolution rate will reduce and there will be greater delays in the finalisation of indictable matters and an increase in the number of trials in which victims are required to give evidence.²²
- 5.27 The Law Institute of Victoria emphasised the financial benefits associated with finalising indictable stream cases within the jurisdiction of the Magistrates’ Court. According to its submission:
- As of 2017–18, the average cost of a criminal trial finalising in the County Court exceeds \$16,000 per trial, for the Supreme Court it is \$50,000. Whereas, a matter finalising in the Magistrates’ or Children’s Court is less than \$800. This is a considerable saving.²³
- 5.28 The County and Supreme Courts suggested that the costs associated with managing pre-trial matters in their jurisdictions could be minimised by employing non-judicial staff, such as judicial registrars, to assist in case management.²⁴
- 5.29 Victoria Legal Aid, however, suggested that rather than investing additional resources in the higher courts, funding should instead be ‘invested in ... improving current systems’, which ‘would have a much greater positive impact on efficiency, speed of finalisation, and the experience of victims in the pre-trial process’.²⁵

Efficiency of the Magistrates’ Court

- 5.30 In 2017–18, the average time between first hearing and committal in the Magistrates’ Court was 36 weeks for death-related and general offences, and 29 weeks for sexual offences.²⁶ Data is not available to show the average time between filing hearing and finalisation in the Magistrates’ Court for those committal stream matters that resolve summarily.
- 5.31 Also in 2017–18, it took on average 38 weeks to finalise matters in the higher courts.²⁷ The average time frame for finalisation in the higher courts includes pleas and sentencing as well as trials.
- 5.32 It is not possible to draw any strong conclusions from these statistics regarding the comparative efficiency of the courts, given the mix of sentencing and trial matters in the higher courts.
- 5.33 The Law Institute of Victoria stated:
- The periods of time that matters take in the Magistrates’ Court can be compared to the overall time that indictable matters take from initiation in the Magistrates’ Court until finalisation in the higher courts. This was, according to the OPP, 19.9 months averaged over [a] five-year period [to 2017–18]. On this basis, it would appear that the bulk of the time spent from initiation to finalisation, occurs in the higher courts, at 12.9 or 16.6 months, depending on the stage at which the matter was committed to the higher courts.²⁸

21 Submission 24 (Law Institute of Victoria).

22 Submission 13 (Victoria Legal Aid).

23 Submission 24 (Law Institute of Victoria).

24 Submissions 20 (County Court of Victoria), 22 (Supreme Court of Victoria).

25 Submission 13 (Victoria Legal Aid).

26 Court Services Victoria, *Committal Data requested by VLRC* (2019), figure 15.

27 Australian Bureau of Statistics, *Criminal Courts, Australia* (Catalogue No 4513.0, 27 February 2019) table 20.

28 Submission 24 (Law Institute of Victoria). The Law Institute notes that the DPP’s data amalgamates all indictable matters regardless of how they were finalised in the higher courts.

- 5.34 Victoria's higher courts finalise criminal cases more quickly than most other Australian jurisdictions.²⁹ Even so, both the Supreme Court and County Court are experiencing issues with delay. These are most serious in the County Court, where the current indicative waiting time from initial directions hearing to trial is between 12 and 13 months depending on the circumstances of the case.³⁰ The waiting time for a plea hearing is five months.³¹
- 5.35 The County Court is working to address delay through case management innovations such as the Long Trial List and Active Case Management System, which appear to be achieving positive outcomes. Even so, increasing the County Court's case management workload by requiring it to supervise cases from an earlier stage will likely make the current problems worse.
- 5.36 Like the County Court, the Supreme Court currently has a backlog of trial cases.³² It has, however, significantly improved its clearance rate,³³ from approximately 70 per cent in 2017–18 to 120 per cent in 2018–19.³⁴
- 5.37 While the Supreme Court argued that it can efficiently manage a selection of cases from the point of filing, it did not seek carriage of all cases within its exclusive jurisdiction from this point.³⁵ It also emphasised that managing more cases from an earlier point will not improve efficiency unless funding is provided to support this shift and to address its existing case backlog. If not, the Court told the Commission:
- new matters [that will be] ready for trial sooner will bottleneck behind a backlog of cases awaiting trial.³⁶

Case management in the Magistrates' Court: negative features

Duplication and delay

- 5.38 Some stakeholders claimed that committal proceedings contribute to unnecessary duplication of pre-trial procedures and delay in indictable prosecutions. This was mentioned in the preceding chapter in relation to the test for committal, but the claim was also made in respect of other elements of committal proceedings.
- 5.39 The Director of Public Prosecutions (DPP) pointed out that:
- Counsel appearing at [committal] hearings are often different to those who will appear at trial, so [holding a committal hearing] does not mean that preparation of trial is commencing any earlier than it otherwise would; in fact, it can mean trial preparation is actually delayed...³⁷
- 5.40 Those County Court judges who favour moving the bulk of pre-trial procedures into the jurisdiction of the trial court claimed a benefit of this would be that:
- The parties need not duplicate efforts to prepare for committal and trial, and argument in relation to the strength of the prosecution case need not be made in two separate jurisdictions.³⁸

29 See Table 2 in Chapter 3 of this report.

30 County Court of Victoria, 'Criminal Division', *Court Divisions* (Web Page, 27 November 2019) <<https://www.countycourt.vic.gov.au/learn-about-court/court-divisions/criminal-division>>.

31 Ibid.

32 Submission 22 (Supreme Court of Victoria).

33 Clearance rate refers to the number of finalisations compared with the number of lodgements: Productivity Commission, Australian Government, *Report on Government Services 2020* (Report, 2020), Table 7A.25 <<https://www.pc.gov.au/research/ongoing/report-on-government-services/2020/justice/courts>>.

34 Productivity Commission, Australian Government, *Report on Government Services 2020* (Report, 2020), Table 7A.25 <<https://www.pc.gov.au/research/ongoing/report-on-government-services/2020/justice/courts>>. These figures relate to non-appeal criminal cases.

35 Consultation 31 (Supreme Court of Victoria).

36 Submission 22 (Supreme Court of Victoria).

37 Submission 4 (Director of Public Prosecutions (Victoria)).

38 Submission 20 (County Court of Victoria).

5.41 According to this view:

Double queuing results from matters awaiting both a committal date, and then subsequently a trial date. This can also cause delays to existing trials. For example, if a matter is awaiting trial in the trial court and new related matters arise and are filed in the lower court, the new matters must first go through the committal process to join up with the matters at trial.³⁹

5.42 In the experience of these County Court judges:

despite the existence of committal procedures, when cases arrive at the trial court, significant disclosure issues persist and must be litigated. This is despite the process also occurring in the Magistrates' Court. As such, there is a duplication of efforts. This is further exacerbated by the fact that each court must familiarise itself with the case ...⁴⁰

5.43 The Supreme Court told the Commission that committal proceedings unnecessarily duplicated aspects of pre-trial procedure that would be better managed within its jurisdiction, including the cross-examination of witnesses. It argued, 'Management from an early stage would allow these processes to be managed as one'.⁴¹ The Court pointed out that in some cases:

there are critical issues, especially evidentiary issues, which will determine the direction or even the outcome of a case, but which can only be determined in the trial court. By allowing the matter to be brought through to the trial court at an early stage there is the opportunity to address those critical issues in a way that may avoid the need for processes which would otherwise be undertaken in the committal process.⁴²

Inconsistent case management practices

5.44 While many committal magistrates are proactive and skilful case managers who actively engage with the parties to ensure full disclosure, encourage early resolution, and narrow the issues in contention, the Commission heard that some magistrates are inadequate case managers who do not exert their authority effectively. This appears to be a particular problem in some—although by no means all—regional areas.

5.45 The Commission was told that some courts treat the case direction notice as an administrative step rather than an important case management tool, and that some magistrates fail to ensure cross-examination at committal hearings is kept within the limits of the issues for which leave to cross-examine was originally granted.

5.46 While not commenting on its experience with particular magistrates, the Victorian Aboriginal Legal Service recommended committal proceedings 'be treated as a specialist stream within the Magistrates' Court and be run by magistrates with specific expertise in committal proceedings.' It suggested this would help ensure committal proceedings achieve their purposes of filtering weak cases and achieving early disclosure, which supports the right to a fair trial.⁴³

Approach to case management in other jurisdictions

5.47 Other jurisdictions that have abolished aspects of committal proceedings, including the test for committal and the opportunity to cross-examine witnesses, have retained the practice of filing charges in a lower court. As a result, there remains a requirement that the accused be 'committed' to the jurisdiction of a higher court, although without prior determination by the lower court that the evidence in the case is sufficient.

39 Ibid.
 40 Ibid.
 41 Submission 22 (Supreme Court of Victoria).
 42 Ibid.
 43 Submission 19 (Victorian Aboriginal Legal Service).

- 5.48 Whether committal occurs by order of a judicial officer or registrar varies among jurisdictions. In all cases, the committal order is dependent on completion by the parties of certain procedural steps, usually including disclosure by the prosecution of relevant materials.
- 5.49 In Western Australia, a special Magistrates' Court has been established in the same building as the Supreme Court. All Perth-based proceedings for Supreme Court indictable offences commence there, at the Magistrates' Court Stirling Gardens. Registrars of the Supreme Court are appointed as magistrates to preside in the Magistrates' Court Stirling Gardens. They provide 'individual case management of each matter from start to finish' and 'expedite ... the committal and management of criminal cases.'⁴⁴

Case management in the lower courts: stakeholder views

- 5.50 The Commission heard a wide variety of views about where pre-trial case management of indictable cases should occur.
- 5.51 The strongest opponents of committal proceedings are groups representing victims and witnesses. Their opposition is primarily to the opportunity to cross-examine witnesses at a committal hearing (see Chapter 11), although they are also concerned that committal proceedings contribute to undue delay.
- 5.52 The County Court is divided in its opinion about the benefits and drawbacks of moving some elements of committal proceedings, such as opportunities for pre-trial cross-examination, into its jurisdiction. The Court is unanimous, however, in recommending that early case management, including filing charges, bail, and standard disclosure, should continue in the Magistrates' Court:
- The Court recognises that a criminal matter proceeding through the Magistrates' Court at first instance has merit. The filing of charges, the setting of bail, and the disclosure of evidence are all invaluable to good case management. Further, the prosecution and defence must be provided with adequate time to assess the evidence, obtain instructions, and enter negotiations. It is for this reason that the Court is of the view that matters can still properly proceed through the Magistrates' Court at first instance..⁴⁵
- 5.53 Like some judges in the County Court, the DPP argued the test for committal should be abolished and there should be a presumption against cross-examination of witnesses during committal proceedings, but recognised the substantial benefits of many elements of committal proceedings. The DPP supported committal proceedings for the purposes of providing 'a limited opportunity to test evidence where it is central to resolution discussions or will inform the charges proceeded with.'⁴⁶ The DPP also told the Commission it was 'appropriate that the availability of summary jurisdiction is determined in the Magistrates' Court.'⁴⁷ Finally, the DPP noted that:
- 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.⁴⁸
- 5.54 The Magistrates' Court emphasised that achieving early disclosure is one of the most significant purposes of committal proceedings. Often, this facilitates early resolution:

44 'Stirling Gardens Magistrates Court', *Supreme Court of Western Australia* (Web Page, 1 March 2019) <https://www.supremecourt.wa.gov.au/M/magistrates_court_stirling_gardens.aspx?uid=4946-0149-8167-1518>.

45 Submission 20 (County Court of Victoria).

46 Submission 4 (Director of Public Prosecutions (Victoria)).

47 Ibid.

48 Ibid.

Committal proceedings play a fundamental role in ensuring proper and timely disclosure. Serious indictable matters should not be proceeding directly from a charge to a lengthy, costly jury trial without concerted attempts having been made to facilitate disclosure and resolution.

...

Committal proceedings have the potential to ensure timely disclosure by making parties accountable for the conduct of their matters in open court.⁴⁹

- 5.55 As well as disclosure and early resolution, the Magistrates' Court stressed the benefits of committal proceedings for narrowing the issues in a case.⁵⁰
- 5.56 The Law Institute of Victoria advocated strongly for the retention of committal proceedings in the Magistrates' Court. It stated that committal proceedings represent a cost effective and efficient means of promoting early resolution or of narrowing the issues in indictable matters:
- LIV members report that committals have improved noticeably over the last few decades in terms of judicial oversight ... many ... aspects of case management occur during committal procedures. These include applications for bail ... custody management issues and confiscation orders ... The LIV submits that this work is best handled in the Magistrates' Court as part of the committal process.⁵¹
- 5.57 In addition to highlighting the benefits of early resolution and narrowing of issues, Victoria Legal Aid suggested:
- The experience of ... committal reform in other jurisdictions tends to suggest that [moving pre-trial procedures to the higher courts] does not result in significant improvements in efficiency or reductions in delay ...⁵²

Commission's conclusions

Retain pre-trial case management in the lower courts for most cases

- 5.58 Although there is a need for more consistent case management in the Magistrates' Court, many elements of committal proceedings expedite resolution of criminal cases or help narrow the issues for trial. This reduces costs and overall delay.
- 5.59 The Commission recommends building on practices in the Magistrates' Court that are working effectively while addressing existing issues in a targeted way.
- 5.60 Around one-third of cases that commence in the committal stream of the Magistrates' Court are determined summarily, and another third are committed to the higher courts following a plea of guilty entered in the Magistrates' Court. Of the remaining third of cases that are committed to the higher courts for trial following a plea of not guilty, a plea of guilty is entered prior to trial in approximately 60 per cent of cases in the County Court.⁵³
- 5.61 If more effective case management can be achieved in the Magistrates' Court, a higher proportion of matters should enter the jurisdiction of the County Court for sentence rather than trial.⁵⁴ This would reduce the County Court's case management burden.

49 Ibid.

50 Ibid.

51 Submission 24 (Law Institute of Victoria).

52 Submission 13 (Victoria Legal Aid).

53 In the County Court in 2017–18, 508 guilty pleas were entered between the first hearing in the County Court and the trial commencing, and 32 guilty pleas were entered during trial. In the Supreme Court in 2017–18, 27 guilty pleas were entered between the first hearing in the Supreme Court and the trial commencing, and 8 guilty pleas were entered during trial: County Court of Victoria, *Case Data Requested by VLRC* (October 2019), Supreme Court of Victoria, *Case Data Requested by VLRC* (September 2019).

54 This is so even accepting that in some instances resolution is impossible in the lower courts because, for example, a ruling from the trial court is sought about the admissibility of evidence.

- 5.62 It may be useful for the Magistrates' Court to establish an 'indictable case management practice group' of magistrates who have particular expertise managing indictable cases. Magistrates could be provided with specialist training around:
- encouraging the parties to narrow the issues in dispute
 - applying the test for leave to cross-examine strictly and consistently
 - implementing reformed disclosure requirements⁵⁵
 - making costs orders where appropriate.
- 5.63 The Magistrates' Court should give consideration to how this training can be provided to magistrates in regional areas.
- 5.64 Duplication between the lower and higher courts does sometimes contribute to delay. This delay is offset by the efficiencies achieved through early and summary resolution of cases in the Magistrates' Court. Delay in the disposition of indictable cases will not be remedied by limiting the case management function of the Magistrates' Court and moving cases to the County Court sooner. In fact, it is likely that would cause additional delay.
- 5.65 Many causes of delay will not be remedied simply by a change of court venue. These causes include inadequate preparation by the parties, insufficient disclosure, and the time taken to provide forensic reports. Recommendations to address these issues are made in subsequent chapters.

Recommendation

- 6 The lower courts should retain a case management function for indictable stream matters that will be heard in the County Court.**

Commence Supreme Court cases in the Supreme Court

- 5.66 The Supreme Court favours moving case management of some matters within its exclusive jurisdiction into its jurisdiction at an early stage.⁵⁶ It submitted that this should occur on application by either party.⁵⁷ The Supreme Court told the Commission that such a change would reflect modern case management principles.
- 5.67 For several reasons, it is desirable for Supreme Court matters to be managed by that Court. Except in Children's Court cases, this should apply from the commencement of proceedings, not—as the Supreme Court submitted—from some point after charges have been filed.
- 5.68 Given the relatively small number of indictable matters within the Supreme Court's exclusive jurisdiction—just over 100 cases annually⁵⁸—and given the Supreme Court already manages bail applications in treason and murder cases,⁵⁹ establishing the services necessary to support early case management in the Supreme Court is more achievable in the short term than adopting this change in the County Court, although still resource intensive.

55 See Chapter 9.

56 Submission 22 (Supreme Court of Victoria). The Supreme Court has jurisdiction in all Victorian cases but is not required to exercise its jurisdiction if jurisdiction has also been given to another court *Constitution Act 1975* (Vic) ss 85, 87(1). The County Court has jurisdiction over all offences *except* treason and misprision of treason; murder and child destruction; attempted murder; unlawful combinations or conspiracies to commit any offence that, when committed by an individual acting alone, could only be tried in the Supreme Court (*County Court Act* (Vic) s 36A). As a consequence, these offences fall within the exclusive jurisdiction of the Supreme Court. Note that the Supreme Court does not explicitly refer only to matters within its exclusive jurisdiction, but this is implied by its description of these matters (homicide and terrorism charges, etc).

57 Submission 22 (Supreme Court of Victoria).

58 Supreme Court of Victoria, *Case Data Requested by VLRC* (September 2019).

59 See paragraph 2.19 of this report.

- 5.69 Moreover, a much lower proportion of Supreme Court matters resolve in the jurisdiction of the Magistrates' Court, or have guilty pleas entered there, than County Court matters. The role played by the Magistrates' Court in the early case management of Supreme Court matters is thus less effective than in other cases.
- 5.70 The difficulties associated with pre-trial management of regional County Court cases also do not apply in Supreme Court matters. Most pre-trial administration and preparation for these matters is currently conducted from the Melbourne Supreme Court, and the proposed change will not affect the conduct of Supreme Court trials by circuit judges.
- 5.71 The Supreme Court argued that matters within its exclusive jurisdiction:
- are readily identifiable when they are commenced in the Magistrates' Court. They are not in the cohort that may ultimately be resolved summarily as even the lesser alternative charges are purely indictable ...
- It is also rare for a matter in the category of cases dealt with by the Supreme Court not to be committed for trial ... There remain many cases where there is a real contest in respect of the charge or a defence, but the committal determination is not the mechanism by which those issues are resolved.⁶⁰
- 5.72 The Supreme Court told the Commission the only exception to the rule that matters within its jurisdiction do not resolve such that they can be heard in a lower court are 'the very small number of cases involving children ... where resolution to a lesser charge can result in the matter being dealt with summarily in [the Children's] Court.'⁶¹
- 5.73 The Supreme Court acknowledged that cases involving a child accused charged with offences within its exclusive jurisdiction should commence and be managed in the Children's Court as currently occurs.⁶²
- 5.74 The Supreme Court's proposal to allow transfer of matters within its jurisdiction from the Magistrates' Court on application by one of the parties should not be adopted. The DPP expressed concern that the Supreme Court would thereby be able to 'cherry pick' matters.⁶³ This would make it difficult to explain to complainants and the accused why some but not all matters are filed in the Supreme Court, with a likely inference being that matters filed in the Supreme Court are considered more important or worthy than others. The DPP told the Commission this would place the prosecution:
- 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 [in the Supreme Court] and not another.⁶⁴
- 5.75 The recommendation that Supreme Court cases should be filed in the Supreme Court should not be implemented without provision of appropriate funding to the Court to support earlier case management and to ensure that the Court's existing backlog of cases is not exacerbated.⁶⁵

Recommendation

- 7** The *Criminal Procedure Act 2009 (Vic)* should be amended to require that matters within the exclusive jurisdiction of the Supreme Court are filed in the Supreme Court, aside from Children's Court matters.

60 Submission 22 (Supreme Court of Victoria).

61 Ibid.

62 Ibid. See Chapter 12: The Children's Court.

63 Submission 4 (Director of Public Prosecutions (Victoria)).

64 Ibid.

65 Submission 22 (Supreme Court of Victoria).

Reforming pre-trial indictable case management: outline of a new system

- 64** Introduction
- 64** New pre-trial procedures
- 65** Figure 2: Proposed pre-trial case management system
- 70** Resourcing more active case management

6. Reforming pre-trial indictable case management: outline of a new system

Introduction

- 6.1 This chapter sets out the main elements of the Commission’s proposed system for pre-trial indictable case management, designed to address negative features of the present system. A key initiative is the creation of a single issues hearing to replace committal mention hearings and committal hearings.
- 6.2 Some reform proposals—such as that the Director of Public Prosecutions (DPP) should have formal conduct of indictable stream matters from the filing hearing—are referred to briefly in this chapter because of their centrality to how indictable stream cases will travel through the courts, but the rationale for their adoption is discussed separately in subsequent chapters. These chapters add detail about specific areas in which additional reform is required, in relation to charging practices, disclosure, and cross-examination. The current chapter concludes by discussing the need to resource more active case management in all courts, and the resourcing implications of the proposed system.
- 6.3 With some modifications where appropriate, the case management proposals in this chapter could be adopted by the Supreme Court if the Commission’s recommendation to file Supreme Court charges in that Court is implemented.

New pre-trial procedures

- 6.4 The reform proposals below are set out in order of the chronology of the pre-trial process.

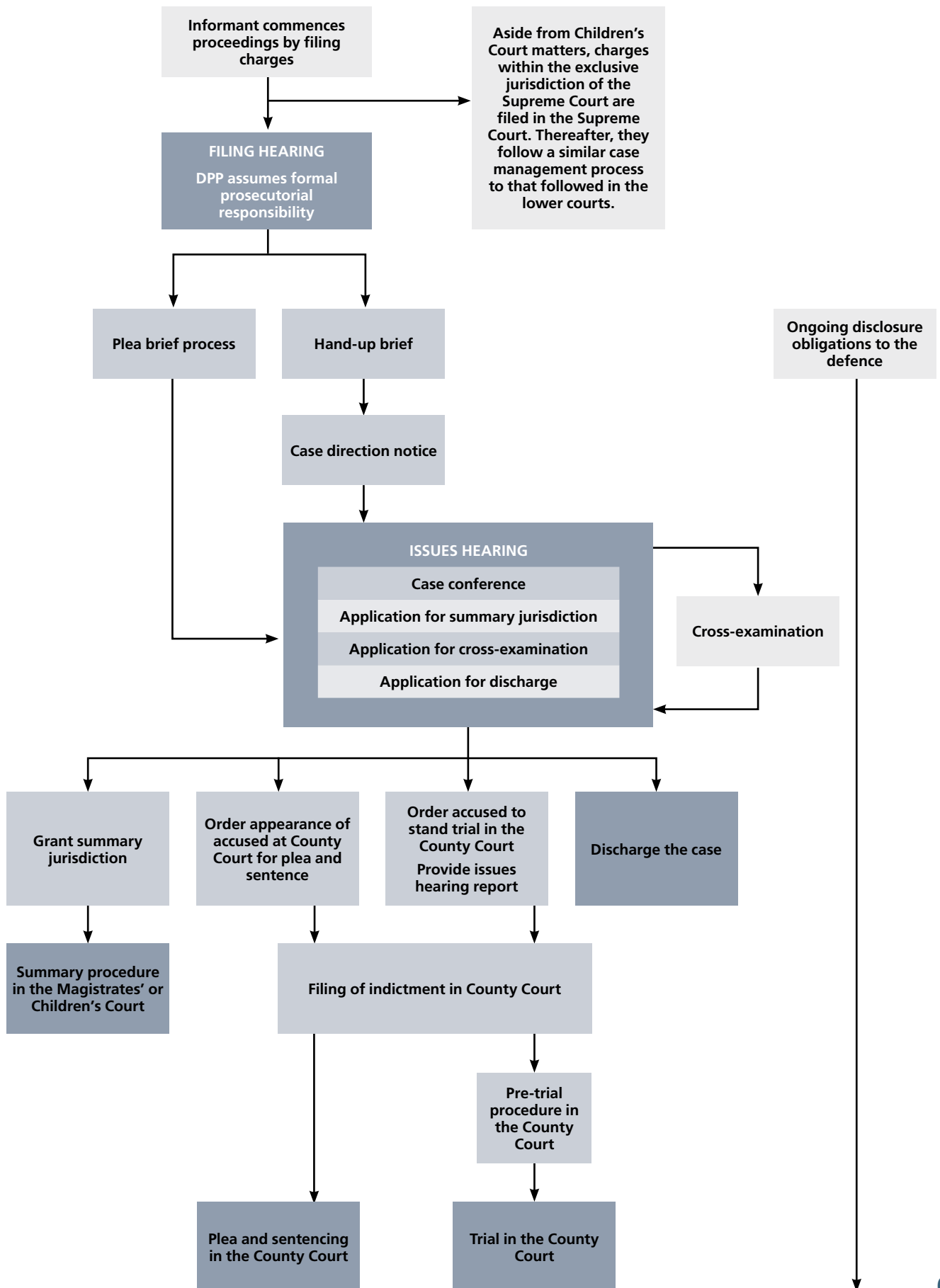
Commencing indictable proceedings

- 6.5 While it should remain the informant’s responsibility to file charges, the DPP should assume formal prosecutorial responsibility for all indictable stream matters from the time of the filing hearing onwards. The rationale for this is discussed in Chapter 7 on the role of the DPP and Chapter 8 on charging practices.

Recommendation

- 8 The *Criminal Procedure Act 2009* (Vic) should be amended to require the Director of Public Prosecutions to assume formal prosecutorial responsibility in cases involving indictable offences from the filing hearing onwards.

Figure 2: Proposed pre-trial case management system



Service of hand-up brief

- 6.6 Currently, the hand-up brief must be served within five months of the commencement of proceedings, or within two months if a sexual offence is involved, except where the Magistrates' Court decides it is in the interests of justice to extend this time frame.¹ In practice, the magistrate at the filing hearing will usually order earlier service of the hand-up brief. In straight-forward cases, service is typically required within six weeks of the filing hearing.²
- 6.7 The time frames for service of the hand-up brief in the *Criminal Procedure Act 2009* (Vic) (CPA) allow for a degree of flexibility and a case-by-case approach. The Magistrates' Court of Victoria suggests this is appropriate, given that:
- An extended period for service of the [hand-up brief] is often required for certain charges, eg. murder. However, this should be considered on a case-by-case basis, be properly justified, and not become a standard for any category of offending. It is often quite realistic for an incomplete brief to be served within [a] 6-week period with the remainder served prior to committal mention.³
- 6.8 While the current approach allows the court to be appropriately responsive to the varying circumstances of each case, magistrates should be encouraged to closely scrutinise the case at hand, and to allow only the minimum time necessary for service of the hand-up brief.
- 6.9 A consequence of the Commission's recommendation that the DPP has formal prosecutorial responsibility for indictable stream matters from filing hearing onwards is that the DPP will be responsible for filing the hand-up brief and serving it on the accused. Preparation of the hand-up brief should remain the informant's responsibility, but the DPP should assist and advise the informant in this regard. This is discussed further in Chapter 9 on disclosure. Here it is only necessary to note that the informant should provide progressive disclosure to the DPP, so that the DPP is aware of the contents of the brief and able to file and serve it within the time frame set by the court.

Contents of the hand-up brief

- 6.10 Recommendations for expanding the materials that must be included in the hand-up brief are made in Chapter 9 on disclosure. Chapter 9 also discusses the need to clarify how to identify in the hand-up brief items that the informant objects to disclosing on grounds such as public interest immunity.

Case direction notice

- 6.11 Currently, the parties must engage in discussions at least 14 days before the committal mention hearing.⁴ The purpose of these discussions is to explore early resolution of the case and, where resolution cannot be achieved, to identify the issues in dispute and any witnesses whom the accused will seek leave to cross-examine.⁵ A case direction notice recording the outcome of these discussions must be filed jointly by the parties seven days before the committal mention.⁶

1 This time frame is established by *Criminal Procedure Act 2009* (Vic) ss 126, 108. Section 126 requires a committal mention hearing to be held within three months after the commencement of proceedings in cases involving a sexual offence and within six months in all other cases, unless the Magistrates' Court fixes a longer period because it is satisfied it is in the interests of justice to do so. Section 108 requires a hand-up brief to be served at least 42 days before the committal mention hearing, unless the Magistrates' Court fixes another period for service or the accused gives written consent to a lesser period.

2 Submission 14 (Magistrates' Court of Victoria).

3 Ibid.

4 Magistrates' Court of Victoria, *Practice Direction 6 of 2013: Directions Concerning the Case Direction Notice*, 10 October 2013.

5 Ibid.

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

- 6.12 The case direction notice may also be used to indicate that the accused will apply for a summary hearing. The Victorian Aboriginal Legal Service told the Commission that when an Aboriginal accused makes an application for summary jurisdiction, he or she will often at the same time make an application for Koori Court determination. This means the magistrate must determine at the committal mention hearing both whether the case is suitable for summary determination and if it meets the criteria for a Koori Court hearing. A concern raised by the Victorian Aboriginal Legal Service is that if this decision is not made by a Koori Court magistrate, its suitability may be challenged by the Koori Court magistrate when the case appears in the Koori Court.⁷
- 6.13 Current provisions for early discussions between the parties and the joint filing of a case direction notice should be retained, although the prescribed timeframe for discussions should be set with reference to the proposed issues hearing, discussed below, rather than the committal mention hearing. A revised case direction notice should support the same purposes as current case direction notices, to promote early resolution discussions, and contain the same fields for identification of the issues in dispute, such as applications for leave to cross-examine witnesses. If an application for summary jurisdiction includes an application for a Koori Court hearing, this should also be stated in the revised case direction notice, allowing the Magistrates' Court registrar to list the issues hearing before a Koori Court magistrate.

Recommendations

- 9 The *Criminal Procedure Act 2009 (Vic)* should be amended to require that a case direction notice is filed before an issues hearing rather than a committal mention hearing.
- 10 If an application for summary jurisdiction includes an application for a Koori Court hearing, this should be stated in the case direction notice and the Magistrates' Court registrar should list the issues hearing before a Koori Court magistrate.

Court-supervised case conferences

- 6.14 Although the Magistrates' Court may direct the parties to appear at a committal case conference conducted by a magistrate,⁸ conferences are currently confined to matters involving offences against the person, robbery, armed robbery or aggravated burglary.
- 6.15 The conferences provide an opportunity for magistrates to question parties about failures to engage actively in early resolution discussions and to identify and narrow the issues in dispute. The parties can raise disclosure issues and the court can provide its views regarding the strength of the prosecution case, the suitability of the charges, and how the issues could be narrowed.
- 6.16 A significant minority of indictable stream cases resolve summarily at committal case conferences: ten per cent in 2016–17 and seven per cent in 2017–18. These results could be improved through more consistent and engaged case management in the Magistrates' Court. The Commission recommends extension of court-supervised conferences to all indictable stream matters.

7 Submission 19 (Victorian Aboriginal Legal Service).
8 *Criminal Procedure Act 2009 (Vic)* s 127.

- 6.17 The conferences should be conducted on the same day as the issues hearing (discussed below). If the Commission’s recommendation to abolish the test for committal is implemented, magistrates will have more scope to actively engage parties about resolving or narrowing the issues in the case.

Recommendation

- 11 Section 127 of the *Criminal Procedure Act 2009 (Vic)* should be amended to require that a case conference be conducted during an issues hearing in all indictable cases, regardless of offence type.

Issues hearing

- 6.18 Generally speaking, committal proceedings do not themselves contribute to undue delay—other factors such as failure to obtain forensic evidence promptly and inadequate preparation by the parties are the main causes of delay.⁹ How committal hearings are currently conducted can, however, cause delay. If a committal hearing is adjourned, the challenge of finding a new court date when the magistrate and parties are available can be exacerbated by the need to accommodate witnesses and to combine witness cross-examination with submissions from counsel and the magistrate’s determination of the test for committal.¹⁰
- 6.19 Abolishing the test for committal, as recommended in Chapter 4, will allow the committal mention and the committal hearing to be combined into a single ‘issues hearing’.
- 6.20 The notion of an issues hearing to replace committal mention hearings was advanced by the DPP in 2018, along with other reforms such as fast-track procedures for certain categories of cases.¹¹ The Commission is not recommending the adoption of those other reforms and its proposed issues hearing will function differently to that envisaged by the DPP.
- 6.21 The Court should determine applications for leave to cross-examine witnesses at the issues hearing.¹² If leave to cross-examine is granted, the issues hearing could be adjourned, with cross-examination scheduled in a flexible manner—rather than being tied, as is currently the case, to a single committal hearing that culminates with the Magistrates’ Court determining the test for committal. This will remove the potential for delay caused by having to schedule witness cross-examination for a dedicated hearing where the magistrate also takes submissions from the parties.
- 6.22 As discussed earlier, the court should conduct a case conference at the issues hearing in order to encourage resolution where possible, or to identify and narrow the issues for trial.
- 6.23 At the issues hearing, the Magistrates’ Court could also:
- hear an application for summary jurisdiction, conduct a summary hearing, or list a matter for summary hearing
 - hear an application for Koori Court
 - hear a discharge application

9 Submissions 11 (Criminal Bar Association (Victoria)), 14 (Magistrates’ Court of Victoria), 15 (Liberty Victoria).

10 Submissions 20 (County Court of Victoria), 22 (Supreme Court of Victoria), 24 (Law Institute of Victoria).

11 Director of Public Prosecutions, Office of Public Prosecutions Victoria, *Proposed Reforms to Reduce Further Trauma to Victims and Witnesses* (Policy Paper, 1 October 2018), appended to Submission 4 (Director of Public Prosecutions (Victoria)).

12 As is currently the case, the accused should provide details of any applications to cross-examine witnesses in the case direction notice: *Criminal Procedure Act 2009 (Vic)* s 119.

- hear and determine any objection to the production of material, or order the matter be transferred to the County Court for consideration of an objection to the production of material¹³
 - order the accused appear for plea and sentence in the County Court on a date to be determined
 - order the accused stand trial in the County Court on a date to be determined.
- 6.24 The attendance of the informant at the issues hearing should be obligatory. Informants will be required to confirm on oath that they have disclosed all relevant material in their possession or knowledge, and that they have made all reasonable enquiries about the existence of such material (see Chapter 9).
- 6.25 Currently, the higher courts have inadequate information about what happened in cases before them while those cases were in the lower courts.
- 6.26 This issue would be partly remedied by more effective and integrated court data management systems.¹⁴ The Commission also recommends introducing a requirement that magistrates complete an 'issues hearing report' for transmission to the higher court.
- 6.27 The proposed issues hearing report will include details of:
- any issues raised before the magistrate
 - if the informant objected to production of material, the grounds for the objection and the court's determination in relation to it
 - any outstanding disclosure items sought by the accused, or disclosure issues that are likely to arise
 - any other matter that the Magistrates' Court regards as relevant to the higher court.
- 6.28 The issues hearing report should also include brief reference to key depositional material, including:
- whether or not the informant confirmed on oath that all relevant material had been fully disclosed
 - if leave was sought to cross-examine witnesses; if leave was granted; and if witnesses were cross-examined (including details of the witnesses in question).
- 6.29 The issues hearing report may also include details of any failure by the parties to adequately complete the case direction notice or make concerted efforts to resolve the matter or narrow the issues in dispute.
- 6.30 Preparation of the issues hearing report need not be overly time consuming. A template could be used allowing some fields to be quickly populated. Copies of the report should be provided to the parties.

Recommendations

- 12 The *Criminal Procedure Act 2009* (Vic) should be amended to replace committal mention hearings and committal hearings with an issues hearing.
- 13 Magistrates should be required to prepare an issues hearing report for transmission to the County Court.

Specialist lists in the County Court

- 6.31 At the initial directions hearing, a judge will categorise matters as suitable for management in one of the County Court's specialist lists. The County Court's current specialist lists are:
- sexual offences
 - general crime (including the pilot Active Case Management System)
 - long trial list
 - Koori Court.
- 6.32 In addition to the existing lists, it may be appropriate to add a separate family violence list, or to create a joint family violence and sexual offences list, as the Commission's recommendations in relation to pre-trial cross-examination require special protections for complainants in family violence matters to supplement the existing protections in sexual offence matters.¹⁵ It may also be appropriate to add a specialist Children's Court list.

Case management in the Supreme Court

- 6.33 The main elements of the case management procedures proposed for the lower courts should be adopted, with appropriate modifications, in the Supreme Court. In particular, early discussions between the parties, joint completion of a case direction notice, and court supervised case conferences should be mandated.
- 6.34 While an issues hearing may take a somewhat different form, it should allow for disclosure issues to be raised and for informants to confirm on oath that they have discharged their disclosure obligations. The accused should be entitled to seek leave to cross-examine witnesses, and to have leave granted if the same conditions are met as apply in other cases.¹⁶

Resourcing more active case management

- 6.35 Civil litigation reforms in the United Kingdom in 1999 represented 'radical, arguably revolutionary, procedural change putting greater emphasis on settlement and giving greater control of litigation to the judiciary.'¹⁷
- 6.36 While the benefits of the reforms continue to be debated, what became clear after their introduction was the importance of ensuring the courts were adequately resourced to meet the increased burden of case management. As the chairman of the Law Society's Civil Litigation Committee noted:
- Case management under Woolf has greatly increased the burden on the courts in driving the pace of litigation ... If the civil justice reforms are to succeed they must have the support of an adequately resourced court infrastructure.¹⁸
- 6.37 This comment applies equally to reforms promoting more active case management of criminal matters. Regardless of the jurisdiction in which case management occurs, active judicial oversight of proceedings imposes a burden on the court in terms of time and other resources. Examples of active case management by the courts include:
- careful scrutiny of applications for adjournment and a strict attitude towards granting them
 - calling parties before the court to explain why they have not met procedural obligations

15 See Chapter 11.

16 Ibid.

17 Susan Moloney, 'A New Approach to Civil Litigation? The Implementation of the "Woolf Reforms" and Judicial Case Management' (2001) 2(1) *Judicial Studies Institute Journal* 98, 100.

18 Fraser Whitehead cited in Susan Moloney, 'A New Approach to Civil Litigation? The Implementation of the "Woolf Reforms" and Judicial Case Management' (2001) 2(1) *Judicial Studies Institute Journal* 98, 104.

- more proactive use of costs orders to penalise delay
- mandated court-supervised case conferences, which require an understanding of the charges and issues.

Resourcing a system rather than its parts

- 6.38 The Supreme Court of Victoria pointed out that ‘inefficiencies are created when one or more aspects of the system are not resourced to keep up with the processes of other parts of the system.’¹⁹ As an example, it cites an increase in police resources leading to more investigations and arrests, and more charges being filed.²⁰ A higher volume of prosecutions will necessarily place an additional burden on the courts that must hear and determine the charges.
- 6.39 The County Court attributes increased delays within its jurisdiction to—among other things—the ‘steady increase in initiations’ from 2014–15 to 2017–18.²¹
- 6.40 If it is the case that prosecutions for indictable offences have been increasing and continue to do so, the entire criminal justice system should be adequately resourced to cater for this. More generally, reforms to specific elements of the criminal justice system will fail to deliver substantial and lasting benefits unless the flow-on effects of these reforms are catered for and resourced. For example, if indictable cases move more quickly through the jurisdiction of the lower courts, the overall time for their disposition will not improve if they simply swell existing backlogs in the higher courts—those backlogs must also be addressed.

Current personnel and infrastructure shortfalls

- 6.41 The Commission was told there are not currently enough magistrates to handle the committal stream caseload.²² This is said to be a particular problem in the regions, where other matters such as summary cases involving family violence offences are often given priority.²³ The Commission also heard that the Magistrates’ Court does not have enough courtrooms with custody or video link facilities to hear indictable cases.²⁴
- 6.42 The Magistrates’ Court told the Commission a cause of delay in its conduct of committal proceedings is the need to adjourn committal hearings because of:
- Lack of ... resources both in magistrates and custody court rooms. More magistrates are required to be available to hear committal hearings. More court rooms are also required. Even with the Court’s lease of [two] court rooms in the County Court building, there is still a shortage of custody courts in the Melbourne Magistrates’ Court building.²⁵
- 6.43 The DPP told the Commission that magistrates ‘are under strain from ever-increasing work pressures.’²⁶
- 6.44 The Law Institute of Victoria pointed to under-resourcing of all courts, not just the Magistrates’ Court. It described this as a major contributor to delay:
- The capacity of the three courts is limited by the number of suitable courtrooms, the competing uses for these courts (i.e. civil and criminal matters) and the number of judicial officers with relevant experience in criminal law to hear a matter.²⁷
- 6.45 The Law Institute calls for investment in court infrastructure, citing a claim in *The Court Services Victoria Strategic Asset Plan* that:

19 Submission 22 (Supreme Court of Victoria).

20 Ibid.

21 Submission 20 (County Court of Victoria).

22 Submission 24 (Law Institute of Victoria).

23 Submission 13 (Victoria Legal Aid), Consultation 29 (Bendigo Magistrates’ Court).

24 Submission 14 (Magistrates’ Court of Victoria); Consultations 8 (Victoria Legal Aid), 16 (LaTrobe Valley practitioners).

25 Submission 14 (Magistrates’ Court of Victoria).

26 Submission 4 (Director of Public Prosecutions (Victoria)).

27 Submission 24 (Law Institute of Victoria).

Current and historical funding for court asset management has been constrained and below levels that are required to maintain and develop appropriate court environments.²⁸

Resource implications of case management recommendations

- 6.46 If the Commission’s recommendation to abolish the test for committal is implemented, this should reduce the Magistrates’ Court’s workload in respect of indictable stream matters. The Commission’s recommendation for more court-supervised case conferences will, however, add to that workload. Meanwhile, the opportunity to cross-examine witnesses at an issues hearing will continue to impose a burden on Magistrates’ Court resources.
- 6.47 Additional funding will therefore be required to redress existing shortages of magistrates and a scarcity of courtrooms in the Melbourne Magistrates’ Court.²⁹
- 6.48 Additional funding will be required to resource the Commission’s recommendation that charges within the exclusive jurisdiction of the Supreme Court are filed there.

Resource implications of abolishing committal proceedings

- 6.49 If—contrary to the Commission’s recommendations—the bulk of pre-trial case management is moved into the County Court, this will require large-scale funding.
- 6.50 Both the County and the Supreme Courts submitted that moving elements of committal proceedings into the higher courts would require additional funding for these courts.³⁰ They argued that these additional resources would be offset by savings in the Magistrates’ Court.
- 6.51 Neither higher court provided an estimate of the figures involved, although the Supreme Court outlined the range of resources it would require. The Supreme Court told the Commission the resources necessary would include:
- ‘judge resources to reduce [existing] trial backlogs and facilitate early management
 - judicial registrar...resources for case management tasks including aspects of pre-trial cross examination
 - staff support to maximise the capacity of judicial resources and undertake out of court management to reduce adjournments and the need for appearances
 - consequential costs associated with the above reflective of having a greater number of matters running at a given time including jury and transcript costs and accommodation.’³¹
- 6.52 The County Court submitted that ‘any transfer of pre-trial cross-examination to the County Court must be supported by appropriate resource allocation, prior to implementation.’³²
- 6.53 It added more generally:
- a significant change in procedure must be accompanied by pre-emptive funding that meets the increased demand on the County Court ...The Court is unanimously opposed to any reforms to committals without upfront and appropriate resource allocation.³³

Recommendation

- 14 The courts should be adequately funded to support any changes to their case management role.**

28 Court Services Victoria, *Strategic Asset Plan 2016-2031* (Report 2016) 10; Submission 24 (Law Institute of Victoria).
29 Submission 14 (Magistrates’ Court of Victoria).
30 Submissions 20 (County Court of Victoria), 22 (Supreme Court of Victoria).
31 Submission 22 (Supreme Court of Victoria).
32 Submission 20 (County Court).
33 Ibid.

Role of the DPP and defence practitioners

- 74** Introduction
- 75** Structural problems with committal proceedings
- 75** New South Wales reforms
- 76** Role of the DPP and defence practitioners: stakeholder views
- 77** Commission's conclusions

7. Role of the DPP and defence practitioners

Introduction

- 7.1 The Commission was told that inefficiency, delay, and failures to resolve matters at an early stage can be attributed partly to failure by defence and prosecution practitioners to engage actively in proceedings from the outset.
- 7.2 In 2014 the New South Wales Law Reform Commission identified several barriers to securing appropriate early guilty pleas. These included:
- a failure by the Director of Public Prosecutions (DPP) to brief Crown Prosecutors with authority to negotiate until late in proceedings
 - discontinuity of legal representation leading to inconsistency in advice and negotiations.¹
- 7.3 These barriers are also present in Victoria. The prosecution is not actively engaged in committal proceedings from the beginning. It is common for both the prosecution and defence to brief less experienced solicitor-advocates or counsel during pre-trial proceedings and to transfer briefs to more senior counsel at the trial stage.
- 7.4 The problem of insufficient early engagement by both parties is also structural. Because the informant is responsible for drafting and filing charges and preparing the brief of evidence, as well as for other aspects of committal proceedings, it is natural that the DPP's involvement is minimal until a late stage in the committal proceedings. Without meaningful early involvement from Office of Public Prosecutions (OPP) practitioners, even those defence practitioners who try to resolve the matter quickly are likely to be thwarted.
- 7.5 This chapter canvasses the situation in Victoria in relation to the informant's and prosecution's different roles in committal proceedings. It explains how reforms in New South Wales have attempted to ensure more active engagement from an early stage by experienced prosecutors and defence practitioners. The chapter considers what stakeholders have reported about the issue in Victoria and concludes by urging the need to 'front-load' the criminal justice system. This requires two things:
- the DPP assuming earlier prosecutorial responsibility for conducting committal proceedings
 - the provision of funding at an early stage in proceedings to secure the involvement of experienced practitioners and to ensure continuity of representation.²

1 New South Wales Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas* (Report No 141, December 2014) 9-10.

2 As the New South Wales Law Reform Commission said, 'resources should be switched away from the end process—where they are mostly wasted—and deployed in a "front-ended" system.' New South Wales Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas* (Report No 141, December 2014) 11.

Structural problems with committal proceedings

- 7.6 The informant commences criminal proceedings by filing charges.³ If the defence wants to communicate with the prosecution between the filing hearing and the committal mention, their point of contact is usually the informant.⁴ The informant is also the point of contact for complainants and other witnesses and is responsible for informing them about court dates and the criminal process.⁵
- 7.7 The DPP conducts almost all committal proceedings for Victorian offences,⁶ but the prosecution's level of engagement is minimal in the early stages of proceedings.⁷ For example, while it is customary for a solicitor from the OPP to appear for the prosecution at filing hearings in the Melbourne Magistrates' Court,⁸ matters are not usually allocated to a dedicated conduct solicitor who will have ongoing oversight of the proceedings until after the filing hearing.
- 7.8 It is not surprising that the DPP does not become actively involved in reviewing cases and pursuing early resolution in the lower courts given the informant bears most of the initial responsibilities in relation to charging and disclosure.

New South Wales reforms

- 7.9 As part of reforms to the criminal justice system introduced in New South Wales in 2018, Legal Aid New South Wales has restructured its serious crime section to provide a continuity of representation model. This means that solicitors now have carriage of criminal cases for the lifetime of the case, whereas previously one solicitor would have carriage of a case during the committal phase and another would assume carriage if the accused was committed to a higher court. Legal Aid New South Wales has also changed its fee structure to increase the allocation of funds provided to private practitioners at the 'front end' of the process. This is designed among other things to address the 'perverse incentive' that previously existed to only resolve matters at trial. Legal Aid New South Wales are also now briefing defence counsel more regularly and at an earlier stage in proceedings.⁹
- 7.10 The New South Wales Government initially provided \$9.3 million in recurrent funding—although limited to two years, to support the new Legal Aid fee model. A further grant of \$10 million in non-recurrent funding was subsequently allocated to help front-load resourcing and ensure continuity of representation.¹⁰
- 7.11 The New South Wales Office of the Director of Public Prosecutions (ODPP) has also created a continuity of representation model, with practitioners working in teams led by a senior practitioner who is the ultimate decision maker. More junior practitioners are involved in refining the issues and identifying the applicable offences. The introduction of this model was supported by additional government funding for the ODPP.¹¹

3 *Criminal Procedure Act 2009* (Vic) s 3, definition of informant.

4 The informant must also provide an address for service of documents (*Criminal Procedure Act 2009* (Vic) s 18), may apply for a compulsory examination order (*Criminal Procedure Act 2009* (Vic) s 103, and must file a case direction notice if the DPP is not conducting the committal proceeding (*Criminal Procedure Act 2009* (Vic) s 118).

5 *Criminal Procedure Act 2009* (Vic) s 129(2).

6 Office of Public Prosecutions Victoria, 'Our Role in Prosecutions', *About Us* (Web Page, 2016) <<http://www.opp.vic.gov.au/About-Us/Our-Legal-Practice/Our-role-in-prosecutions>>. Other agencies such as WorkSafe Victoria may also conduct committal proceedings.

7 This is so even though it has been the DPP's long-standing policy to take responsibility for the prosecution of matters during committal proceedings: see Directors of Public Prosecutions and National Legal Aid, *Best Practice Model for the Determination of Criminal Charges* (1988) 2 [1], available as an annexure to Brian Ross Martin, *Review of the Major Indictable Reforms—Criminal Procedure Act 1921 (As Amended by the Summary Procedure (Indictable Offences) Amendment Act 2017* (Report, 13 September 2019), annexure 7.

8 In regional areas, a Victoria Police prosecutor usually appears for the prosecution at the filing hearing.

9 Consultation 34 (Legal Aid New South Wales).

10 *Ibid.*

11 Consultation 33 (Director of Public Prosecutions (New South Wales)).

Role of the DPP and defence practitioners: stakeholder views

Prosecution not in a position to negotiate

- 7.12 Even after a conduct solicitor is appointed, the Magistrates' Court reports that OPP duty solicitors appear in committal mentions rather than the conduct solicitor.¹² Duty solicitors do not have authority to make significant decisions such as to withdraw charges and thus are not able to negotiate effectively with the defence. According to the Magistrates' Court, it is common for matters to be 'needlessly adjourned for instructions to be obtained.'¹³
- 7.13 The Commission was told by regional defence practitioners that OPP practitioners who appear at committal mentions in circuit courts do not have authority to negotiate and commonly have a poor understanding of the issues in the case.
- 7.14 A further problem identified by the Magistrates' Court and commented on by regional defence practitioners is that it is difficult to determine who has conduct of a file at the OPP. This makes engaging in proactive and early resolution discussions almost impossible.¹⁴
- 7.15 The Commission heard that the OPP formerly had a dedicated regional team of practitioners who had carriage of matters and who travelled to circuit locations and engaged in constructive resolution discussions with defence practitioners.¹⁵
- 7.16 The Victorian Aboriginal Legal Service suggested the OPP:
should receive additional funding to ensure that senior prosecutors with authority to negotiate can provide oversight during charging and disclosure.¹⁶
- 7.17 Victoria Legal Aid similarly called for:
senior prosecutors ... to prepare and engage with the evidence at the earliest stage of committal proceedings, including for case conferencing and appearance in the committal proceedings.¹⁷

Inadequate preparation by both parties

- 7.18 It is common in Victoria as in many other Australian jurisdictions to brief less experienced solicitor-advocates or counsel during pre-trial proceedings and to transfer briefs to more senior counsel at the trial stage.¹⁸
- 7.19 The Magistrates' Court reported:
Magistrates are frustrated by the lack of accountability on [the] part of both defence and the OPP in [engaging in timely resolution discussions]. Delayed brief analysis by defence leads to delayed request[s] for further disclosure material and delayed negotiation. Meanwhile, OPP solicitors wait on defence to communicate their position, rather than proactively communicating the bottom line, which magistrates frequently encourage them to do.¹⁹

12 Submission 14 (Magistrates' Court of Victoria).

13 Submission 14 (Magistrates' Court of Victoria), 13 (Victoria Legal Aid).

14 'It is ... a common complaint from defence practitioners that they have difficulty determining who at the OPP has conduct of a particular file and commence disclosure or resolution discussions at an early stage.' Submission 14 (Magistrates' Court of Victoria).

15 Consultations 13 (Goulburn Valley practitioners), 38 (Victoria Legal Aid regional practitioners).

16 Submission 19 (Victorian Aboriginal Legal Service).

17 Submission 13 (Victoria Legal Aid).

18 Jason Payne, *Criminal Trial Delays in Australia: Trial Listing Outcomes* (Research and Public Policy Series No 74, Australian Institute of Criminology, 2007) 45–6.

19 Submission 14 (Magistrates' Court of Victoria).

- 7.20 The Court claimed that in response to questioning from the bench it often became apparent that the parties left it very late to engage in resolution discussions or to identify the issues that prevent the case from resolving.²⁰
- 7.21 While it is Victoria Legal Aid’s policy that solicitors have carriage of indictable matters for the lifetime of a case, senior practitioners for both the prosecution and defence are commonly briefed only at the trial stage. This has been identified as an impediment to early resolution and a contributing factor to delay in jurisdictions around Australia.²¹ Having different counsel appear in the lower and higher courts also leads to a duplication of efforts.²² Victoria Legal Aid attempts to address this issue by paying a supplementary ‘uplift’ fee to counsel who act both in committal proceedings and subsequently in the trial court.
- 7.22 The County Court has tried to tackle the same issue by requiring counsel who appear at a committal hearing also to appear at the initial directions hearing in the County Court, and by emphasising that counsel must have a sound understanding of the case.²³ Compliance with this requirement is, however, patchy.

Commission’s conclusions

Early involvement of the DPP

- 7.23 The informant has primary responsibility for charging and disclosure throughout committal proceedings. This has led to problems that are discussed in subsequent chapters.
- 7.24 The DPP should assume formal prosecutorial responsibility for all indictable stream matters from the point of filing in the Magistrates’ Court onwards (see recommendation 8, Chapter 6). This would improve appropriate charging and disclosure. It would also encourage consistent representation and facilitate the earlier involvement of experienced prosecutors.

Early engagement of experienced practitioners

- 7.25 It is essential that both parties are equipped to negotiate at an early stage in the Magistrates’ Court, and to assist the Court in its oversight of cases by having a sound understanding of the issues.
- 7.26 The Magistrates’ Court should be more assertive in its use of costs orders to penalise practitioners who appear at court without adequate instructions.
- 7.27 Victoria Legal Aid, the Victorian Aboriginal Legal Service, and the DPP should:
- appoint experienced practitioners at an early stage
 - endeavour to ensure that practitioners who accept conduct of matters do not withdraw before the matter has finally resolved, unless they have good reasons for doing so.

20 Submission 14 (Magistrates’ Court of Victoria). In accordance with Magistrates’ Court of Victoria *Practice Direction 6 of 2013: Directions Concerning the Case Direction Notice*, 10 October 2013, the parties are required to engage in resolution discussions at least 14 days before the committal mention hearing. The parties are required to file a case direction notice with the outcomes of their discussions at least seven days before the committal mention hearing: *Criminal Procedure Act 2009 (Vic)* s118.

21 New South Wales Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas* (Report No 141, December 2014) 9–10; Jason Payne, *Criminal Trial Delays in Australia: Trial Listing Outcomes* (Research and Public Policy Series No 74, Australian Institute of Criminology, 2007) 45–6.

22 Submission 20 (County Court of Victoria).

23 County Court of Victoria, *Criminal Division Practice Note PNCR 1-2015*, 12 July 2019, pts 2, 3, 4.

- 7.28 The Commission recognises the logistical challenges associated with ensuring the early and continuous involvement of experienced practitioners. A mentoring system could be adopted, allowing less experienced practitioners to appear and conduct negotiations in committal proceedings and have conduct of pre-trial matters in the trial courts with consistent oversight by experienced practitioners who are familiar with and ultimately responsible for the matter. Supervising practitioners would need to be reliably available to provide instructions.
- 7.29 Fee structures at the OPP and Victoria Legal Aid should provide for the early appointment of experienced practitioners. As discussed earlier, Victoria Legal Aid currently provides an uplift fee to counsel who act both in committal proceedings and subsequently in the trial court. The DPP could consider introducing similar incentives for counsel for the prosecution.
- 7.30 Additional funding should be provided to Victoria Legal Aid and the DPP for initiatives to engage experienced practitioners at an early stage and to ensure they remain involved throughout proceedings.

Recommendations

- 15 Experienced practitioners should be engaged at an early stage in proceedings and have continuing responsibility for the case until trial or resolution.
- 16 The Director of Public Prosecutions and Victoria Legal Aid should be provided with additional funding to ensure experienced practitioners have oversight of committal proceedings from the outset and are responsible for the conduct of matters until final resolution, including in the higher courts.
- 17 Fee structures at Victoria Legal Aid and the Office of Public Prosecutions should provide for the early involvement of counsel and to ensure continuity of representation.
- 18 Victoria Legal Aid and the Office of Public Prosecutions should regularly and publicly report, preferably in their annual reports, on:
 - (a) measures used to ensure legal practitioners acting in indictable matters retain responsibility for those matters for the lifetime of the prosecution
 - (b) the success of these measures.

Charging practices

- 80** Introduction
- 81** Current approach to charging
- 82** Historical backdrop to current charging practices
- 83** Overcharging
- 84** Is overcharging a problem in Victoria?
- 85** Commission's conclusions: addressing overcharging
- 91** Consulting victims about charging decisions

8. Charging practices

Introduction

- 8.1 Appropriate charging is important for ensuring fair trial rights, efficiency in the criminal justice system, and to minimise trauma for victims and witnesses. Charges filed against an accused person must be evidence-based.
- 8.2 Consistently with this, the *Victoria Police Manual* 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.'¹ The *Policy of the Director of Public Prosecutions for Victoria (Director's Policy)* requires that for a prosecution to proceed, there must be a reasonable prospect of conviction and it must be in the public interest.²
- 8.3 Nonetheless, in Victoria, as in many other jurisdictions, it is common for more charges to be filed than are ultimately prosecuted or result in a guilty plea.³ Frequently, Victoria Police or the Director of Public Prosecutions (DPP) withdraws or downgrades charges during negotiations with the defence or as a result of its own case review.⁴
- 8.4 This chapter examines the current approach and historical backdrop to charging in Victoria. It describes the phenomenon of overcharging, which involves *unnecessarily* filing more charges than are pleaded or indicted, and considers if this is a problem in Victoria. After concluding that overcharging is a problem, the chapter discusses the consequences of overcharging for the accused, for efficiency, and for victims and witnesses.
- 8.5 The Commission considers a range of responses to overcharging. It concludes there is a need to provide Victoria Police with better charging training and support, and to involve the DPP in charging decisions at an early stage. It describes recent initiatives to improve consultation with victims about charging and resolution decisions. These initiatives should reduce the trauma experienced by victims and other witnesses when charges are withdrawn.

1 Victoria Police, *Victoria Police Manual* (CD-Rom, 29 April 2019) 6 [4.3].

2 Director of Public Prosecutions for Victoria, Office of Public Prosecutions Victoria, *Policy of the Director of Public Prosecutions for Victoria* (17 December 2019) 2 <<http://www.opp.vic.gov.au/Resources/Policies>>. See also Victorian Law Reform Commission, *Committals* (Issues Paper, June 2019) 12 [3.9]–[3.13], discussing the factors that the police and the DPP must take into account before deciding to file charges or an indictment.

3 Submissions 13 (Victoria Legal Aid), 19 (Victorian Aboriginal Legal Service); Consultations 8 (Victoria Legal Aid), 13 (Goulburn Valley practitioners), 16 (LaTrobe Valley practitioners), 18 (Academic Roundtable), 29 (Bendigo Magistrates' Court).

4 The informant or prosecution may seek leave to withdraw charges or file additional charges: see *Criminal Procedure Act 2009* (Vic) ss 8, 164, 165.

Current approach to charging

Responsibility for investigating criminal conduct and filing charges

- 8.6 Several agencies have responsibility for investigating criminal conduct. Victoria Police conducts most criminal investigations in this state. Commonwealth offences are investigated by the Australian Federal Police, sometimes in collaboration with Victoria Police.⁵ Statutory agencies such as WorkSafe Victoria and the Environmental Protection Authority also have the power to investigate criminal conduct falling within their statutory authority. While the DPP has the power to provide advice about the investigation of a criminal offence,⁶ its longstanding policy has been not to give advice about 'operational or investigative matters'.⁷
- 8.7 Criminal proceedings are commenced in the lower courts by an investigating officer ('the informant') filing a charge sheet.⁸ The charge sheet must be signed by the informant personally.⁹ In most cases, the informant is a Victoria Police officer.
- 8.8 The DPP is not involved in the initial drafting of charges but is available to provide charging advice to Victoria Police or other investigative agencies in cases that are 'complex', 'novel', have policy implications, or raise potential conflicts of interest for the police.¹⁰
- 8.9 After apprehension, if the accused has not been released by the police on summons or bail, they must be brought before a bail justice or a magistrate within 'a reasonable period of time'.¹¹ In most cases involving indictable offences, bail may only be granted in 'exceptional circumstances'¹² or if the accused can 'show compelling reasons why bail should be granted'.¹³ The 'show compelling reasons' test, introduced in 2018, means that it is now less common for police or a bail justice to grant bail; magistrates are hearing more applications for bail; and more people are being detained on remand.¹⁴

Responsibility for conduct of committal proceedings and charge review

- 8.10 Both the informant and the DPP have responsibilities in relation to the conduct of committal proceedings (see Chapter 7), but in the early stages of the proceedings, active consideration or review of the charges by the DPP is rare. In some cases, charges are not reviewed until just before the committal mention, when they may be re-assessed in the context of completion of the case direction notice. In other cases, charges may not be reviewed at all until after the accused has been committed for trial, when they are considered in the context of the DPP's decision to file an indictment.¹⁵

5 Note that Victorian courts have jurisdiction to hear matters relating to Commonwealth criminal offences. Victoria's criminal procedure rules apply in these instances: *Judiciary Act 1903* (Cth) s 68. The offences are prosecuted by the Commonwealth Director of Public Prosecutions.

6 *Public Prosecutions Act 1994* (Vic) s 22(1)(ce).

7 Director of Public Prosecutions, Office of Public Prosecutions for Victoria, *Policy of the Director of Public Prosecutions for Victoria* (17 December 2019) 22 [64] <<http://www.opp.vic.gov.au/Resources/Policies>>.

8 *Criminal Procedure Act 2009* (Vic) ss 5(a), 6(1)(a). If the accused was arrested without a warrant and is released on bail, the proceedings can be commenced by filing a charge sheet with a bail justice: *Criminal Procedure Act 2009* (Vic) s 6(1)(b). Proceedings can also be commenced by a police officer or public official signing a charge sheet and issuing a summons to answer the charge: *Criminal Procedure Act 2009* (Vic) s 6(1)(c). Note that criminal proceedings in the Children's Court are commenced in the same way: *Children, Youth and Families Act 2005* (Vic) s 528.

9 *Criminal Procedure Act 2009* (Vic) s 6(3).

10 Director of Public Prosecutions for Victoria, *Policy of the Director of Public Prosecutions for Victoria* (17 December 2019) 22 [64], Submission 4 (Director of Public Prosecutions (Victoria)).

11 *Crimes Act 1958* (Vic) s 464A(1). See *Crimes Act 1958* (Vic) s 464A(4) for a list of matters that may be considered for the purposes of determining what constitutes 'a reasonable time'. See also *Bail Act 1977* (Vic), which requires a person refused bail by an authorised police officer to be brought before a court 'as soon as practicable within the period of 48 hours after being so remanded': ss 10(6), 10AA(4)(b).

12 *Bail Act 1977* (Vic) ss 4AA, 4A, sch 1.

13 *Ibid* sch 2.

14 See Submission 13 (Victoria Legal Aid).

15 Submission 11 (Criminal Bar Association (Victoria)), Consultations 13 (Goulburn Valley practitioners), 16 (LaTrobe Valley practitioners), 21 (Geelong practitioners), 29 (Bendigo Magistrates' Court).

Historical backdrop to current charging practices

- 8.11 The involvement of investigative agencies in filing charges and conducting committal proceedings is, to some degree, a historical legacy.¹⁶
- 8.12 Victoria established Australia's first independent DPP in 1982, and the first Commonwealth Director of Public Prosecutions was established in 1984.¹⁷ The DPP was appointed, and the Office of the DPP created, in response to concerns about the politicisation of criminal prosecutions and the lack of an independent, non-partisan prosecuting agency.¹⁸ Before this, investigators tended not to consult with prosecutorial authorities, who were embedded in government departments.¹⁹
- 8.13 The need to enhance public confidence in police investigations and the criminal justice system more broadly was recognised by (among others) Australia's DPPs. While DPPs did not seek to influence investigative processes, they moved to separate them from the prosecution of offences. They also addressed concerns about the quality of police prosecutions by establishing uniform prosecution and disclosure guidelines.²⁰
- 8.14 In the 1980s, other common law countries separated the investigation of criminal offences from their prosecution, abolishing the role that the police had previously performed in prosecuting crime, even in relation to summary offences.²¹ Corns points out that
- the prohibition on the police conducting criminal prosecutions is based on the ideological and operational need to separate criminal investigative functions from prosecutorial functions to ensure ... independence and impartiality in prosecution decision-making.²²
- 8.15 In the United Kingdom, Crown Prosecutors rather than the police are responsible for making indictable charging decisions. The separation between criminal investigations and indictable prosecutions has been reduced, however, because Crown Prosecutors may advise the police on reasonable lines of enquiry to take in an investigation. If police fail to pursue lines of enquiry suggested by a Crown Prosecutor, or to provide information requested by the prosecutor about an investigation, the prosecutor may defer a charging decision or refuse to make it at all.²³ Even so, there is an attempt to retain the separation between investigative and prosecutorial roles: prosecutors are not meant to *direct* police or other investigators in the conduct of their investigations, and are characterised as independent of police.²⁴

16 This is also true of the fact that Victoria Police has responsibility for prosecuting all summary offences in the Magistrates' Court: see Christopher Corns, *Public Prosecutions in Australia: Law, Policy and Practice* (Thomson Reuters, 2014) 242–244 [7.140]–[7.160].

17 Damian Bugg, 'The Role of the DPP in the 20th Century' (Speech, Judicial College of Australia Colloquium, 1999) 3. Tasmania was the first jurisdiction in Australia to establish an independent prosecuting agency, with the creation in 1973 of the Crown Advocate.

18 In the United Kingdom, according to Sir Thomas Hetherington DPP, the role of the Crown Prosecution service was established with broader objectives, including 'To be, and to be seen to be, independent of the Police'. Damian Bugg, 'The Role of the DPP in the 20th Century' (Speech, Judicial College of Australia Colloquium, 1999) 2–3. See also Christopher Corns, *Public Prosecutions in Australia: Law, Policy and Practice* (Thomson Reuters, 2014) 242–244 [7.140]–[7.160].

19 Damian Bugg, 'The Role of the DPP in the 20th Century' (Speech, Judicial College of Australia Colloquium, 1999) 2.

20 Ibid 18–20. In Tasmania, the role of Crown Advocate was changed to Director of Public Prosecutions in 1986. At the same time, the prosecutor's obligation 'to provide advice and representation to Police' was removed in order 'to recognise the independence of the DPP from the policing and investigative function.' Ibid 5.

21 Chris Corns, 'Police Prosecutions in Australia and New Zealand: Some Comparisons' (2000) 19(2) *University of Tasmania Law Review* 280, 280.

22 Ibid.

23 Crown Prosecution Service (England and Wales), *Disclosure Manual* (Report, 14 December 2018) 9.

24 Crown Prosecution Service (England and Wales), 'The Code for Crown Prosecutors', *Publications* (Web Page, 26 October 2018) [2.1], [3.3] <<https://www.cps.gov.uk/publication/code-crown-prosecutors>>.

Overcharging

What is overcharging?

- 8.16 'Overcharging' involves unnecessarily filing more charges than are ultimately indicted or pleaded. Three distinct forms of charging are often conflated, and all are sometimes described as 'overcharging': alternative charging, discrete event charging and inflated charging. Each of these is explained below.
- 8.17 Whilst is generally appropriate to characterise 'discrete event charging' and 'inflated charging' as overcharging, 'alternative charging' may be defensible and appropriate. This is only so, however, in circumstances where it seems likely, on the available evidence, that the accused is guilty of an offence or offences at the more serious end of the spectrum. Using alternative charging as a strategy for the conduct of plea negotiations is inappropriate and constitutes overcharging.

Alternative charges

- 8.18 In relation to the same offending conduct, it is common for the accused to be charged with the most serious version of the alleged offence—such as intentionally cause serious injury—as well as less serious versions, such as intentionally cause injury.
- 8.19 Alternative charging has a statutory basis.²⁵ It may be warranted in situations where charges must be filed while an investigation is still in its infancy.²⁶ It is important that charges reflect the most serious offence on the available evidence, as this will influence decisions such as the jurisdiction in which the case will proceed and the availability of bail. Once an investigation is complete, it may be apparent that the available evidence does not support the most serious offence charged. As a result, alternative less serious versions of the offence may proceed.
- 8.20 An accused is entitled to have his or her alleged criminal conduct dealt with as promptly as possible.²⁷ Filing less serious alternative charges at the outset means that, if the more serious charges are withdrawn, the remaining alternative charges can be dealt with immediately.

Discrete event charges

- 8.21 Sometimes criminal offending occurs over the course of numerous discrete events. The *Criminal Procedure Act 2009* (Vic) (CPA) allows for an accused to be charged according to a 'course of conduct' if the offending involves more than one incident of a relevant offence—either a sexual offence or an offence under specified sections of the *Crimes Act 1958* (Vic)²⁸—and other conditions are met.²⁹
- 8.22 Instead of a course of conduct charge, however, the informant will often charge the accused for each of the discrete events. For example, 20 separate charges of obtaining property by deception on 20 separate days may be filed rather than a single charge of obtaining property by deception over a sustained period. This practice reflects police culture and there is no statutory requirement for it.

Inflated charges

- 8.23 Inflated charging involves speculative charging for offences that are more serious than the available evidence is likely to support, alongside charging for less serious offences for which there is evidence. While this may appear similar to alternative charging, it differs in that the evidence at the outset does not credibly support the most serious charges.

²⁵ *Crimes Act 1958* pt III div 1 (19).

²⁶ Submission 11 (Criminal Bar Association (Victoria)).

²⁷ *Charter of Human Rights and Responsibilities Act 2006* s 25(1)(c).

²⁸ *Criminal Procedure Act 2009* (Vic) sch 1, 4A(1)(b).

²⁹ *Ibid* sch 1, 4A. Note that the police must not file a course of conduct charge for a sexual offence without prior consent from the DPP: *Criminal Procedure Act 2009* (Vic) sch 1, 4A(12).

Is overcharging a problem in Victoria?

- 8.24 Victoria Police denied that overcharging is an issue, suggesting that its charge rate is at the lower end of the spectrum by comparison with other Australian jurisdictions.³⁰ It told the Commission that filing alternative charges is its standard practice, and claims that this is legitimate 'as a basis for plea negotiations'.³¹
- 8.25 The Criminal Bar Association and the Magistrates' Court both note that charges are often laid at the time of an accused's arrest, when police might have little evidence in admissible form available to them.³² In these circumstances, some disparity between the charges initially filed and those prosecuted or pleaded is inevitable.
- 8.26 While acknowledging that 'divergence between charges filed by police and those ultimately prosecuted can be problematic', the DPP suggested it 'is understandable that police often file charges for more serious offences than those ultimately proceeded with'.³³
- 8.27 The Magistrates' Court acknowledged this complexity:
- there may be times when more serious charges than are warranted are laid as a form of negotiation. However, the Court appreciates that charges are often laid at the time of an accused's arrest, when police may have little evidence in admissible form available to them. As more evidence becomes disclosed and witnesses are identified and questioned, it is appropriate for charges to be reviewed, and only those charges that could be supported by evidence pursued. The prosecution should be encouraged to review and negotiate charges as investigation and disclosure progresses.³⁴
- 8.28 The Victorian Aboriginal Legal Service reports that in its experience there is often disparity between charges initially filed and those ultimately prosecuted.³⁵

Consequences of overcharging

- 8.29 Overcharging is problematic because charges that do not have a strong evidentiary basis may be discharged at committal; withdrawn by the prosecution at some point prior to trial; or lead to an acquittal. It is of course appropriate that the accused is acquitted of ill-founded charges, or even better, is not indicted on those charges, but it would be better still if they were not charged at all.
- 8.30 Overcharging undermines fair trial rights, is inefficient, and can have consequences that are traumatic for victims and witnesses.

Overcharging undermines fair trial rights

- 8.31 Overcharging may undermine fair trial rights if it leads to unnecessary delay and prevents timely disposition of evidence-based charges. The Judicial College's *Criminal Procedure Manual* says the prosecution 'should not include every conceivable charge on a charge sheet or indictment as this is unfair and tends to impede the proper disposition of the more serious offences'.³⁶
- 8.32 Victoria Legal Aid points out that overcharging increases the likelihood of an accused person being refused bail in circumstances in which they may be entitled to bail.³⁷ The Victorian Aboriginal Legal Service also emphasises the danger of this.³⁸

30 Consultation 19 (Victoria Police).

31 Ibid.

32 Submissions 11 (Criminal Bar Association (Victoria)), 14 (Magistrates' Court of Victoria).

33 Submission 4 (Director of Public Prosecutions (Victoria)).

34 Submission 14 (Magistrates' Court of Victoria).

35 Submission 19 (Victorian Aboriginal Legal Service).

36 Judicial College of Victoria, '2.1 Charge Sheet and Indictment', *Victorian Criminal Proceedings Manual* (Online Manual, 1 March 2017) <<https://www.judicialcollege.vic.edu.au/eManuals/VCPM/indexpage.htm#27318.htm>>. See also *R v Walker* [2004] VSC 411, [15].

37 Submission 13 (Victoria Legal Aid).

38 Submission 19 (Victorian Aboriginal Legal Service).

Overcharging undermines efficiency

- 8.33 As well as placing time and resource burdens on the courts, defence, and prosecutors, Victoria Legal Aid told the Commission that overcharging can delay early guilty pleas.³⁹
- 8.34 One practitioner described overcharging as a ‘very negative thing’, telling the Commission that in his experience, ‘having so many charges at the outset is problematic because psychologically, the tendency of the accused is to want to respond by flipping one finger up to the prosecution.’⁴⁰

Overcharging can lead to trauma for victims

- 8.35 The Royal Commission into Institutional Responses to Child Sexual Abuse (RCIRCSA) emphasised the distress felt by victims when charges are withdrawn or downgraded, particularly in instances where victims feel the remaining charges ‘do not reflect the worst abuse or the extent of the abuse they suffered.’⁴¹ RCIRCSA also found:

The later in the course of a prosecution that charges are downgraded or discontinued, the greater the likely negative impact on victims and the criminal justice system. In particular, discontinuing prosecutions close to the trial date raises significant concerns.⁴²

- 8.36 Domestic Violence Victoria told the Commission that using overcharging as a basis for negotiation:
- reflects the fact that these things get developed in a vacuum and very much separate from the experience of the victim. How the victim might feel about charges being downgraded is just seen as an unfortunate side-effect ... [the system has not been developed] with the victim at the centre.⁴³
- 8.37 The legal centre knowmore, which represents victims of child sexual abuse, suggests that decisions to withdraw or downgrade charges ‘are particularly difficult for victims when they do not understand the prosecutor’s decision or feel as though they have not been properly consulted about it’.⁴⁴
- 8.38 According to the Victims of Crime Commissioner:
- Some victims are relieved if a lesser charge means that their matter won’t go to trial, they don’t need to give evidence, and the offender admits their guilt—other victims can feel completely let down and cheated.⁴⁵
- 8.39 The Victims of Crime Commissioner emphasised that the risk of participation in the criminal justice system causing ‘secondary victimisation’ is reduced:
- if victims are given information about the process, are kept informed of the progress of their case and have the opportunity to have their views heard—even if the outcome doesn’t result in a conviction or a lengthy sentence.⁴⁶

Commission’s conclusions: addressing overcharging

- 8.40 While divergence between the charges filed and those prosecuted is inevitable in some cases, there is a need to reduce the disparity between charges filed by investigating agencies and those prosecuted on indictment.

39 Submission 13 (Victoria Legal Aid).
 40 Consultation 8 (Victoria Legal Aid).
 41 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice* (Consultation Paper, September 2016) 280.
 42 Ibid 289.
 43 Consultation 14 (Domestic Violence Victoria).
 44 Submission 7 (knowmore).
 45 Submission 23 (Victims of Crime Commissioner).
 46 Ibid.

Do not introduce charge certification

- 8.41 In New South Wales and South Australia, recent reforms require that police disclose the evidence in the case to the prosecution, which must then certify the charges (in New South Wales) or make a charge determination in respect of the charges (in South Australia) that will proceed to trial.⁴⁷
- 8.42 Some stakeholders suggested that charge certification ‘may be a useful mechanism for ensuring that appropriate charges are laid at an early stage.’⁴⁸
- 8.43 In New South Wales, the requirement for charge certification has led to delay.⁴⁹ The Director of Public Prosecutions (New South Wales) told the Commission he has been reluctant to certify charges until the brief of evidence is complete, and frequently has to request additional material from police following service of the brief.⁵⁰ He added:
- in a way, that’s not unexpected. We have been working closely with the police and have restructured to align our working groups with Police Commands. Senior lawyers are going out and talking to the police and educating them about what they should provide.⁵¹
- 8.44 The Director commented that ‘it is a work in progress.’ He said his office will not certify a charge unless it thinks it has the right material and if necessary the ODPP will requisition the police until it gets further material:
- This means that the Local Court gets requests to extend the time period for charge certification, especially in complex matters.⁵²
- 8.45 NSW Legal Aid told the Commission that sometimes an accused may wish to plead but is unable to do so under the legislation until the charges have been certified.⁵³
- 8.46 The Office of the Director of Public Prosecutions in South Australia has also been reluctant to certify charges until a complete brief of evidence is provided by South Australia Police. Although a recent review concluded the delays resulting from the reforms have been over-stated and ‘Signs to date are positive’,⁵⁴ the Commission was told that, in some cases, charges had not been certified twelve months after they were originally filed. As a result, magistrates are discharging cases where certification has not occurred.⁵⁵
- 8.47 The logic behind charge certification—of requiring the prosecution to review charges at an early stage in proceedings—is sound. Due to the practical issues associated with it in New South Wales and South Australia, however, and a lack of clear evidence concerning its effect on delay in those states, the Commission does not recommend adopting a requirement for charge certification at this point.

Provide charging training for Victoria Police

- 8.48 Victoria Police’s position that alternative charging may serve appropriately as a basis for plea negotiations is at odds with the need to ensure that only evidence-based charges are filed.

47 *Criminal Procedure Act 1986* (NSW) ch 3 pt 2 div 4; *Criminal Procedure Act 1921* (SA) s106.

48 Submissions 7 (knowmore), 13 (Victoria Legal Aid).

49 Consultations 32 (Local Court of New South Wales), 33 (Director of Public Prosecutions (New South Wales)).

50 Consultation 33 (Director of Public Prosecutions (New South Wales)).

51 Ibid.

52 Ibid.

53 Consultation 34 (Legal Aid New South Wales).

54 While the report found ‘it is too early in the operations of the reforms to draw any firm conclusions as to [their] impact’, it concluded it is possible they have succeeded in reducing delay between the time of the defendant’s first appearance in the Magistrates’ Court and committal. Brian Ross Martin, *Review of the Major Indictable Reforms—Criminal Procedure Act 1921 (As Amended by the Summary Procedure (Indictable Offences) Amendment Act 2017)* (Report, 13 September 2019) 99 [198] see also [387].

55 Consultation 28 (South Australia Major Indictable Review).

- 8.49 Victoria Police should ensure police informants are trained to charge appropriately on the basis of the evidence, and not to view ‘the use of alternative charges to allow for early pleas’⁵⁶ as tactically advantageous.
- 8.50 This training needs to be provided for both junior members and experienced officers and should be regularly updated. The work of drafting charges needs to be treated as an integral part of police officers’ duties, not as an adjunct to their operational roles.

Recommendations

- 19 Victoria Police officers should receive regular and up-to-date charging training.

Require earlier involvement of DPP in charging

- 8.51 In order to reduce disparity between charges initially filed and those ultimately prosecuted, the DPP should be involved in reviewing and instructing on the most appropriate charges in serious criminal matters at an earlier stage.
- 8.52 Earlier involvement of the OPP in advising investigating agencies on the most appropriate charges, and in reviewing at an early stage the charges filed by the investigating agency, would strengthen the separation of the police’s investigative functions from their role in prosecuting offences. The police’s prosecutorial role should be minimal in relation to indictable offences.
- 8.53 Twenty years ago the Standing Committee of Attorneys-General recommended that DPPs review charges laid by police at a much earlier stage in proceedings.⁵⁷ It also suggested that DPPs should provide prosecution advice during the investigative process in complex cases. On its face this might appear to threaten the separation between investigation and prosecution functions, but the separation can be maintained by ensuring that the DPP’s advice is confined to ‘reviewing the sufficiency of evidence, advising on proofs to be obtained and suggesting appropriate charges’, as the committee then recommended.⁵⁸
- 8.54 There is widespread support among stakeholders for earlier involvement by the DPP⁵⁹ in providing charging advice.
- 8.55 Victoria Legal Aid suggested:
- there would be substantial value in having earlier support from the prosecuting agency’s lawyers ... This would assist police investigators to advance the preparation of the complete hand-up brief in accordance with the rules of evidence and admissibility, to ensure that appropriate evidence is obtained and included, and ensure that the process is completed in a timely manner.⁶⁰
- 8.56 Victoria Legal Aid clarified that it ‘does not recommend that the prosecution provide investigative advice, rather, pre-charge advice about what evidence would be required to support the charge.’⁶¹

56 Consultation 19 (Victoria Police).

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

58 Ibid.

59 Or other prosecuting agency, such as the CDPP.

60 Submission 13 (Victoria Legal Aid).

61 Ibid.

- 8.57 The Magistrates' Court supported DPP involvement 'at the earliest possible stage of decision making in relation to the charges'.⁶² When this should occur 'would be a matter for consultation with the OPP. In the Court's view, the process could easily commence with the service of the [hand-up brief], or as early as the filing hearing'.⁶³
- 8.58 The County Court supported improvement of procedures for charging, saying that it supports the model adopted in the United Kingdom whereby senior lawyers from the prosecution service play a role in determining the appropriate charges. The Court submitted that 'it stands to reason that the DPP should also file the charges at the commencement of the proceeding,' recognising that this process would increase resource demands on the DPP.⁶⁴
- 8.59 Victoria Police argued that decisions regarding what charges to file should remain with Victoria Police, 'but [it should have ...] early access to advice from [the] DPP'.⁶⁵ While this occurs currently, Victoria Police claimed 'it is not as widespread as desirable'.⁶⁶
- 8.60 The Commission concludes that it is appropriate to give decision-making power in relation to charging indictable matters to the DPP in some circumstances. How the DPP is involved in providing charging instructions will differ depending on the nature of the alleged offending and its investigation.

Charge immediately following apprehension—cases where remand is sought

- 8.61 It is generally accepted that it may be necessary in some instances for the police to file charges before an investigation is complete. This may be because the police believe an alleged offender poses a risk to the community and should be remanded in custody pending prosecution.
- 8.62 In South Australia, the Office of the Department of Public Prosecutions (SA ODPP) undertakes an adjudication in all cases in which a person is charged with a major indictable offence, including when charges need to be filed without the benefit of a full investigation. The SA ODPP provides advice to the South Australia Police on the appropriate charge or charges that should be filed and provides advice about the likely evidence required.⁶⁷
- 8.63 Requiring adjudication at an early stage and for all cases was a part of South Australia's Major Indictable Reform package. In his review of the reforms, the Hon. Brian Martin AO QC described the availability of adjudication for all cases as a 'sensible administrative step ... that should be encouraged and appropriately resourced'.⁶⁸
- 8.64 To implement a similar process in Victoria would be expensive and would involve a major cultural shift. Given this is not a system that stakeholders have advocated for, the Commission does not recommend placing onerous adjudication obligations on the DPP. Even so, adjudication could be considered in the future if the South Australian experience demonstrates that:
- it is practical for the DPP to adjudicate charges in every case involving a suspected indictable offence
 - adjudication leads to more accurate charging.

62 Submission 14 (Magistrates' Court of Victoria).

63 Ibid.

64 Submission 20 (County Court of Victoria).

65 Consultation 19 (Victoria Police).

66 Ibid.

67 Brian Ross Martin, *Review of the Major Indictable Reforms—Criminal Procedure Act 1921 (As Amended by the Summary Procedure (Indictable Offences) Amendment Act 2017)* (Report, 13 September 2019) 27. See pages 46–50 for an explanation of the adjudication.

68 Ibid 92.

- 8.65 In instances in which charges must be laid soon after the accused is apprehended, the informant should not be required to seek nor the DPP required to provide pre-charge instructions. The charges should be reviewed by the DPP when it assumes carriage of the matter. There should be a formal requirement that the DPP review the charges within seven days of receiving the hand-up brief from the informant and prior to serving it on the accused.

Recommendation

- 20 In cases where indictable charges are filed immediately following apprehension, the Director of Public Prosecutions should review the charges within seven days of receipt of the hand-up brief from the informant.**

Charge following investigation

- 8.66 There are some matters that can be thoroughly investigated and a brief of evidence prepared before charges are filed. The New South Wales DPP suggested:
- In matters that lend themselves to it, the police need to have an adequate brief before arrest. Especially in sexual assault cases, police need to check all the evidence and supporting material beforehand.⁶⁹
- 8.67 Where there is an opportunity to investigate alleged serious offending prior to arrest, the investigating agency should prepare an ‘initial charge brief’ for review by the DPP. It should contain:
- a summary of the alleged indictable offending and available evidence
 - a draft charge sheet.
- 8.68 The DPP should be required to review initial charge briefs and provide instructions to the informant as to the suitability of the proposed charges according to the evidence presented.
- 8.69 The DPP’s instructions should be binding on the informant. This would entrench the distinction between the role of investigative agencies to investigate crime and the DPP to prosecute it.
- 8.70 This distinction enhances the independence and impartiality of prosecution decision making. It recognises that the police’s current role in prosecuting indictable matters (along with summary offences) in the Magistrates’ Court is a historical legacy, is inefficient and may lower justice standards because:
- prosecuting indictable crime is not a ‘core function’ of investigating agencies
 - investigating agency personnel need not be legally qualified.⁷⁰

69 Consultation 33 (Director of Public Prosecutions (New South Wales)).

70 Chris Corns, ‘Police Prosecutions in Australia and New Zealand: Some Comparisons’ (2000) 19(2) *University of Tasmania Law Review* 280, 296.

Recommendations

- 21 In cases involving a suspected indictable offence that has been the subject of an ongoing investigation prior to arrest, the investigating agency should prepare an 'initial charge brief'. This should be provided to the Director of Public Prosecutions before any charge sheet is filed.
- 22 The Director of Public Prosecutions should review any 'initial charge brief' received and provide charge instructions to the informant. Charge instructions should be binding on the informant.

Improve disclosure and early engagement

- 8.71 Victoria Legal Aid argued:
- the most effective way to ensure that charges are amended at the earliest possible stage in a case is to ensure that the available evidence has been properly disclosed, and the parties have been properly funded and incentivised to consider the evidence at the earliest stages in proceedings.⁷¹
- 8.72 Recommendations to ensure full and early disclosure are discussed in detail in Chapter 9, and recommendations to support early involvement of the DPP and experienced practitioners are set out in Chapter 7.

Codify the DPP's power to withdraw charges

- 8.73 There may be a need to withdraw, add or amend charges during the course of a case. The CPA does not specifically allow the DPP to withdraw charges.⁷² According to the DPP:
- There are differences of opinion as to whether the prosecution gives notice of its decision to withdraw charges to a magistrate or applies to a magistrate to make the decision.⁷³
- 8.74 Given the differences of opinion cited by the DPP, the Commission recommends that the CPA should be amended to explicitly set out the power of the DPP to decide to withdraw charges. This power should be subject to the Court's inherent power to avoid an abuse of process.

Recommendation

- 23 The *Criminal Procedure Act 2009* (Vic) should be amended to give the Director of Public Prosecutions the power to withdraw, amend or file charges in the Magistrates' and Children's Courts.

71 Submission 13 (Victoria Legal Aid).

72 Currently the Magistrates' Court can order that a charge sheet be amended in any manner that the court thinks necessary, unless the required amendment cannot be made without injustice to the accused: *Criminal Procedure Act 2009* (Vic) s 8(1). The DPP says that recent Court of Appeal obiter has called into question its power to withdraw charges and give notice of its decision to the court: Submission 4 (Director of Public Prosecutions).

73 Submission 4 (Director of Public Prosecutions).

Consulting victims about charging decisions

- 8.75 Although the DPP’s decision about what charges should be filed on indictment should ultimately be made independently,⁷⁴ the DPP is required to consult with victims and consider their views regarding certain charging decisions. The *Victims Charter Act 2006* (Vic) requires the DPP to seek victims’ views before deciding to:
- substantially modify charges
 - discontinue a prosecution
 - accept a plea of guilty to a lesser charge.⁷⁵
- 8.76 If a decision is made on these issues, the DPP must inform victims and provide reasons as soon as reasonably practicable.⁷⁶
- 8.77 Such consultations recognise that victims have an interest in the decision, and ensure victims are treated with respect.⁷⁷ This can result in victims feeling fairly treated and able to accept the outcome of a prosecution.⁷⁸ There is some research to suggest that victims who perceive procedures to be fair suffer less symptoms of trauma than those who felt they were treated unfairly.⁷⁹
- 8.78 Citing the experience of its clients,⁸⁰ knowmore suggested the quality of information provided to victims and their ability to understand and engage meaningfully in the consultation process has been inadequate.⁸¹ Amendments to the Victims Charter Act in 2018 requiring greater consultation, and initiatives by the DPP to strengthen communication with victims, should address these concerns.
- 8.79 In 2018 the DPP adopted a ‘Discontinuance Review Framework’ that sets out a detailed procedure for obtaining victims’ views about discontinuing a prosecution. It also requires prosecutors to inform victims of a decision to discontinue before the decision is announced in court.⁸²
- 8.80 Also in 2018 the DPP commissioned the Centre for Innovative Justice (CIJ) to conduct research into victims’ experience of their consultations with OPP lawyers about resolution decisions. The research found that while OPP lawyers can and do consult effectively with victims about resolution decisions, there is room for improvement.⁸³ The CIJ recommended that:
- the OPP develop a best practice guide for communicating with and consulting victims. It proposed a guide to support OPP lawyers to build a relationship of trust with victims; communicate effectively; manage victims’ expectations and any misunderstandings; and consult about case resolution proposals. It said the guide should be provided to all lawyers and Witness Assistance Service staff.
 - the OPP liaise with Victoria Police to identify strategies to support police officers to communicate effectively with victims about prosecution processes and decisions, recognising that police interactions with victims often lead to victims having unrealistic expectations of the prosecution process.

74 The Director’s policy explains that ‘Prosecutors represent the DPP, not the government, the police, the victim or any other person’: Director of Public Prosecutions, Office of Public Prosecutions Victoria, *Policy of the Director of Public Prosecutions for Victoria* (17 December 2019) 6 [14].

75 *Victims Charter Act 2006* (Vic) s 9B.

76 *Ibid* ss 9(c), 9C.

77 Centre for Innovative Justice, *Communicating with Victims about Resolution Decisions: A Study of Victims’ Experiences and Communication Needs* (Report, April 2019) 20.

78 *Ibid* 20–21.

79 Jo-Anne Wemmers, ‘Victims’ Experiences in the Criminal Justice System and Their Recovery from Crime’ (2013) 19(3) *International Review of Victimology* 221.

80 As well as the experience of victims reported in: Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (Report, August 2017) pts III–VI, 346–347.

81 Submission 7 (knowmore).

82 Director of Public Prosecutions, Office of Public Prosecutions Victoria, *Discontinuance Review Framework* (Guide, 26 March 2019) <<http://www.opp.vic.gov.au/Resources/Discontinuance-Review-Framework>>.

83 Centre for Innovative Justice, RMIT University, *Communicating with Victims about Resolution Decisions: A Study of Victims’ Experiences and Communication Needs* (Report, April 2019) 8.

- the OPP liaise with court representatives to highlight the value of providing sufficient time to consult with victims about proposals for resolution.⁸⁴
- 8.81 The OPP told the Commission that it is in the process of implementing the recommendations of the CIJ report, including training staff in line with the best practice guide.⁸⁵ It reported that multi-disciplinary teams have been established, involving trial lawyers and social workers from the Victims and Witness Assistance Service, who together develop and implement victim engagement plans for all indictable prosecutions.⁸⁶
- 8.82 If a victim has a complaint regarding the prosecution's compliance with the Victims Charter Act, they can address them to the OPP and if they are dissatisfied with the response they may make a complaint to the Victims of Crime Commissioner.⁸⁷

84 The CIJ said this was necessary because the OPP is sometimes pressured to make a decision quickly when pleas are received at the last minute: Centre for Innovative Justice, *Communicating with Victims about Resolution Decisions: A Study of Victims, Experiences and Communication Needs* (Report, April 2019) 15.

85 Letter from Office of Public Prosecutions to Victorian Law Reform Commission, 19 December 2019.

86 Ibid.

87 *Victims and Other Legislation Amendment Act 2018* (Vic) s 20 inserting new Division 3A to Part 2 of the *Victims of Crime Commissioner Act 2015* (Vic).

Disclosure

- 94** Introduction
- 95** Current disclosure regime
- 101** Problems with disclosure
- 102** Commission's conclusions: improving disclosure

9. Disclosure

Introduction

- 9.1 Fair trials, and fairness in the conduct of pre-trial negotiations, require early and adequate disclosure. This ensures that the accused understands the evidentiary basis for the charge and is able to prepare a defence. Inadequate disclosure can be ‘a potent source of injustice’.¹ The *Charter of Human Rights and Responsibilities Act 2006* (Vic) recognises that a person charged with a criminal offence is entitled to be ‘informed promptly and in detail of the nature and reason for the charge’.²
- 9.2 Disclosure helps to redress the imbalance that would otherwise characterise an adversarial system in which investigators and prosecution have the backing of the state. As Justice Kevin Bell points out, the prosecution usually ‘enters a criminal trial with two advantages: having superior resources and having conducted the investigation that led to the charges being brought’.³ Requiring the prosecution to disclose all relevant material to the accused, including material that may undermine the prosecution case,⁴ goes some way to achieving ‘equality of arms’ between the parties, and thus a fair trial.⁵
- 9.3 Aside from its importance for fair trial rights, disclosure can facilitate early resolution and early identification of the issues in dispute. Victoria Legal Aid told the Commission it is of ‘critical’ importance that:
- the case against the accused be adequately disclosed [early in the pre-trial stage of proceedings]. This ensures that the accused and their legal representative has sufficient information to enable them to enter into meaningful negotiations and potentially enter an early guilty plea.⁶
- 9.4 This chapter describes Victoria’s current disclosure regime, including the prosecution’s general duty of disclosure at common law and the distinct disclosure obligations imposed by the *Criminal Procedure Act 2009* (Vic) (CPA) on the informant and the prosecution. The chapter outlines current approaches in New South Wales and the United Kingdom, where reforms have been introduced to improve disclosure. It discusses the problem of inadequate disclosure in Victoria and concludes by considering ways to improve disclosure.

1 *R v Ward* [1993] 2 All ER 577, 599.

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

3 *Ragg v Magistrates’ Court of Victoria* [2008] VSC 1 [50], (2008) 18 VR 300.

4 *BA v Attorney-General* [2017] VSC 259 [64], (2017) 319 FLR 329.

5 *Ragg v Magistrates’ Court of Victoria* [2008] VSC 1 [45]–[62].

6 Submission 13 (Victoria Legal Aid).

Current disclosure regime

Disclosure at common law

9.5 In *R v Farquharson*, the Victorian Court of Appeal said:

It is axiomatic that there must be full disclosure in criminal trials. The prosecution has a duty to disclose *all relevant material*. A failure of proper disclosure can result in a miscarriage of justice.⁷

9.6 The scope of the duty to disclose extends beyond material that the prosecution intends to rely on for its own case. In *Ragg v Magistrates' Court of Victoria*, Justice Bell set out an extensive list of material that is disclosable at common law, including material in the possession of or known to the prosecution that may:

- undermine the prosecution case
- assist the defence case
- exculpate the accused
- affect the credit of prosecution witnesses.⁸

Additional disclosable material includes:

- statements of material witnesses whom the prosecution does *not* intend to call
- 'documents, photographs and other real evidence, including scientific analysis'.⁹

9.7 While emphasising the breadth of the prosecution's disclosure obligations, Justice Bell noted that:

[they do] *not* require the disclosure of material that might undermine the defence case, such as matters affecting the credibility of defence witnesses: the defence is responsible for making its own inquiries in this regard.¹⁰

9.8 The prosecution's duty of disclosure extends beyond material in its possession or that is known to it. The duty encompasses an obligation to *seek out* material likely to be relevant, and therefore disclosable. In *Anile v The Queen*, the Victorian Court of Appeal noted that:

the rule requiring disclosure applies in relation to material both in the possession of the prosecution, and material which it should obtain. In other words, the obligation to disclose includes, in an appropriate case, an obligation to make enquiries.¹¹

9.9 When considering whether non-disclosure has infringed on an accused's right to a fair trial, it is immaterial whether the failure to disclose material is attributable to the informant or the prosecution. This was confirmed in *Farquharson*.¹² One of the grounds of appeal in that case was the informant's failure to disclose, to *either* the prosecutor or the accused, pending criminal charges against the prosecution's key witness. The Court accepted the Director of Public Prosecutions' concession that 'there is no distinction for disclosure purposes to be drawn between the prosecution ... and the police informant'.¹³

7 *R v Farquharson* [2009] VSCA 307 [210], (2009) 26 VR 410, emphasis added. See also *Metro Trains Melbourne Pty Ltd v Paciocco* [2017] VSC 778 [57].

8 *Ragg v Magistrates' Court of Victoria* [2008] VSC 1 [73], (2008) 18 VR 300 cited in *BA v Attorney-General* [2017] VSC 259, 266.

9 *Ragg v Magistrates' Court of Victoria* [2008] VSC 1 [73], cited in *BA v Attorney-General* [2017] VSC 259, 266.

10 *Ibid*, emphasis added.

11 *Anile v The Queen* [2018] VSCA 235 [130], citing *AJ v The Queen* [2011] VSCA 215, (2011) 32 VR 614, 620 [22].

12 *R v Farquharson* [2009] VSCA 307, (2009) 26 VR 410. See also *Cannon v Tahche* [2002] VSCA 84, (2002) 5 VR 317, 339–41 [56]–[60] and *Mallard v The Queen* [2005] HCA 68, (2005) 224 CLR 125, 132–3 [16].

13 *R v Farquharson* [2009] VSCA 307 [212].

- 9.10 The *Policy of the Director for Public Prosecutions for Victoria (Director's Policy)* guides disclosure by the Director of Public Prosecutions (DPP). Based on the test set out in *R v Spiteri*¹⁴ and adopted by the Supreme Court of Victoria in *Farquharson*,¹⁵ the *Director's Policy* requires prosecutors to disclose to the accused 'any material which is known to them which, on their sensible appraisal:
- is relevant or possibly relevant to an issue in the case; or
 - raises or possibly raises a new issue that is not apparent from the evidence the prosecution proposes to use; or
 - holds out a real as opposed to fanciful prospect of providing a line of inquiry which goes to [the] above.'¹⁶
- 9.11 Also mirroring the position at common law,¹⁷ the *Director's Policy* notes that the prosecution's duty of disclosure does not extend to disclosing material:
- 'relevant only to the credibility of the defence (as distinct from prosecution) witnesses
 - relevant only to the credibility of the accused
 - relevant only because it might deter an accused from giving false evidence or raising an issue of fact which might be shown to be false
 - for the purposes of preventing an accused from creating a trap for themselves, if at the time the prosecution became aware of the material it was not a relevant issue at trial'.¹⁸
- 9.12 Nor are prosecutors required by the *Director's Policy* to disclose material that is subject to a claim of public interest immunity or legal professional privilege, or if there is a statutory basis for not disclosing the material.¹⁹ These exceptions are discussed further below.

Statutory disclosure requirements

- 9.13 Part 4.4 of the CPA outlines how the prosecution case is to be disclosed during committal proceedings. Part 5.5 includes further provisions relating to disclosure after an accused is committed for trial or a direct indictment is filed.

The informant's statutory disclosure obligations

- 9.14 Unless the accused consents to service of a plea brief,²⁰ the informant must prepare a hand-up brief containing the evidence in the case.²¹ The hand-up brief must be served on the accused,²² filed with the court, and forwarded to the DPP.²³
- 9.15 The brief must include *both*:
- copies of material on which the prosecution intends to rely in the committal proceeding
 - copies or details of other material in the possession of the prosecution that is relevant to the alleged offending but which the prosecution does not intend to tender at the committal hearing, or on which the prosecution does not intend to rely.²⁴

14 *R v Spiteri* [2004] 61 NSWCCA 321, (2004) 61 NSWLR 369.

15 *R v Farquharson* [2009] VSCA 307 [213], cited in *Gild v The Queen* [2018] VSCA 317 [49].

16 Director of Public Prosecutions, Office of Public Prosecutions Victoria, *Policy of the Director of Public Prosecutions for Victoria* (17 December 2019) 6 [15] <<http://www.opp.vic.gov.au/Resources/Policies>>.

17 *R v Farquharson* [2009] VSCA 307 [214], citing *R v Spiteri* [2004] 61 NSWCCA 321.

18 Director of Public Prosecutions, Office of Public Prosecutions Victoria, *Policy of the Director of Public Prosecutions for Victoria* (17 December 2019) 6 [16] <<http://www.opp.vic.gov.au/Resources/Policies>>.

19 The issue of how and when objections may be made to disclosure on public interest immunity or other grounds is discussed below. [insert paragraph cross-reference] Director of Public Prosecutions, Office of Public Prosecutions Victoria, *Policy of the Director of Public Prosecutions for Victoria* (17 December 2019) 6 [15] <<http://www.opp.vic.gov.au/Resources/Policies>>.

20 *Criminal Procedure Act 2009* (Vic) s 116.

21 *Ibid* ss 107, 110.

22 *Ibid* ss 107, 108.

23 *Ibid* s 109. This requirement only applies if the DPP is conducting the committal proceeding.

24 *Ibid* s 110. See Chapter 2 for the requirements of what must be included in a hand-up brief.

- 9.16 The informant's disclosure obligations are continuing.²⁵ If, after service of the hand-up brief, the informant obtains or becomes aware of material that should have been included or listed in the hand-up brief, the informant must serve copies of this material on the accused as soon as practicable.²⁶ Copies must also be filed with the court and forwarded to the DPP.²⁷
- 9.17 Through the case direction notice, which must be filed jointly by the parties before the committal mention hearing,²⁸ the accused may request:
- the production of material that was listed in the hand-up brief²⁹
 - copies of material *not* included in the hand-up brief but that the accused considers ought to have been included.³⁰
- 9.18 The informant may object to the production of material requested by the accused on any ground:
- referred to in section 45 of the CPA, which covers material the informant considers would, or would be reasonably likely to:
 - prejudice the investigation of a contravention or possible contravention of the law or prejudice the enforcement or proper administration of the law in a particular instance
 - prejudice the fair hearing of the charge against a person or the impartial adjudication of a particular case
 - disclose, or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of the law
 - disclose policing methods in a way likely to prejudice the effectiveness of those methods
 - endanger the lives or physical safety of people engaged in or connected with law enforcement, including those who have provided confidential information
 - endanger the life or physical safety of a person or a family member in cases involving family violence
 - result in the disclosure of child abuse material to the accused personally³¹
 - referred to in section 114 of the CPA, which provides that the informant must not, with limited exceptions, disclose in materials provided to the accused the address or telephone number of any person.³²
- 9.19 In addition, the informant may claim public interest immunity over certain material. The informant may withhold material on the basis of public interest immunity if the material relates to 'matters of state' and the court determines that the public interest in preserving the material's secrecy or confidentiality outweighs the public interest in disclosing it.³³ In criminal cases, public interest immunity is most commonly claimed in respect of material that may identify police informers or policing methods.

25 Ibid s 111.

26 Ibid s 111(2). This requirement only applies if the DPP is conducting the committal proceeding.

27 Ibid s 111(2).

28 Ibid s 118(1).

29 Ibid s 119(e)(i).

30 Ibid s 119(e)(ii).

31 Ibid s 122(2); *Criminal Procedure Act 2009* (Vic) s 45(1).

32 Ibid s 122(2); s 114.

33 *Evidence Act 2008* (Vic) ss 130(1), 131A.

- 9.20 If the accused seeks the production of material and the informant objects to its production, the Magistrates' Court may hear and determine the objection at the committal mention.³⁴

The prosecution's statutory disclosure obligations

- 9.21 Section 185 of the CPA places a continuing obligation of disclosure on the prosecution commencing after an accused is committed for trial or a direct indictment is filed.³⁵ The prosecution must serve on the accused copies of (or provide a list of) any material that comes into its possession that would have been required to be included in the hand-up brief.³⁶
- 9.22 The prosecution is not, however, required to disclose material that it is required or permitted to withhold under any statute or rule of law.³⁷ This captures cases in which the prosecution may object to producing material on the basis of public interest immunity or on any of the grounds set out in sections 45 and 114 of the CPA and discussed earlier in relation to the informant's statutory disclosure duties.
- 9.23 The CPA expressly states that nothing it contains 'derogates from a duty otherwise imposed on the prosecution to disclose to the accused material relevant to the charge.'³⁸ Thus the prosecution's statutory disclosure obligations co-exist with its disclosure obligations at common law.

Approaches to disclosure in other jurisdictions

New South Wales

- 9.24 In New South Wales, the prosecution is responsible for serving the brief of evidence on the accused.³⁹ Informants prepare the brief and since 2001 have had a statutory duty of disclosure to the New South Wales DPP.⁴⁰ The *Director of Public Prosecutions Act 1986* (NSW) imposes a duty on law enforcement officers investigating alleged offences:
- to disclose to the Director 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.⁴¹
- 9.25 The law enforcement officer must complete and sign a disclosure certificate acknowledging:
- the officer's duty to disclose all relevant material to the DPP, and explaining that the officer understands the meaning of 'relevant material' to include:
 - 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*.
 - that the duty to disclose continues until the DPP decides not to prosecute the accused for the alleged offence, the accused is found guilty or acquitted, or the prosecution is terminated
 - that the duty to disclose is subject to claims of privilege, public interest immunity, statutory immunity, and statutory publication restrictions.⁴²

34 *Criminal Procedure Act 2009* (Vic) s 125(1)(e).

35 *Ibid* s 185.

36 *Ibid* s 185.

37 *Ibid* s 416(2).

38 *Ibid* s 416(1).

39 *Criminal Procedure Act 1986* (NSW) s 61.

40 *Director of Public Prosecutions Act 1986* (NSW) s 15A(1); in effect since 19 November 2001.

41 *Ibid* s15A(1A). The duty only arises if the DPP is exercising a prosecutorial function, which may include providing advice to an informant about commencing criminal proceedings.

42 *Director of Public Prosecutions Regulation 2015* [NSW] sch 1, emphasis added.

- 9.26 The disclosure certificate also includes a statement that the officer certifies the truth of information provided in attached schedules.⁴³ These schedules acknowledge the existence of, and describe, relevant material not contained in the brief of evidence that:
- is the subject of a claim of privilege, public interest immunity or statutory immunity
 - is the subject of a statutory publication restriction and can be disclosed without contravening the restriction
 - is not the subject of a claim of privilege or immunity or a statutory publication restriction.⁴⁴
- 9.27 Where relevant material is the subject of a privilege, public interest immunity or statutory immunity, the officer is required to:
- disclose to the DPP ‘the existence and nature of all such material’
 - retain the material for as long as the officer’s duty to disclose exists
 - provide the material to the DPP on request.⁴⁵
- 9.28 The disclosure certificate must also be signed by the law enforcement officer’s superior officer. The merits of disclosure certificates are discussed below.

United Kingdom

- 9.29 In the United Kingdom, investigating agencies and their officers have duties of disclosure to the Crown Prosecution Service (CPS), which is responsible for disclosing material to the accused.⁴⁶ The investigating agencies and the CPS are expected to work collaboratively to ensure full disclosure to the accused⁴⁷ and to engage with disclosure issues from an early stage in proceedings, especially in large or complicated cases.⁴⁸
- 9.30 Material is disclosable to the accused, subject to public interest considerations, if:
- it is relevant
 - it has not previously been disclosed
 - it ‘might reasonably be considered capable of undermining the case for the prosecution ... or of assisting the case for the accused.’⁴⁹
- 9.31 Material is relevant if it appears to have ‘some bearing on [an] offence under investigation or [a] person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case’.⁵⁰
- 9.32 Dedicated police disclosure officers are appointed in all criminal investigations.⁵¹ In order to identify material that may be disclosable, they examine or listen to all relevant material retained by the investigator that does not form part of the prosecution case.⁵²

43 Ibid sch 1.

44 Ibid.

45 Ibid. The disclosure certificate also includes an acknowledgement that if the officer objects to the disclosure of material that is subject to a claim of privilege, public interest immunity or statutory immunity, the officer ‘can request a conference with the responsible solicitor in the Office of the Director of Public Prosecutions to discuss reasons for this.’

46 The duties are set out in the *Criminal Procedure and Investigations Act 1996* (UK) and the Ministry of Justice (UK), *Criminal Procedure and Investigations Act 1996 (section 23(1))* (Code of Practice, March 2015). The application of the Code is limited to England and Wales: Ministry of Justice (UK), *Criminal Procedure and Investigations Act 1996 (section 23(1))* (Code of Practice, March 2015) [1.4]. In addition to their statutory disclosure obligations, investigators have common law disclosure obligations to disclose at an early stage material that ‘would assist the accused in the preparation of the defence case, including the making of a bail application’: Crown Prosecution Service (England and Wales), *Disclosure Manual* (Report, 14 December 2018) 9. See also *R v DPP ex parte Lee* [1999] 2 All ER 737.

47 The prosecution team, which includes investigators and the CPS, should ‘have at an early stage an agreed strategy and plan, with sufficient resources attached, for completing the disclosure exercise.’ Crown Prosecution Service (England and Wales), *Disclosure Manual* (Report, 14 December 2018) 22. If in doubt about what material to disclose to the prosecution, the officer responsible for disclosure should liaise with the prosecutor: Crown Prosecution Service (England and Wales), *Disclosure Manual* (Report, 14 December 2018) 27.

48 Crown Prosecution Service (England and Wales), *Disclosure Manual* (Report, 14 December 2018) 29.

49 *Criminal Procedure and Investigations Act 1996 (UK)* s 3(1)(a); Ministry of Justice (UK), Crown Prosecution Service (England and Wales), *Disclosure Manual* (Report, 14 December 2018) 5.

50 Ministry of Justice (UK), *Criminal Procedure and Investigations Act 1996 (section 23(1))* (Code of Practice, March 2015) [2.1].

51 The disclosure officer need not be a sworn police officer, but may be a ‘police support employee’: Crown Prosecution Service (England and Wales), *Disclosure Manual* (Report, 14 December 2018) 11–13. Investigations conducted by agencies other than the police should follow the same disclosure procedures: Crown Prosecution Service (England and Wales), *Disclosure Manual* (Report, 14 December 2018), 4–5.

52 Director of Public Prosecutions, Crown Prosecution Service (England and Wales), *Disclosure Manual* (Report, 14 December 2018) 12. The officer in charge of the investigation is responsible for ensuring that all relevant material is revealed to the disclosure officer, except in cases of highly sensitive material. The existence of this material should be revealed directly to the prosecutor: Director of Public Prosecutions, Crown Prosecution Service (England and Wales), *Disclosure Manual* (Report, 14 December 2018), 29.

- They prepare schedules of materials that are potentially disclosable for provision to the prosecutor.⁵³ They must certify to the prosecutor that the existence of all relevant material retained in the case has been revealed to the prosecutor.⁵⁴
- 9.33 The prosecutor must review the schedules and decide what material is disclosable and must be provided to the accused.⁵⁵ The schedules themselves are also provided to the accused, with the exception of schedules of material subject to public interest immunity.⁵⁶ If the prosecutor believes it is not in the public interest to disclose the material, the prosecutor must either withdraw the prosecution or apply to the court for a ruling as to whether the public interest requires disclosure.⁵⁷
- 9.34 If the accused believes that the prosecution has failed to disclose material that should have been disclosed, the accused may apply to the court for a disclosure order.⁵⁸
- 9.35 The investigating agency's disclosure duties to the prosecution⁵⁹ and the prosecution's disclosure duties to the accused continue at least until the accused is acquitted or convicted or the prosecutor decides not to proceed with the case.⁶⁰ Where the accused is convicted and a custodial sentence is imposed, relevant material must be retained until after the convicted person has been released from custody.⁶¹ If an appeal against conviction is in progress when the person is released from custody,⁶² all material that may be relevant must be retained until the appeal is determined.⁶³
- 9.36 Disclosure failures in the United Kingdom have been a cause of concern and the subject of public inquiries since at least 2011. The House of Commons Justice Committee's report, *Disclosure of Evidence in Criminal Cases*, lists 'six reports in as many years that have highlighted issues and made recommendations' for improved disclosure.⁶⁴ The Justice Committee's consideration of the issue was prompted by a series of cases in 2017 and 2018 that collapsed or had guilty verdicts overturned on appeal because of errors in the disclosure process.⁶⁵
- 9.37 After reviewing the United Kingdom's disclosure regime, the Justice Committee concluded that the legislative framework and basic principles governing disclosure were adequate but that these principles were not applied consistently by police officers and prosecutors. The Committee attributed the failures to:
- a culture within both police and prosecution that views disclosure as 'an administrative add on' rather than 'a core justice duty'
 - inadequate skills and technology to review the large volumes of digital material that are now routinely collected by the police

53 Separate schedules are prepared for material that: could undermine the case for the prosecution or assist the case for the accused; is non-sensitive and which the prosecution does not intend to use; is sensitive (meaning that it may be subject to public interest immunity) and which the prosecution does not intend to use: Director of Public Prosecutions, Crown Prosecution Service (England and Wales), *Disclosure Manual* (Report, 14 December 2018). As noted above (footnote 52), in exceptional circumstances, sensitive material need not be listed in a schedule. Instead, its existence may be revealed separately to the prosecution by the investigator who knows the details of the material.

54 Crown Prosecution Service (England and Wales), *Disclosure Manual* (Report, 14 December 2018) 12. A series of certifications are required to cover the fact the duty of disclosure is continuing: Crown Prosecution Service (England and Wales), *Disclosure Manual* (Report, 14 December 2018) 29.

55 *Criminal Procedure and Investigations Act 1996* (UK) ss 3, 7A. The material may be provided in the form of copies or made available for inspection.

56 Crown Prosecution Service (England and Wales), *Disclosure Manual* (Report, 14 December 2018) 24.

57 *Ibid* 29. *Criminal Procedure and Investigations Act 1996* (UK) s 6 'Material must not be disclosed to...the extent that the court, on an application by the prosecutor, concludes that it is not in the public interest to disclose it and orders accordingly.'

58 *Criminal Procedure and Investigations Act 1996* (UK) s 8. The accused may only do so after the accused has provided a 'defence statement', setting out in general terms the nature of the accused's defence: see *Criminal Procedure and Investigations Act 1996* (UK) s 5).

59 Director of Public Prosecutions, Crown Prosecution Service (England and Wales), *Disclosure Manual* (Report, 14 December 2018) 29, 30.

60 *Criminal Procedure and Investigations Act 1996* (UK) s 7A; Crown Prosecution Service (England and Wales), *Disclosure Manual* (Report, 14 December 2018) 5.

61 Ministry of Justice (UK), *Criminal Procedure and Investigations Act 1996 (section 23(1))* (Code of Practice, March 2015) [5.9]. In other instances, relevant material must be retained at least until six months from the date of conviction: *ibid*.

62 Or at the end of the six-month period after conviction if a custodial order has not been imposed.

63 Ministry of Justice (UK), *Criminal Procedure and Investigations Act 1996 (section 23(1))* (Code of Practice, March 2015) [5.10].

64 House of Commons Justice Committee, Parliament of the United Kingdom, *Disclosure of Evidence in Criminal Cases* (Final Report, 17 July 2018)¹¹ [22].

65 *Ibid* 4 [2].

- inadequate guidelines for handling sensitive material⁶⁶
- inadequate funding for the police, Crown Prosecution Service, criminal defence and legal aid.⁶⁷

Problems with disclosure

9.38 Failure to provide the accused with early and adequate disclosure is a widely acknowledged and persistent issue in Victoria, but the problem is not unique to this state—ensuring adequate disclosure is a challenge in most common law jurisdictions. In Victoria, the Magistrates’ Court notes that:

Disclosure is always an issue, especially in complex matters ... Disclosure issues in the higher [courts] are frequently commented upon as an expensive cause of delay. Experience in other jurisdictions ... shows that no matter the legislative requirements for disclosure, the lack of it is a major cause of trial delay and length.⁶⁸

9.39 The DPP believes there are three main reasons why adequate and timely disclosure is not consistently provided in Victoria:

- police sometimes misunderstand their disclosure obligations
- police often wait to see whether the defence requests disclosure of specific items rather than providing appropriate disclosure up-front
- police tend to merge the concepts of disclosure and public interest immunity.⁶⁹

9.40 The DPP’s views were echoed by others, who attributed inadequate disclosure to:

- lack of clarity among investigating agencies, particularly police informants, about their disclosure obligations to the accused and the DPP, especially about what material is disclosable⁷⁰
- failure by investigating agencies, particularly Victoria Police, to prioritise their disclosure obligations to the accused and the DPP, and to devise appropriate internal systems to facilitate adequate and early disclosure⁷¹
- delay in seeking and obtaining forensic reports, particularly those provided by Victoria Police forensic services.⁷²

9.41 The Commission heard there is a tendency among police informants to define ‘relevant’ evidence narrowly, with reference primarily to evidence that corroborates the allegations.⁷³ The result is that exculpatory evidence is not routinely disclosed. The Law Institute of Victoria cited ‘numerous’ cases where cross-examination of a witness at a committal hearing revealed the witness had taken part in a photo-board identification process during which the witness failed to identify the accused, yet no reference to this was made in the hand-up brief.⁷⁴

66 Ibid 3 [9].

67 House of Commons Justice Committee, Parliament of the United Kingdom, *Disclosure of Evidence in Criminal Cases* (Final Report, 17 July 2018) 3, 12–17. The National Police Chiefs’ Council, College of Policing, and CPS have collaborated on a ‘National Disclosure Improvement Plan’ to, among other things: modernise the prosecution’s data management systems; review how sensitive material is handled, stored and disclosed; provide specialised disclosure training to investigators and disclosure officers; and update the disclosure training provided by the College of Policing: National Police Chiefs’ Council, College of Policing and Crown Prosecution Service (UK), *National Disclosure Improvement Plan* (Report, January 2018), National Police Chiefs’ Council, College of Policing and Crown Prosecution Service (UK), *National Disclosure Improvement Plan—Progress Update* (Report, Spring 2019); Crown Prosecution Service (England and Wales), ‘Joint National Disclosure Improvement Plan—June update’, *Publications* (Web Page, 2019) <<https://www.cps.gov.uk/publication/joint-national-disclosure-improvement-plan-june-update>>

68 Submission 14 (Magistrates’ Court of Victoria). The Magistrates’ Court refers specifically in this quote to other jurisdictions that ‘have abolished committals’. In the view of the Magistrates’ Court, this points to the need to retain the opportunity to cross-examine witnesses during committal hearings in Victoria. The Court says that cross-examination frequently alerts the court and the defence to material that has not been fully or adequately disclosed. This argument is addressed separately in Chapter 11.

69 Submission 4 (Director of Public Prosecutions (Victoria)).

70 Consultations 10 (Law Institute of Victoria), 19 (Victoria Police); Submissions 11 (Criminal Bar Association (Victoria)), 13 (Victoria Legal Aid), 24 (Law Institute of Victoria).

71 Consultations 10 (Law Institute of Victoria), 12 (Shepparton Magistrates’ Court); Submission 11 (Criminal Bar Association (Victoria)).

72 Consultation 1 (Victorian Aboriginal Legal Service); Submission 13 (Victoria Legal Aid).

73 Submissions 11 (Criminal Bar Association (Victoria)), 24 (Law Institute of Victoria).

74 Submission 24 (Law Institute of Victoria).

- 9.42 Another issue is apparent systemic failure by Victoria Police to ensure that the DPP and the accused are told about the existence of material that may be subject to statutory or public interest immunity claims. The Royal Commission into the Management of Police Informants is currently inquiring into matters relating to Victoria Police's use and management of human sources. One of its terms of reference is to consider the appropriateness of Victoria Police practices around the disclosure or non-disclosure to prosecuting authorities of the use of human sources.⁷⁵
- 9.43 Victoria Police acknowledged that inconsistent disclosure by police informants is an issue but told the Commission there is a need for 'improved transparency, predictability and guidance for investigators' regarding what materials should routinely be disclosed.⁷⁶ It pointed out that disclosure is an onerous task, particularly in complex cases and those involving extensive digital evidence. It stated that increased resources would allow it to implement better electronic document management systems, which would speed up the disclosure process.⁷⁷

Lack of clarity about objecting to disclosure

- 9.44 Section 110 of the CPA provides that copies of disclosable material must be provided in the hand-up brief. Section 110 does not, however, specify how material should be included or referred to where the informant objects to the production of that material.⁷⁸
- 9.45 The hand-up brief must be accompanied by a list of its contents, signed by the informant.⁷⁹ The prescribed form for the list of hand-up brief contents does not include any field for material that the informant objects to producing.⁸⁰
- 9.46 Section 110 also provides that a notice containing information about committal proceedings must be included in the hand-up brief. The prescribed notice is Magistrates' Court Form 29.⁸¹ Form 29 directs the parties to engage in discussions about the case before the committal mention hearing, and to prepare a case direction notice explaining the outcome of their discussions.⁸² Form 29 explains that during these discussions, the accused may notify the informant they wish to inspect items listed in the hand-up brief and the informant may object to this inspection.⁸³
- 9.47 In some cases, however, the accused may be unaware of the existence of material that the informant objects to producing, given it has not been included nor its existence mentioned in the hand-up brief. Currently there is no clear mechanism enabling notification by the informant in the hand-up brief of the existence of such material.

Commission's conclusions: improving disclosure

- 9.48 The statutory regime for disclosure in indictable stream matters in Victoria does not provide clear guidance for informants. It could be improved by clarifying:
- that the informant is required to disclose all relevant material, including exculpatory material or material that otherwise assists the case for the defence or undermines the case for the prosecution, and including material on which the prosecution does *not* intend to rely
 - the process by which an informant may object to disclosure on public interest immunity or other grounds, including those set out in section 45 of the CPA.

75 The Royal Commission's report will be delivered on 1 July 2020: *Royal Commission into the Management of Police Informants* (Web Page, 21 February 2020) <<https://www.rcmpi.vic.gov.au/>>.

76 Consultation 19 (Victoria Police).

77 Ibid.

78 Under section 122(2) of the *Criminal Procedure Act 2009* (Vic), the informant may object to the production of an item on any ground referred to in sections 45 or 114. The informant may also object to the production of material on the grounds of public interest immunity. *Magistrates' Court Criminal Procedure Rules 2019* r 57(2).

79 Ibid r 57(2) (Form 30).

80 Ibid r 57(1) (Form 29).

81 In accordance with sections 118 and 119 of the *Criminal Procedure Act 2009* (Vic).

82 The case direction notice includes a field allowing the parties to state that 'The accused seeks the production of an item or items listed in the hand-up brief and the informant objects to the production of the item or items'. The item or items must be listed and the grounds for objection provided.

- 9.49 The DPP should also provide greater assistance to informants in relation to the nature of their disclosure obligations. Practitioners in the Office of Public Prosecutions are legally trained and have expertise in this regard. While some informants have legal training, and all should receive training in relation to their disclosure obligations, their investigative role means they are less likely to focus on disclosure as a fundamental aspect of every prosecution and an overriding duty.
- 9.50 Although the problems with disclosure are attributed by stakeholders primarily to Victoria Police, the Commission's recommendations for strengthening disclosure obligations should apply to all informants, including those working for agencies such as WorkSafe and the Environmental Protection Authority. The potential consequences of disclosure failures by these agencies are as significant as in the case of Victoria Police.
- 9.51 Flowing from its earlier recommendation that the DPP should have prosecutorial responsibility for indictable stream matters from the filing hearing onwards, and should be actively involved in providing informants with guidance in relation to discharging their obligations during committal proceedings, the DPP should have formal responsibility for disclosure to the accused. The informant's disclosure obligations should be to the DPP rather than directly to the accused. Further detail is provided below.

Strengthen the prosecution's statutory disclosure obligations

- 9.52 The DPP should have formal prosecutorial responsibility for indictable stream matters from the filing hearing onwards. As well as advising on or reviewing charging decisions at an early stage, the DPP should assume responsibility for disclosure to the accused, and the informant's disclosure obligations should be to the DPP rather than directly to the accused.
- 9.53 While the informant will be obliged to prepare the brief of evidence, as is currently the case, it should be the DPP's responsibility to file and serve it. The informant will be able to seek advice from the DPP in relation to preparation of the brief and will be expected to communicate with the DPP about the progress of its preparation. The DPP should also be formally empowered, through amendments to the *Public Prosecutions Act 1994 (Vic)*, to make enquiries of the informant in relation to disclosure, and the informant should be required to respond to those enquiries. This means that the DPP should not require extensive additional time to review the brief, once it is complete, before filing it with the court and serving it on the accused.
- 9.54 Where material exists that the informant objects to producing on statutory or public interest immunity grounds, the DPP should be required to ensure the existence of the material is communicated to the accused via the hand-up brief.
- 9.55 The CPA should be amended to specify that the prosecution's disclosure obligations are continuing from the filing hearing until the death of the accused, regardless of the outcome of the prosecution and even in circumstances in which the prosecution is discontinued. This is necessary to capture situations in which relevant evidence comes to light after a prosecution has been finalised. This material may be significant for the accused even if the charges were withdrawn or there was a verdict of not guilty. The potential consequences of having been the subject of indictable charges include not being eligible for a Working with Children check, despite a finding of not guilty.⁸⁴
- 9.56 Assuming disclosure obligations at an earlier stage in proceedings will place a resource burden on the DPP. The DPP should be provided with adequate funding to ensure these recommendations are implemented effectively in a way that addresses the deficiencies with disclosure discussed earlier.

Recommendations

- 24 While the informant should be required to prepare the brief of evidence, the *Criminal Procedure Act 2009* (Vic) should be amended to require the Director of Public Prosecutions (DPP) to file and serve the brief and assume all obligations of disclosure to the accused currently imposed by the Act on the informant. The DPP should ensure the existence of material that the informant objects to producing is communicated to the accused.
- 25 The *Criminal Procedure Act 2009* (Vic) should be amended to specify that the Director of Public Prosecutions' disclosure obligations continue from the filing hearing until the death of the accused, regardless of the outcome of the prosecution.
- 26 The *Public Prosecutions Act 1994* (Vic) should be amended to empower the Director of Public Prosecutions to make enquiries of the informant in relation to disclosure, and to require the informant to respond to those enquiries.
- 27 Additional resources should be provided to the Office of Public Prosecutions to allow it to manage its increased disclosure obligations.

No change to the prosecution's common law disclosure obligations

- 9.57 The prosecution's disclosure obligations at common law exist alongside the informant's and the prosecution's distinct statutory disclosure obligations. The Commission recommends retaining explicit recognition that nothing in the CPA removes or reduces the duty of the prosecution to disclose to the accused material relevant to a charge.⁸⁵

Strengthen the informant's statutory disclosure obligations

- 9.58 There is a need to provide Victoria Police with greater clarity about the nature of an informant's disclosure obligations, the meaning of 'relevant' material, and how and when to object to the production of material on public interest or other grounds. There is also a need for cultural change within Victoria Police, so that the importance of early disclosure of all relevant materials, and the obligation to make enquiries about the existence of relevant materials, is recognised and becomes entrenched in the force's operating procedures.
- 9.59 Along with other investigative agencies, Victoria Police should establish internal procedures to ensure that informants are made aware of, or able to obtain information concerning, potentially disclosable material that exists or is known about within other parts of the agency. Informants should be obliged to retain potentially disclosable material for as long as their disclosure obligations continue, and systems should be established at investigating agencies to ensure potentially disclosable material is retained and not destroyed.
- 9.60 Early and active oversight by the DPP will assist informants to understand and meet their disclosure obligations. The informant should continue to have disclosure obligations in relation to all indictable stream matters under the CPA, but these should be to the prosecution rather than the accused and should be continuing from the filing hearing until the death of the accused.

- 9.61 The informant should remain responsible for preparation of the brief of evidence. The informant should liaise directly with the DPP about preparation of the brief, provide all brief materials to the DPP as soon as they are available, and should respond to the DPP's disclosure enquiries.

Recommendations

- 28 Part 4.4 of the *Criminal Procedure Act 2009* (Vic) should be amended to make it clear that the informant has a continuing obligation of disclosure to the Director of Public Prosecutions (DPP). This obligation commences at the filing hearing and includes preparation of the hand-up brief, which must be provided to the DPP before the date specified by the Magistrates' Court at the filing hearing for service of the hand-up brief on the accused.
- 29 The *Criminal Procedure Act 2009* (Vic) should be amended to specify that the informant's disclosure obligations continue from the filing hearing until the death of the accused, regardless of the outcome of the prosecution.
- 30 The *Criminal Procedure Act 2009* (Vic) should be amended to specify that informants have an obligation to retain potentially disclosable material for as long as their disclosure obligations continue.
- 31 Systems should be established at investigating agencies to ensure that:
- (a) informants are made aware of, or able to obtain information concerning, potentially disclosable material that exists or is known about within other parts of the agency
 - (b) potentially disclosable material is retained and not destroyed.

Require the informant to give disclosure evidence at the issues hearing

- 9.62 Unless the prosecution and defence agree otherwise, the informant should be required to appear at the issues hearing⁸⁶ and provide sworn evidence to the court that the informant has discharged their disclosure obligations. When setting the date for an issues hearing, the court should take into account the informant's availability. The defence may also seek leave to cross-examine the informant regarding their disclosure evidence. Any cross-examination should be narrow, targeted, and properly managed by the presiding magistrate.

Recommendation

- 32 The *Criminal Procedure Act 2009* (Vic) should be amended to require the informant, unless excused by the court, to appear at the issues hearing and provide evidence that:
- (a) all available relevant material has been disclosed to the Director of Public Prosecutions
 - (b) all reasonable enquiries have been made by the informant to determine if there is any additional relevant material in existence.

86

Or committal mention hearing if the Commission's recommendation to replace committal mention hearings and committal hearings with a single issues hearing is not implemented.

The process for objecting to disclosure

- 9.63 If the informant believes material should not be disclosed or produced because it is subject to a public interest immunity claim, or on the basis of one of the grounds set out in sections 45 and 119 of the CPA, the informant should be required to disclose in general terms the existence of the material to the DPP. The informant should not be obliged to describe the specific contents of the material. The informant should, however, explain the nature of the objection to production, including whether it is on the grounds of public interest immunity or with reference to section 45 if the objection is made under that section.
- 9.64 In the hand-up brief, the informant should note the existence of material in relation to which a statutory objection to production is made, and to the degree feasible, the grounds on which an objection is made.
- 9.65 The informant need not produce the material in relation to which the objection relates to the DPP or the accused unless directed by order of the court.
- 9.66 After service of the hand-up brief on the accused, if the accused seeks production of material that has been withheld, the informant should be responsible for making an application to the court for an order that the material does not need to be produced.
- 9.67 When considering an objection to production on the grounds of public interest immunity or any of the grounds set out in sections 45 or 119 of the CPA, the Magistrates' Court may choose to refer the matter to a higher court for determination of the objection if in its view it is more appropriate that the trial court makes the determination.

Recommendations

- 33 The *Criminal Procedure Act 2009 (Vic)* should be amended to provide that the informant's disclosure obligations to the Director of Public Prosecutions (DPP) apply regardless of claims of privilege, public interest immunity, or statutory immunity, but where such claims are made, the material that is the subject of these claims need not be produced to the DPP. The informant must indicate to the DPP the grounds on which the objection to production is made.
- 34 Section 110 of the *Criminal Procedure Act 2009 (Vic)* should be amended to require reference in the hand-up brief to the general existence of material that the informant objects to producing and the grounds for the objection.
- 35 The Magistrates' Court Rules 2019 should be amended to clarify that the list of contents that must accompany the hand-up brief and be signed by the informant (currently Magistrates' Court Form 30) includes a field noting the existence of material, if any, that the informant objects to producing.

Relevant material includes exculpatory material

- 9.68 In order to provide greater clarity to informants about the nature of their disclosure obligations, the CPA should be amended to explain that relevant material includes exculpatory material and that any such material must be included in the hand-up brief.

Recommendation

- 36 Section 110 of the *Criminal Procedure Act 2009 (Vic)* should be amended to include a section explaining that a hand-up brief must disclose all relevant material, including all information, documents or other things obtained during the investigation that are exculpatory or might reasonably be expected to:
- (a) undermine the case for the prosecution or
 - (b) assist the case for the accused.

Expand the indicative list in section 110 of materials that must be included in the hand-up brief

- 9.69 Magistrates' Court Practice Direction 3 of 2019 sets out certain procedural requirements relevant to section 123 matters, involving sexual offences where the complainant was a child or person with a cognitive impairment when proceedings commenced. The Practice Direction also sets out 'standard disclosure material' that the informant must serve on the accused and on the DPP at the time of service of the hand-up brief, in addition to the other material that section 110 directs must be included in the hand-up brief.
- 9.70 The standard disclosure material includes such things as copies of crime reports, attendance registers, police notes, diary and day-book entries, relevant INTERPOSE data entries and copies of relevant Victoria Police LEAP data-based entries.
- 9.71 Victoria Legal Aid suggests that as the Standard Disclosure Material is often requested 'as a matter of course' in all cases, not just section 123 cases, requiring that it be included in the hand-up brief would reduce the delay caused by the need to request it, which would 'facilitate[...] pre-hearing negotiations and early resolution'.⁸⁷
- 9.72 The Law Institute of Victoria suggests including Standard Disclosure Material in the hand-up brief requirements would 'improve consistency and reduce disclosure indiscretions and inordinate delay'.⁸⁸

Recommendation

- 37 Section 110 of the *Criminal Procedure Act 2009 (Vic)* should be amended to include, in addition to the other materials that a hand-up brief must contain, a list of the materials contained in the list of 'Standard Disclosure Material' currently set out in Magistrates' Court Practice Direction No 3 of 2019.

A disclosure certificate regime should not be introduced

- 9.73 Some stakeholders supported the introduction of a disclosure certificate requirement similar to that established under section 15A of New South Wales' *Director of Public Prosecutions Act 1986*.⁸⁹
- 9.74 The Law Institute of Victoria suggested that a disclosure certificate requirement would force the police, as the principal investigating agency and the agency in relation to which most disclosure issues arise, to focus on its disclosure obligations and to have systems in place to ensure these are met.⁹⁰
- 9.75 Victoria Legal Aid advocated for the introduction of a disclosure certificate requirement but suggested this would fall on the prosecution rather than the investigating agency. The Commission is of the view, however, that the DPP cannot be required to certify as to the adequacy of the investigating agency's disclosure.
- 9.76 The NSW Disclosure Certificate explains the meaning of 'relevant' material and includes an acknowledgement by the informant that they have an ongoing duty of disclosure. Introducing a similar certificate in Victoria would mean that the police's disclosure obligations are reiterated and the police are routinely reminded of these obligations.
- 9.77 On the other hand, inadequate disclosure by the police remains a problem in New South Wales, despite the disclosure certificate regime.⁹¹ Disclosure certificates are frequently signed despite disclosure not being complete.⁹² Given this is the case, introducing a disclosure certificate requirement may represent a costly reform in terms of the administrative burden on police, with little substantive benefit.
- 9.78 In light of the experience in New South Wales, a disclosure certificate regime should not be introduced in Victoria. A more proactive approach should be adopted to ensuring police informants, in particular, disclose all relevant material (or its existence, where there is an objection to production), to the prosecution. Requiring informants to give evidence on oath at an issues hearing that they have discharged their disclosure obligations, and providing the opportunity for the accused to cross-examine the informant regarding disclosure, will impose a stronger discipline on informants than a disclosure certificate.

89 Submissions 13 (Victoria Legal Aid), 20 (County Court of Victoria), 24 (Law Institute of Victoria).

90 Submission 24 (Law Institute of Victoria).

91 Consultations 33 (Director of Public Prosecutions (New South Wales)), 34 (Legal Aid New South Wales), 36 (Police Prosecutions Command New South Wales).

92 Consultations 33 (Director of Public Prosecutions (New South Wales)), 36 (Police Prosecutions Command New South Wales).

Forensic reports and delay

- 110** Introduction
- 110** Forensic services in Victoria
- 111** Timelines for forensic reports
- 112** Delay in the provision of forensic reports: stakeholder views
- 113** Commission's conclusions: better resourcing for forensic service providers

10. Forensic reports and delay

Introduction

- 10.1 The Commission was told frequently about difficulties obtaining timely forensic analysis.¹ This chapter examines the provision of forensic services in Victoria and associated delay, and how to address this. It concludes that funding for forensic service providers should be increased and conferencing between the parties and forensic experts should be encouraged. To the degree possible, the lower courts should ensure that the time frames set for service of forensic reports are realistic.

Forensic services in Victoria

- 10.2 Forensic science ‘is the application of science to assist in the judicial process’,² primarily through analysis of physical evidence. It includes a variety of disciplines such as medicine, toxicology, pathology, biology, chemistry, and engineering.³ The use of these disciplines for the purposes of forensic analysis is a highly specialised area requiring extensive training.⁴

Victoria Police Forensic Services Department

- 10.3 Most forensic services are provided by Victoria Police’s Forensic Services Department (FSD). FSD provides forensic services in a variety of areas relevant to indictable cases, including:
- biological analysis, such as DNA profiling; detection and identification of biological material including blood, semen, and hair; and bloodstain pattern analysis
 - ballistics
 - drug analysis
 - processing major crime scenes, which involves searching, collection of exhibits, and recording scenes using photography and video.⁵

1 See Submissions 11 (Criminal Bar Association (Victoria)), 13 (Victoria Legal Aid), 14 (Magistrates’ Court of Victoria), 19 (Victorian Aboriginal Legal Service), 20 (County Court of Victoria), 22 (Supreme Court of Victoria), 24 (Law Institute of Victoria); Consultations 1 (Victorian Aboriginal Legal Service), 8 (Victoria Legal Aid), 10 (Law Institute of Victoria), 13 (Goulburn Valley practitioners), 15 (Magistrates’ Court of Victoria), 16 (La Trobe Valley Practitioners), 23 (Children’s Court of Victoria), 30 (County Court of Victoria), 31 (Supreme Court of Victoria).

2 National Institute of Forensic Science, ‘What is Forensic Science?’ *Forensic Sciences* (Web Page) <<http://www.anzpa.org.au/forensic-science/forensic-sciences>>.

3 Consultations 17 (Victorian Institute of Forensic Medicine), 37 (Victoria Police Forensic Services Department); National Institute of Forensic Science, ‘What is Forensic Science?’ *Forensic Sciences* (Web Page) <<http://www.anzpa.org.au/forensic-science/forensic-sciences>>.

4 Consultations 17 (Victorian Institute of Forensic Medicine), 37 (Victoria Police Forensic Services Department).

5 Victoria Police, ‘Areas of Forensic Science’, *Forensic Services* (Web Page, 13 March 2019) <<https://www.police.vic.gov.au/forensic-services>>.

The Victorian Institute of Forensic Medicine

- 10.4 The Victorian Institute of Forensic Medicine (VIFM) is a statutory authority that primarily provides assistance to the Coroner⁶ but also provides forensic services in criminal cases. These include:
- forensic pathology, involving death-related investigations and preparation of autopsy reports⁷
 - forensic toxicology, involving analysis of drugs and poisons in biological tissues⁸
 - clinical forensic medicine, involving medical examinations of victims of crime and alleged perpetrators.⁹

Other providers

- 10.5 Victoria Police's E-Crime Squad conducts analysis of digital material. In Commonwealth cases, forensic analysis is generally conducted by Commonwealth agencies, such as the Australian Federal Police.¹⁰

Timelines for forensic reports

- 10.6 The time taken to produce a forensic report varies according to the disciplines involved, the forms of testing required, and the volume of material to be analysed.
- 10.7 FSD publishes the turnaround time for its reports¹¹ and the current backlogs within each discipline for the information of courts, investigators, prosecutors and defence practitioners.¹² FSD is engaged in a multi-year program to modernise its service delivery model,¹³ which it said has 'dramatically reduced turnaround times and minimised backlogs in several key areas'.¹⁴ Nevertheless, backlogs remain an issue.¹⁵
- 10.8 In some disciplines, such as DNA analysis, the turnaround time is relatively short (12.8 working days) and there is no reported backlog. In others, such as drug analysis, there is large backlog of cases (92 cases) with a longer turnaround time (four months).¹⁶
- 10.9 VIFM told the Commission that it is usually able to provide an autopsy report within 12 weeks of having a case referred to it.¹⁷ In some more straightforward matters the report may be completed in eight weeks but in more complex matters the turnaround time may be longer than 12 weeks.¹⁸
- 10.10 According to the Magistrates' Court, Victoria Police's E-Crime Squad takes 24 months to conduct standard e-crime analysis, or eight months where a matter is urgent.¹⁹
- 10.11 While the Commission does not have specific turnaround times for reports generated by Commonwealth agencies, representatives from the Commonwealth Director of Public Prosecutions said that in their experience, 'State-based forensic services have longer delays than Commonwealth agencies'.²⁰

6 *Victorian Institute of Forensic Medicine Act 1985* (Vic) s 66.

7 Consultation 17 (Victorian Institute of Forensic Medicine).

8 Victorian Institute of Forensic Medicine, 'Supporting Victoria Police', *Forensic Services* (Web Page) <<https://www.vifm.org/forensic-services/overview/victoria-police/>>.

9 *Ibid.*

10 Consultation 7 (Commonwealth Director of Public Prosecutions).

11 Turnaround time is the time taken to provide a report from the receipt of the case at FSD—not from the date of offence or date of arrest: Victoria Police Forensic Services Department, *Turnaround Times and Backlogs for Forensic Units* (Report, 1 October 2019) <<https://www.police.vic.gov.au/turn-around-times-and-backlogs>>.

12 *Ibid.*

13 Letter from Victoria Police Chief Commissioner Graham Ashton to Chair of the Commission, 28 December 2019.

14 Consultation 37 (Victoria Police Forensic Services Department).

15 Victoria Police Forensic Services Department, *Turnaround Times and Backlogs for Forensic Units* (Report, 1 October 2019) <<https://www.police.vic.gov.au/turn-around-times-and-backlogs>>.

16 *Ibid.*

17 Consultation 17 (Victorian Institute of Forensic Medicine).

18 *Ibid.*

19 Submission 14 (Magistrates' Court of Victoria).

20 Consultation 7 (Commonwealth Director of Public Prosecutions).

Delay in the provision of forensic reports: stakeholder views

- 10.12 The Supreme, County, Magistrates', and Children's Courts, Victoria Legal Aid, the Law Institute of Victoria, the Criminal Bar Association and the Victorian Aboriginal Legal Service, all described the time taken to prepare forensic reports as a major source of delay in pre-trial proceedings.²¹
- 10.13 The Magistrates' Court told the Commission:
Delay in drug and forensic analysis provided by ... FSD ... is the single greatest cause of delay in this jurisdiction.²²
- 10.14 The Victorian Aboriginal Legal Service attributed delay in provision of forensic and medical reports to an 'apparent under-resourcing' of VIFM and FSD.²³
- 10.15 Victoria Legal Aid said forensic analysis of IT evidence typically took 'a minimum 6-9 months to process'.²⁴ Victoria Legal Aid also explained that delay obtaining forensic evidence was often greater in regional cases.²⁵
- 10.16 CASA Forum viewed delay in conducting forensic medical examinations after alleged sexual assaults, and subsequent delays in the provision of forensic reports, as a serious problem warranting the provision of extra funding for VIFM.²⁶
- 10.17 VIFM told the Commission that it had a 'service level agreement' with Victoria Police and was contracted to attend to examine victims of alleged assault within a certain timeframe. It said it was meeting its performance indicators for timely completion of examinations, but pointed out that:
As Melbourne is getting bigger it is difficult and we cover the whole state—not just Melbourne—this does raise issues around rostering.²⁷
- 10.18 VIFM explained that it did its best to accommodate court deadlines for the provision of reports. It told the Commission that as long as police informants provided indicative timelines in advance, it met court deadlines '95 per cent of the time'.²⁸

Causes of delay

- 10.19 The variation in indicative timeframes for forensic reports relates in part to the complexity of forensic science disciplines, with some requiring much more time for analysis than others.
- 10.20 The Magistrates' Court of Victoria, Victoria Legal Aid, and the Victorian Aboriginal Legal Service all suggested that informants tended to delay requesting forensic reports. According to these stakeholders, informants wait to see if the defence will request a report rather than acting on their own initiative to obtain reports at an early stage.²⁹
- 10.21 Victoria Police acknowledged that delay has been a long-standing issue for FSD:
Historically, FSD has had testing backlogs and extended turn-around times that have impacted [its] ability to meet court dates.³⁰
- 10.22 FSD suggested its service modernisation project would help it to reduce delays and backlogs in the provision of reports.

21 See Submissions 11 (Criminal Bar Association (Victoria)), 13 (Victoria Legal Aid), 14 (Magistrates' Court of Victoria), 19 (Victorian Aboriginal Legal Service), 20 (County Court of Victoria), 22 (Supreme Court of Victoria), 24 (Law Institute of Victoria), Consultations 1 (Victorian Aboriginal Legal Service), 8 (Victoria Legal Aid), 10 (Law Institute of Victoria), 13 (Goulburn Valley practitioners), 15 (Magistrates' Court of Victoria), 16 (La Trobe Valley Practitioners), 23 (Children's Court of Victoria), 30 (County Court of Victoria), 31 (Supreme Court of Victoria).

22 Submission 14 (Magistrates' Court of Victoria).

23 Submission 19 (Victorian Aboriginal Legal Service).

24 Submission 13 (Victoria Legal Aid).

25 Submission 13 (Victoria Legal Aid) and see Consultation 13 (Goulburn Valley practitioners).

26 Consultation 3 (CASA Forum).

27 Consultation 17 (Victorian Institute of Forensic Medicine).

28 Ibid.

29 Submissions 13 (Victoria Legal Aid), 14 (Magistrates' Court of Victoria), 19 (Victorian Aboriginal Legal Service).

30 Letter from Victoria Police Chief Commissioner Graham Ashton to Victorian Law Reform Commission Chair, 28 December 2019.

- 10.23 VIFM observed in relation to the provision of its forensic medical reports that:
- there has been investment in Court services to improve the timelines of the criminal process which in turn raised an expectation that forensic medical reports be provided more quickly. This presents us with a very big resource issue which can only be met by a redesign and investment in technology, laboratory infrastructure, laboratory process, and specialist workforce funding ... which has not been forthcoming.³¹

Effects of delay

- 10.24 Delay in the provision of forensic reports undermines the efficient functioning of the justice system. The Supreme Court observed:
- Inefficiencies are created when one or more aspects of the system are not resourced to keep up with the processes of other parts of the system. Bottlenecks and adjournment are typical signs of this occurring. For example ... the adjournment of cases otherwise ready to proceed because resources to process forensic evidence do not match demand.³²
- 10.25 In cases in which forensic evidence is central to the prosecution case, delay in the provision of forensic analysis can prevent early resolution. As Victoria Legal Aid pointed out:
- If forensic evidence is pivotal to the prosecution case, then the delay in collecting and analysing forensic evidence will affect the ability of the parties to enter into plea negotiations.

Commission's conclusions: better resourcing for forensic service providers

- 10.26 The complexity of forensic analysis and the amount of material requiring analysis in many indictable cases, especially those involving e-crime, mean that Victoria's forensic service providers are sometimes failing to keep up with demand for their services.
- 10.27 In the case of FSD, this may not be attributable solely to a lack of resources. Delay in the provision of reports by FSD appears to be a product of internal workflow issues that FSD is currently redressing.³³ Nevertheless, additional funding would allow FSD to cater for increasingly complex cases in some areas of forensic analysis.
- 10.28 VIFM does not have enough specialised personnel nor the infrastructure necessary to support its work. Along with FSD, it should be provided with additional funding.

Recommendation

- 38 Funding for forensic service providers should be increased to support faster preparation of forensic reports.**

31 Consultation 17 (Victorian Institute of Forensic Medicine).

32 Submission 22 (Supreme Court of Victoria).

33 Consultation 37 (Victoria Police Forensic Services Department).

Publicise timeframes for the provision of forensic reports

- 10.29 Victoria Legal Aid proposed that:
- forensic services and analysts should have an active presence or voice in communicating to the court which services they can realistically deliver, as well as the time frames in which [those services] can be delivered.³⁴
- 10.30 Better awareness of forensic processes among courts and practitioners will assist with issues such as courts setting hearing dates based on unrealistic expectations about how long forensic reports take to prepare.³⁵
- 10.31 As well as publishing FSD turnaround times and backlogs, FSD told the Commission it had established a case management group to provide improved visibility to lawyers and investigators about the progress of forensic reports.³⁶
- 10.32 VIFM explained that it had been engaging actively with the courts and practitioners to ensure they understand what timeframes are feasible for the provision of its reports.³⁷
- 10.33 These measures should allow the courts to set realistic timeframes for service of reports.

Recommendation

- 39 Forensic service providers should publicise current turnaround times for the provision of reports and the courts should have regard to these when setting dates for the service of reports.**

Conferencing with forensic experts

- 10.34 The Commission was told that conferencing between forensic experts and prosecutors and defence practitioners would improve efficiency in cases involving reliance on forensic evidence.³⁸
- 10.35 VIFM explained that it does not see itself as a witness for the prosecution but as a witness for the court, whose role is to 'support the court and the justice system'.³⁹ It proposed that time would be saved if, instead of requiring its experts to provide pre-trial oral evidence, the parties clarified forensic issues during out-of-court consultations with experts.⁴⁰ If the forensic issues in dispute can be narrowed, there will be less need to traverse highly technical material that is potentially difficult for juries to follow during a trial.⁴¹ Professor Ransom, from VIFM, said:

A great example of effective communication was the Palm Island case—I ... travelled to Brisbane and spent an entire day with the prosecution team ... and later a day with the defence team. This process ... short-circuited many issues that might have otherwise been a matter of dispute at trial.⁴²

34 Submission 13 (Victoria Legal Aid).

35 This was a problem commented on by VIFM: Consultation 17 (Victorian Institute of Forensic Medicine).

36 Consultation 37 (Victoria Police Forensic Services Department).

37 Consultation 17 (Victorian Institute of Forensic Medicine).

38 Submission 25 (Victoria Police); Consultations 17 (Victorian Institute of Forensic Medicine), 37 (Victoria Police Forensic Services Department).

39 Consultation 17 (Victorian Institute of Forensic Medicine).

40 Ibid.

41 Ibid.

42 Ibid.

- 10.36 Conferencing between forensic experts and prosecution lawyers already occurs in cases involving clandestine drug laboratories.⁴³ According to Victoria Police, these meetings are ‘essential in streamlining work flow and meeting set dates by targeting key items for analysis and ensuring appropriate prioritisation of work’.⁴⁴ Victoria Police and FSD supported expanding these case conferences to a broader category of cases.⁴⁵
- 10.37 As well as expanding conferencing with the prosecution, conferencing between forensic experts and defence practitioners will often be appropriate. Defence practitioners may be reluctant initially to engage in pre-trial conferencing with forensic staff because of concerns about the independence of staff whose reports have been sought by the prosecution. The professionalism of FSD and VIFM staff should ameliorate these concerns.⁴⁶ Defence practitioners should be conscious of the substantial benefits for the accused flowing from reduced delay and greater clarity about the issues in the case.
- 10.38 As the County Court noted, ‘there is no property in witnesses and a cultural change needs to [occur] whereby the defence are more proactive in speaking to forensic witnesses’.⁴⁷ As a general rule, conferencing should take place before leave is granted to cross-examine forensic experts during committal proceedings.

Recommendations

- 40 Forensic case conferencing between forensic experts and the prosecution, based on the existing model used in clandestine laboratory drug cases, should be adopted in all cases where forensic evidence is in issue.
- 41 Forensic case conferencing between forensic experts and defence practitioners should be encouraged in cases where forensic evidence is in issue.

Preliminary forensic reports?

- 10.39 New South Wales now permits brief, or ‘short-form’ forensic reports in limited circumstances.⁴⁸ The reports present the results of preliminary forensic analysis. They were introduced to ensure that unnecessary time and resources are not expended ‘producing evidence [in circumstances in which] the defendant is ultimately likely to plead guilty’.⁴⁹
- 10.40 The Director of Public Prosecutions (New South Wales) told the Commission that preliminary forensic reports:
- provide flexibility and do cut down on unacceptable delay, especially in drugs and ballistics cases. They allow us, for example, to identify what the drug is and let the other side know quicker or let them know if the bullets match the gun.⁵⁰

43 Submission 25 (Victoria Police); Consultation 37 (Victoria Police Forensic Services Department).

44 Submission 25 (Victoria Police).

45 Ibid; Consultation 37 (Victoria Police Forensic Services Department).

46 Although not necessarily a marker of independence, a third of VIFM’s forensic pathologists have legal as well as medical qualifications: Consultation 17 (Victorian Institute of Forensic Medicine).

47 Consultation 30 (County Court of Victoria).

48 Instances in which short-form reports may be provided include drugs and ballistics cases: Consultation 33 (Director of Public Prosecutions (New South Wales)).

49 New South Wales Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas* (Report No 141, December 2014) xx [0.19].

50 Consultation 33 (Director of Public Prosecutions (New South Wales)).

- 10.41 Caution was expressed in Victoria and New South Wales about the efficacy of preliminary forensic reports.⁵¹ VIFM told the Commission that providing a preliminary report prior to the completion of thorough forensic examination can pre-judge an issue and set the case on a particular path, which may not be the right one.⁵² VIFM also warned that it can be difficult to revise the trajectory of a case on the basis of a full report, even where the full report demonstrates the preliminary report got it wrong.⁵³
- 10.42 New South Wales Legal Aid expressed scepticism about reliance on short-form reports, saying that while these reports tend to be less problematic in drug identification cases, the conclusions provided are scientifically dubious where they involve DNA testing, fingerprint tests, and firearms tests.⁵⁴
- 10.43 The Commission did not receive submissions in favour of introducing preliminary forensic reports. It does not support their immediate introduction, but their use in other states should be monitored. This will allow an evidence-based assessment of whether preliminary reports should be adopted if delays in the provision of forensic reports continue to be a major issue.

51 Consultations 6 (Criminal Bar Association (Victoria)), 17 (Victorian Institute of Forensic Medicine), 34 (Legal Aid New South Wales).
52 Consultation 17 (Victorian Institute of Forensic Medicine).
53 Ibid.
54 Consultation 34 (Legal Aid New South Wales).

Pre-trial cross-examination

118 Introduction

119 Pre-trial cross-examination in the present system

122 Cross-examination in the lower courts

127 Protecting additional classes of witness from cross-examination

130 Should the test for leave to cross-examine witnesses in the lower courts be strengthened?

131 Reducing trauma during cross-examination

11. Pre-trial cross-examination

Introduction

- 11.1 The ability to cross-examine some witnesses during committal proceedings was one of the most polarising issues raised during the consultation process.¹
- 11.2 Some stakeholders told the Commission the opportunity to cross-examine in the lower courts was fundamental to ensuring adequate disclosure and therefore a fair trial. Victoria Legal Aid,² the Criminal Bar Association³ and the Magistrates' Court of Victoria⁴ advised that full disclosure is sometimes impossible without cross-examination during committal proceedings. They argued that abolishing cross-examination in the lower courts would significantly reduce the number of cases that resolve, either summarily or as a plea of guilty to an indictable offence, at a relatively early stage.⁵
- 11.3 On the other hand, Victoria Police,⁶ the Victims of Crime Commissioner,⁷ CASA Forum,⁸ Domestic Violence Victoria,⁹ and the Director of Public Prosecutions¹⁰ (DPP) told the Commission that cross-examination during committal proceedings can be unnecessarily traumatic for victims and witnesses. In addition to cross-examination being intrinsically stressful, having to be cross-examined more than once—during committal or other pre-trial procedures and again at trial—may be an additional source of trauma. These stakeholders also regarded the committal hearing as a source of delay that unnecessarily duplicated higher court pre-trial and trial processes.¹¹
- 11.4 While the DPP supported retaining the ability to cross-examine some witnesses in the lower courts in limited circumstances, it did not view disclosure as a legitimate purpose of cross-examination: 'Disclosure, in its legal sense, does not include cross-examination of witnesses'.¹² The DPP's rejection of disclosure as a legitimate purpose of cross-examination is considered under the heading 'Cross-examination and disclosure' below.
- 11.5 This chapter explains the situations in which pre-trial cross-examination is currently available, either during a committal hearing or prior to trial in the jurisdiction of the higher courts. The focus here is on forms of cross-examination that do not preclude or substitute for cross-examination during a trial.

1 In this chapter, references to witnesses include the complainant unless otherwise specified.
2 Submission 13 (Victoria Legal Aid).
3 Submission 11 (Criminal Bar Association (Victoria)).
4 Submission 14 (Magistrates' Court of Victoria).
5 Submission 11 (Criminal Bar Association (Victoria)), 13 (Victoria Legal Aid), 14 (Magistrates' Court of Victoria).
6 Submission 25 (Victoria Police).
7 Submission 23 (Victims of Crime Commissioner).
8 Consultation 3 (CASA Forum).
9 Consultation 14 (Domestic Violence Victoria).
10 Submission 4 (Director of Public Prosecutions (Victoria)).
11 See also Consultation 9 (Women's Housing Ltd).
12 Submission 4 (Director of Public Prosecutions (Victoria)).

- 11.6 The discussion then addresses the question of whether there exists ‘a culture of pre-trial cross-examination’ in Victoria before turning to consider the major issues associated with cross-examination in the lower courts:
- the trauma associated with cross-examination for victims and witnesses
 - disclosure
 - early resolution and narrowing of the issues in dispute.
- 11.7 The Commission concludes that cross-examination in the lower courts should be retained because of its importance for disclosure, early resolution and narrowing the issues in dispute. This conclusion leaves open the questions of whether:
- existing prohibitions on cross-examining certain classes of witness in the lower courts should be expanded
 - the test for leave to cross-examine witnesses in the lower courts needs to be strengthened.
- 11.8 The question of whether to expand existing prohibitions on cross-examination is addressed in the next part of the chapter. The discussion then turns to the question of whether to strengthen the test for granting leave to cross-examine witnesses to whom prohibitions do not apply. The Commission recommends limited expansion of existing prohibitions on cross-examination in the lower courts. It also recommends measures to:
- ensure the test for leave to cross-examine is applied consistently
 - require that additional criteria for leave, including the need to minimise trauma, are met for witnesses with cognitive impairments, and victims in cases involving sexual or family violence.
- 11.9 It is now well recognised that the criminal justice system has failed in the past to adequately protect victims. Cross-examination in the lower courts is a particularly contentious issue and it causes distress and sometimes trauma for victims.
- 11.10 The final part of the chapter outlines how some trauma-informed approaches are being implemented in criminal proceedings; the services available for victims and witnesses; and the measures courts can take to reduce trauma for victims and witnesses. Combined with its other recommendations for limiting cross-examination and strengthening judicial oversight, the Commission concludes that these initiatives will assist in protecting victims from harm and promoting a culture of respect for victims within the criminal justice system. To further support and entrench such a culture, the Commission makes additional recommendations to expand the availability of intermediaries and to clarify courts’ existing powers to order alternative arrangements for giving evidence.

Pre-trial cross-examination in the present system

- 11.11 In indictable stream matters, cross-examination may occur:
- during a committal hearing
 - in the trial court before a trial commences
 - during trial.¹³

Cross-examination during committal proceedings

Leave to cross-examine witnesses

- 11.12 In order to cross-examine a witness at a committal hearing, the defence must apply for leave of the court.
- 11.13 Historically there was no leave requirement. When initially enacted, the *Magistrates' Court Act 1989* (Vic) merely required an accused to notify the court of their intention to cross-examine a witness during the committal proceeding.¹⁴ The court could prevent cross-examination if it was considered 'frivolous, vexatious or oppressive in all the circumstances'.¹⁵
- 11.14 In 2000, a test for leave was introduced.¹⁶ The introduction of the test acknowledged the harm that cross-examination can cause and recognised the need to better protect victims and other witnesses.
- 11.15 When the *Criminal Procedure Act 2009* (Vic) (CPA) was enacted in 2009 it adopted the test contained in the *Magistrates' Court Act*.¹⁷
- 11.16 Before leave to cross-examine a witness is granted, the court must be satisfied that:
- the accused has identified an issue to which the proposed questioning relates¹⁸
 - the accused has provided a reason why the evidence of the witness is relevant to that issue¹⁹
 - cross-examination of the witness on that issue is justified.²⁰
- 11.17 In determining whether cross-examination on an issue is justified, the court must have regard under section 124(4) of the CPA to the need to ensure that:
- the prosecution case is adequately disclosed
 - the issues are adequately defined
 - the evidence is of sufficient weight to support a conviction for the offence with which the accused is charged
 - a fair trial will take place if the matter proceeds to trial—this includes ensuring that the accused is able to prepare and present a defence
 - matters relevant to a potential plea of guilty are clarified
 - matters relevant to a potential discontinuance of prosecution ... are clarified
 - trivial, vexatious or oppressive cross-examination is not permitted
 - the interests of justice are otherwise served.²¹
- 11.18 If the witness is a child, the court must consider additional matters, including the need to minimise the trauma that might be experienced by the witness in giving evidence.²²
- 11.19 When deciding whether to grant leave to cross-examine, the court may have regard to whether the informant consents to or opposes leave being granted.²³
- 11.20 If leave is granted, the court must identify each issue on which the witness may be cross-examined.²⁴ The scope of the cross-examination is limited to the issues identified.²⁵

14 *Magistrates' Court Act 1989* (Vic) sch 5 cl 3(4).

15 *Ibid* sch 5 cl3(7).

16 *Magistrates' Court (Committal Proceedings) Act 2000* (Vic).

17 *Criminal Procedure Act 2009* (Vic) s 124.

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

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

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

21 *Ibid* s 124(4).

22 *Ibid* s 124(5).

23 *Ibid* s 124(2).

24 *Ibid* s 124(6).

25 *Ibid* s 132.

- 11.21 Despite the requirement to identify each issue on which a witness may be cross-examined, a magistrate has the power to grant leave during a committal hearing to cross-examine a witness on an issue not previously identified.²⁶ A magistrate cannot grant leave to cross-examine on any new issues unless satisfied that the witness's evidence is relevant to the issue and the cross-examination is justified on the same grounds as apply to the original grant of leave to cross-examine.²⁷

Pre-trial cross-examination in the higher courts

Sexual offence cases where the complainant was a child or person with a cognitive impairment when proceedings commenced

- 11.22 Pursuant to section 123 of the CPA, a magistrate must not grant leave during committal proceedings to cross-examine the complainant or any other witnesses in cases involving a sexual offence where the complainant was a child or person with a cognitive impairment when the proceedings commenced.
- 11.23 Complainants in these cases can be cross-examined once only over the course of the criminal proceeding, and only if the matter is listed for trial. The cross-examination occurs during a special hearing in the trial court.²⁸
- 11.24 In section 123 cases, the defence may apply in the higher courts for leave under section 198A to cross-examine witnesses other than the complainant prior to trial.
- 11.25 The prohibition in section 123 on cross-examining any witnesses during committal proceedings, and the provision in section 198A allowing for pre-trial cross-examination in the higher courts of witnesses other than the complainant, took effect in March 2019. The amendments were introduced to create greater contemporaneity between the cross-examination for trial purposes of complainants in these cases and the pre-trial cross-examination, if any, of other witnesses. Then Attorney-General Martin Pakula said the amendments were designed to reduce delay and allow 'the trial court to conduct more case management of these matters'.²⁹
- 11.26 Before leave to cross-examine a witness under section 198A is granted, the court must be satisfied that:
- the accused has identified an issue to which the proposed questioning relates
 - the accused has provided a reason the evidence of the witness is relevant to that issue
 - cross-examination of the witness on that issue is justified.³⁰
- 11.27 In determining whether cross-examination is justified, the court must have regard to the criteria set out in section 124(4) of the CPA, including the need to ensure that the prosecution case is adequately disclosed.³¹ If the witness is a child, the court must also have regard to the criteria set out in section 124(5).³² The court may have regard to whether the prosecution consents to the order for cross-examination being made.³³
- 11.28 If the court makes an order for cross-examination under section 198A, the court must identify each issue on which the witness may be cross-examined.

26 Ibid ss 132(1)(b), 132A.

27 Ibid ss 132A(4), 132A(5).

28 Ibid s 370 and see generally ch 8, pt 8.2, div 6.

29 Victoria, Parliamentary Debates, Legislative Assembly, 21 June 2018, 2146 (Martin Pakula, Attorney-General).

30 *Criminal Procedure Act 2009* (Vic) s 198A(4).

31 Ibid s 198A(5)(a). See the criteria listed in paragraph 11.17, above.

32 Ibid s 198A(6).

33 Ibid s 198A(5)(b).

Section 198B (formerly Basha hearings)

11.29 Section 198B of the CPA codifies hearings previously known as ‘Basha hearings’.³⁴ The trial court is able to order cross-examination of a witness prior to trial if satisfied that it is necessary to avoid a serious risk that the trial would be unfair.³⁵ As with section 198A, the court must consider the criteria in section 124(4) of the CPA before making an order under section 198B.³⁶

Voir dire

11.30 A witness may be cross-examined prior to trial in the course of a voir dire hearing. The purpose of a voir dire hearing is to allow the court to determine questions of law, often related to whether a witness’s evidence is admissible or should be rejected on discretionary grounds.³⁷

Cross-examination in the lower courts

11.31 This section considers the claim that Victoria has a culture of pre-trial cross-examination. The discussion then turns to consideration of three issues raised during consultations:

- trauma for victims and witnesses
- the importance of cross-examination for disclosure
- the contribution of cross-examination to early resolution or narrowing the issues in dispute.

Does Victoria have a culture of pre-trial cross-examination?

11.32 The DPP submitted that Victoria has a ‘culture’ of pre-trial cross-examination that means it is common for witnesses to be cross-examined several times during a single indictable proceeding.³⁸ Other stakeholders objected to this characterisation, suggesting the DPP ‘overstates the frequency at which witnesses are required to give evidence twice.’³⁹

11.33 The Commission is unable to gauge accurately how frequently cross-examination occurs both during a committal hearing and subsequently at other pre-trial hearings and/or during a trial.

11.34 The Commission is also unable to determine from the available data how frequently witnesses are cross-examined during committal hearings. In 2017–18, leave to cross-examine at least one witness was granted in 46 per cent of all committal stream cases—a total of 1,569 cases.⁴⁰ Data is not available to show:

- whether committal hearings were held in all cases in which leave to cross-examine was granted
- in respect of how many witnesses leave to cross-examine was granted
- the type of witnesses in respect of whom leave was granted, for example: informants, experts, complainants, or civilian witnesses.

34 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.

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

36 *Ibid* s 198B(4).

37 Judicial College of Victoria, ‘17 Voir Dire’, *Victorian Criminal Proceedings Manual* (1 April 2011) [4].

38 Submission 4 (Director of Public Prosecutions (Victoria)).

39 Submission 9 (Australian Lawyers for Human Rights).

40 Magistrates’ Court of Victoria, *Committal Data Requested by VLRC* (24 April 2019). See also Victorian Law Reform Commission, *Committals* (Issues Paper, June 2019) 17–18 [3.44]. Data obtained by the Commission in 2016 shows that in 2015, one or more witness was cross-examined in 46 per cent of matters that proceeded through a committal hearing: Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 210 [8.86].

- 11.35 There are unlikely to be more than a handful of cases each year in which a higher court is satisfied there is justification for again cross-examining a witness prior to trial who has already been examined at a committal hearing. The Judicial College of Victoria's *Criminal Proceedings Manual* suggests, for example, that voir dire hearings will 'rarely be necessary if the witnesses were cross-examined at the committal hearing'.⁴¹
- 11.36 In the experience of Victoria Legal Aid, child witnesses are rarely, if ever, cross-examined during committal proceedings.⁴² Victoria Legal Aid attributes this to the additional matters the court must consider before granting leave to cross-examine children at a committal hearing, including the need to minimise trauma.⁴³

Trauma associated with cross-examination

- 11.37 Cross-examination is a stressful experience for many witnesses. This is particularly true for victims of crime, and even more so for those victims who are young or have a cognitive impairment.
- 11.38 How a witness's evidence is tested in an adversarial criminal justice system helps explain why cross-examination can be stressful and even traumatising. Often the role of defence counsel is to shed doubt on the reliability or veracity of a witness' evidence. The Victims of Crime Commissioner noted that 'variations in storytelling are common (even 'inevitable')',⁴⁴ yet inconsistencies between accounts given by a witness on different occasions may be seized on by the defence as indicating that a witness is unreliable or duplicitous. Occasionally this conclusion may be justified, but not always.
- 11.39 In its 2016 report *The Role of Victims in the Criminal Trial Process* the Commission noted that many victims it spoke to 'felt disrespected by the way they were treated during cross-examination and the type of questions they were asked'.⁴⁵
- 11.40 knowmore, a community legal centre, pointed out that some survivors who gave evidence at the Royal Commission into Institutional Responses to Child Sexual Abuse described being cross-examined as 're-traumatising and offensive' and 'as bad as the child sexual abuse they suffered'.⁴⁶ The centre explained that many of its clients 'have likewise reported difficulties in persisting with their complaint due to the stress and trauma of being examined in court'.⁴⁷ This problem was also highlighted by CASA Forum.⁴⁸

Cross-examination during a committal hearing

- 11.41 Cross-examination during a committal hearing has been described as 'worse than at the trial'.⁴⁹ An explanation for this is that witnesses are not generally given an opportunity to tell their story in their own way through evidence-in-chief.⁵⁰ Another explanation is that defence counsel is 'not constrained by the presence of a jury' and may therefore be 'more oppressive or intimidating'.⁵¹

41 Judicial College of Victoria, '17 Voir Dire', *Victorian Criminal Proceedings Manual* (1 April 2011) [9].

42 Submission 13 (Victoria Legal Aid).

43 Ibid; *Criminal Procedure Act 2009* (Vic) s 124(5).

44 Submission 23 (Victims of Crime Commissioner), citing Diana Eades, 'Telling and Retelling Your Story in Court: Questions, Assumptions and Intercultural Implications' (2008) 20(2) *Current Issues in Criminal Justice* 209, 215.

45 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 93 [5.36].

46 Submission 7 (knowmore).

47 Ibid.

48 Consultation 3 (CASA Forum).

49 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 207 [8.64].

50 It is common practice at committal hearings for witness' statements to be tendered in lieu of them giving oral evidence-in-chief: Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 207 [8.64].

51 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 207 [8.64].

- 11.42 A representative from CASA Forum told the Commission:
- While it may be positive in some respects that victim survivors are not required to give their evidence-in-chief prior to trial at committal stage, it can also be very negative for them to have to respond only to questions that cast doubt on their story. In practice, they are denied the opportunity to tell their own story, and are limited to responding to questions that cast doubt on their evidence.⁵²
- 11.43 Domestic Violence Victoria questioned whether it is fair to expect survivors of domestic violence to undergo cross-examination at a committal hearing:
- in terms of procedural fairness—if victims are so traumatised by the pre-trial process that they want to pull out—how is that fair?⁵³
- 11.44 The Office of the Public Advocate suggested:
- the potential for cross-examinations in committal hearings to retraumatise victims and witnesses is high and, as such, cross-examination should be avoided wherever possible.⁵⁴
- 11.45 Some County Court judges favoured abolishing the opportunity to cross-examine witnesses in the lower courts. They suggested that ‘witnesses have a greater degree of protection in the trial court because cross-examination can be restricted to the key issues in dispute at the trial’.⁵⁵
- 11.46 Recognition that cross-examination can be stressful or worse was shared by those who believe cross-examination in the lower courts is nevertheless an important foundation for ensuring fair trials. These stakeholders also claimed, however, that some opportunities for cross-examination at committal may benefit victims and other witnesses by contributing to early resolution.⁵⁶ Victoria Legal Aid acknowledged that giving evidence in court, especially during cross-examination, can be traumatic and intimidating.⁵⁷
- 11.47 The Criminal Bar Association (Victoria), which represents both prosecution and defence counsel, told the Commission:
- Giving evidence in court might be a stressful process, but there are a range of responses. There are instances when witnesses, including victims, look forward to giving evidence and having their day in court. Other witnesses are assisted by the opportunity of giving evidence in the Magistrates’ Court before potentially having to do so in a higher court, often before a jury. One concrete rule that all witnesses are likely to be traumatised by any questioning, and particularly so at committal hearing, is not helpful.⁵⁸
- 11.48 During its inquiry *The Role of Victims of Crime in the Criminal Trial Process*, the Commission heard from victims who ‘found giving evidence at the committal to be positive—it was an opportunity to “practise” for the trial and to be heard by a court’.⁵⁹

52 Consultation 3 (CASA Forum).

53 Consultation 14 (Domestic Violence Victoria).

54 Submission 6 (Office of the Public Advocate).

55 Submission 20 (County Court of Victoria).

56 See discussion below under the heading, ‘Cross-examination and early resolution’.

57 Submission 13 (Victoria Legal Aid).

58 Submission 11 (Criminal Bar Association (Victoria)).

59 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Consultation Paper, July 2015) 138 [7.39].

Cross-examination and disclosure

- 11.49 A witness's evidence is usually recorded during the investigative phase in a written statement.⁶⁰ In most cases, written statements are prepared by the police based on the witness's oral account. The statement is then signed by the witness in the presence of a police officer. Written statements, along with any other relevant evidence, are compiled into the hand-up brief and provided to the court, DPP and accused.⁶¹
- 11.50 Many stakeholders viewed the opportunity to obtain leave to cross-examine witnesses in the lower courts as necessary to obtaining full disclosure of the prosecution case.⁶²
- 11.51 The Criminal Bar Association submitted that relying only a written statement may sometimes be 'sufficient—or at least sufficient to form the basis of an allegation to which an accused can plead guilty—other times it is not'.⁶³ This is, they say, because 'a written statement is not set in stone' and early pre-trial cross-examination can 'determine if a witness will maintain, change or add to their account previously given in written form',⁶⁴ affecting how a case will progress.
- 11.52 The Magistrates' Court submitted that relying only on a written witness statement can be problematic as the process of compiling one is 'not merely the recording of events as detailed in a narrative form by a complainant or witness' but includes content which evolves through discussion between the police officer and the witness.⁶⁵ Consequently,
- It is ... not unusual for a witness to give differing accounts under cross-examination which may in fact constitute a minimal departure from their statements, but which are significant in terms of making out the elements of the offence charged.⁶⁶
- 11.53 According to the Law Institute of Victoria (LIV), its members report poor disclosure practices by investigative agencies. A particularly common problem is failure by informants to recognise that non-incriminating evidence may be relevant and therefore disclosable. In the LIV's view, the opportunity to cross-examine at a committal hearing is 'essential to ensure effective and timely disclosure'.⁶⁷ The LIV illustrated its point with reference to the use of photoboards, citing the following 'generic' case study as one of 'numerous examples ... with consistently similar facts' provided by its members:
- There was no indication in the hand-up brief of the witness having partaken in a photoboard identification procedure during which the witnesses had not picked out the accused or had selected a number of persons on the photoboard. This is important exculpatory evidence that only came to light during cross-examination of the witness at committal.⁶⁸
- 11.54 In the DPP's submission, cross-examination and disclosure 'should not be conflated' as 'disclosure in its legal sense does not include cross-examination of witnesses'.⁶⁹ The DPP submitted that improving other aspects of the system such as earlier engagement of prosecutors and better charging and disclosure practices [among informants] would remove the need to rely on cross-examination to achieve early disclosure.⁷⁰ Victoria Police agreed, saying that 'adequate pre-trial processes can be implemented' to achieve the disclosure that currently occurs during cross-examination.⁷¹

60 The evidence of child complainants and complainants with cognitive impairments in cases involving certain offences is audio-visually recorded by the police. The relevant offences include: sexual offences, an offence where the conduct constituting the offence consists of family violence within the meaning of the *Family Violence Protection Act 2008* (Vic), an indictable offence which involves an assault on, or injury or a threat of injury to, a person or certain unlawful assault offences in the *Summary Offences Act 1966* (Vic): *Criminal Procedure Act 2009* (Vic) s 366.

61 See *Criminal Procedure Act 2009* (Vic) s 110.

62 Submissions 11 (Criminal Bar Association (Victoria)), 14 (Magistrates' Court of Victoria), 24 (Law Institute of Victoria), 19 (Victorian Aboriginal Legal Service).

63 Submission 11 (Criminal Bar Association (Victoria)).

64 Ibid.

65 Submission 14 (Magistrates' Court of Victoria).

66 Ibid.

67 Submission 24 (Law Institute of Victoria).

68 Ibid.

69 Submission 4 (Director of Public Prosecutions (Victoria)).

70 Ibid.

71 Submission 25 (Victoria Police). Victoria Police does not specify what these processes might be.

- 11.55 Despite differences of opinion about the benefits of committal proceedings,⁷² the judges of the County Court are united in their view that:
- pre-trial cross-examination of witnesses exists as a central part of the full and fair disclosure of the prosecution case. It is a process that, when conducted efficiently and fairly, is of benefit to all parties, as well as the court. It can facilitate early resolution, full disclosure, and the elucidation of issues in dispute.⁷³
- 11.56 The CPA currently treats the opportunity to cross-examine witnesses during a committal hearing as a component of disclosure and an element of ensuring a fair trial.⁷⁴ Despite this, it explicitly prohibits cross-examination during committal proceedings of any witnesses in section 123 cases.⁷⁵

Cross-examination and early resolution

- 11.57 Appropriate early resolution of a case has numerous benefits. It allows resources to be allocated elsewhere; means that many victims and witnesses are spared the stress and uncertainty of extended proceedings; and it can benefit the accused by providing certainty and, where the accused has entered a guilty plea, may lead to a reduced sentence.
- 11.58 Differing views were put to the Commission about the contribution made by cross-examination during committal hearings to early resolution, and the degree to which cross-examination can narrow the issues for trial if a case cannot be resolved.
- 11.59 In the view of Victoria Legal Aid, cross-examination at the pre-trial stage can be 'pivotal in ... facilitating a guilty plea and precluding the need for a trial'.⁷⁶ Victoria Legal Aid points out that cross-examination 'can also reduce the number of charges committed or the issues in dispute, thereby narrowing and shortening the subsequent trial'.⁷⁷
- 11.60 The Magistrates' Court submitted that because 'the quality of evidence at committal is highly probative, this often leads to resolution, obviating the need for trial and minimising trauma for potential witnesses'.⁷⁸ The Magistrates' Court described one committal proceeding which:
- was listed for 5 days on a charge of murder with 16 witnesses listed for cross-examination. After hearing the evidence of the first witness, the case was resolved to a plea for manslaughter obviating the need for further witnesses...
- There was no significant departure by the first witness from her statement but rather a clarification of the incident. Court time and stress to witnesses were avoided.⁷⁹
- 11.61 Those County Court judges who supported retaining the opportunity to cross-examine witnesses in the lower courts emphasised its role in narrowing issues for trial:
- For matters that do proceed to the trial court, committals ensure that the issues are clarified ... and the scope of the charges are limited ...⁸⁰

72 'There are two broad views within the Court regarding the need to reform committals, particularly regarding the overall merit of transferring pre-trial cross-examination to the trial court': Submission 20 (County Court of Victoria).

73 Submission 20 (County Court of Victoria).

74 *Criminal Procedure Act 2009* (Vic) s 97(d)(i), (ii).

75 As noted earlier, these are cases involving sexual offences where the complainant was a child or person with a cognitive impairment when the proceedings commenced.

76 Submission 13 (Victoria Legal Aid).

77 Ibid.

78 Submission 14 (Magistrates' Court of Victoria).

79 Ibid.

80 Submission 20 (County Court of Victoria).

Other jurisdictions

- 11.62 The Commission was asked to consider the experience of comparable jurisdictions that have abolished pre-trial cross-examination.⁸¹
- 11.63 In Western Australia, cross-examination in the lower courts has been effectively abolished.⁸² Discussing these amendments in 2009, Western Australian Chief Justice Wayne Martin suggested that ‘the abolition of committal hearings [has] expedited the final resolution of many criminal cases, to the advantage of the community generally’.⁸³
- 11.64 By contrast, the Magistrates’ Court of Victoria uses Western Australia as an example of a jurisdiction where, following the abolition of pre-trial cross-examination, ‘many examples have arisen of non-disclosure issues resulting in convictions being overturned and trials being adjourned or aborted’.⁸⁴
- 11.65 England and Wales is another jurisdiction where cross-examination is not available in the lower courts. Figures provided by the Magistrates’ Court of Victoria show that between January and December 2017, approximately 69 per cent of indictable cases in England and Wales were sent from the Magistrates’ Court to the Crown Court for trial and only 31 per cent for sentence.⁸⁵ In Victoria in 2016–17, the Magistrates’ Court committed 46 per cent of cases to the higher courts for trial and 54 per cent for sentence.⁸⁶ This differential is consistent with the opportunity to cross-examine in the lower courts in Victoria contributing to securing early guilty pleas.

Commission’s conclusion: retain cross-examination in the lower courts

- 11.66 Cross-examination in the lower courts should be retained in appropriate cases.
- 11.67 In combination with other recommendations made in this report, retaining the opportunity to cross-examine some witnesses in the lower courts will ensure criminal cases in Victoria are dealt with efficiently, with less trauma for victims and witnesses, while preserving the right to a fair trial.
- 11.68 The Commission now turns to a consideration of whether the prohibition on cross-examining certain classes of witnesses in section 123 of the CPA should be expanded.

Protecting additional classes of witness from cross-examination

- 11.69 Stakeholders have divergent views about whether existing prohibitions on cross-examining some classes of witness in the lower courts should be expanded.
- 11.70 The DPP’s suggested approach, supported by Victoria Police,⁸⁷ is to:
- prohibit pre-trial cross-examination (whether in the lower or higher courts) of any complainants where the proceeding relates to a sexual or family violence offence
 - prohibit pre-trial cross-examination (whether in the lower or higher courts) of any ‘vulnerable witnesses’, unless for the purposes of recording the witnesses’ evidence for use at trial.⁸⁸

81 Submission 9 (Australian Lawyers for Human Rights), Submission 10 (Rape and Domestic Violence Services Australia).

82 Pre-trial cross-examination is only available where the prosecution has been unable to obtain a written statement from a witness and needs to take their evidence in a process similar to Victoria’s compulsory witness examination hearing.

83 Chief Justice Wayne Martin, ‘The Law Reform Commission of WA: Review of the Civil and Criminal Justice System—10 Years On’ (Speech, Supreme Court of Western Australia, 13 October 2009) 11 <https://www.supremecourt.wa.gov.au/_files/Law_Reform_Commission_20091013.pdf>.

84 Submission 14 (Magistrates’ Court of Victoria).

85 Ibid.

86 Ibid.

87 Submission 25 (Victoria Police).

88 Submission 4 (Director of Public Prosecutions (Victoria)).

- 11.71 The DPP proposed a ‘vulnerable witness’ should be defined as any child or person with a cognitive impairment, regardless of whether they are a complainant in the matter.⁸⁹
- 11.72 The supervising magistrates of the Family Violence and Sexual Offences Lists suggested section 123 should be expanded to cases involving family violence.⁹⁰ This would prevent cross-examination in the lower courts of any witnesses in cases involving a sexual offence or family violence where the complainant was a child or person with a cognitive impairment when proceedings commenced. Beyond the inclusion of family violence offences, these magistrates opposed any further expansion of section 123. They claimed it was still too early to assess if the recent amendment to section 123 and introduction of section 198A, ‘has assisted to reduce trauma for complainants, promote resolution or avoid delay.’⁹¹
- 11.73 The Victims of Crime Commissioner and the Office of the Public Advocate endorsed recommendations made by the Commission in *The Role of Victims of Crime in the Criminal Trial Process: Report* to prohibit cross-examination in the lower courts of ‘protected victims’. The report says a protected victim should be defined as ‘a victim who is likely to suffer severe emotional trauma or be so intimidated or distressed as to be unable to give evidence or give evidence fairly.’⁹² Who should count as a ‘protected victim’ should be assessed on a case-by-case basis, having regard to factors such as the nature of the offending and the victim’s relationship with the accused.⁹³

Commission’s conclusion: expand section 123 to some family violence cases

- 11.74 For many witnesses, being cross-examined is confronting and distressing. This is a more common experience for some witnesses because of their personal circumstances or the type of offending.
- 11.75 Section 123 of the CPA should be expanded to preclude cross-examination in the lower courts of any witnesses in cases involving family violence where the complainant was a child or person with a cognitive impairment when the proceedings commenced.⁹⁴
- 11.76 The expansion of section 123 and implementation of section 198A in March 2019 created a different situation to that considered by the Commission in *The Role of Victims in the Criminal Trial Process: Report*. Until the results of the recent changes become clear, it would be premature to implement a separate ‘protected victim’ category, as recommended in that report.
- 11.77 The current recommendation to expand section 123 to include family violence cases is not as broad as the DPP’s proposal but is consistent with it. The recommendation has the support of the supervising magistrates of the Family Violence and Sexual Offences Lists.⁹⁵ Expanding section 123 to include cases involving family violence is consistent with other parts of the CPA that already provide certain protections in family violence cases.⁹⁶

89 Ibid.

90 Submission 14a (Magistrates’ Court of Victoria – additional submission).

91 Ibid.

92 Recommendation 37: Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 213.

93 Ibid. Recommendation 38 says that ‘All child victims other than child victims of sexual offences [who are already protected under the *Criminal Procedure Act 2009* (Vic) s 123] should be considered protected victims unless the court is satisfied that the child victim is aware that the protective procedures are available and does not wish to use them.’

94 Defined as an offence where the conduct constituting the offence consists of family violence within the meaning of the *Family Violence Protection Act 2008* (Vic): *Criminal Procedure Act 2009* (Vic) s 353(1)(b). Unlike sexual offences, which can be more exhaustively defined, offending committed in the context of family violence may take a number of forms, including sexual offences, serious assaults, homicide offences, threats to kill or cause serious injury, as well as property offences involving theft burglary and damage to property: Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 201–202 [8.34].

95 Submission 14a (Magistrates’ Court of Victoria – additional submission)

96 *Criminal Procedure Act 2009* (Vic) s 353(1)(b).

- 11.78 At the same time, the proposal will not have the far-reaching consequences of the DPP's proposal, which could lead to many more section 198A applications and special hearings. Special hearings involve complainants being cross-examined on their trial evidence. The cross-examination occurs from the trial court by video link, with the complainant located in a remote witness facility. Although technically part of the trial, special hearings are conducted in the absence of the jury and are often conducted before the trial proper commences.⁹⁷ Recordings of the complainant's evidence-in-chief and cross-examination are then admitted as the complainant's evidence in the trial and played for the jury.⁹⁸
- 11.79 While a strong case can be made to expand the scope of section 123 further to cover other victims, especially those who may be vulnerable to or experiencing severe forms of trauma, who may benefit from giving evidence once only during special hearings, the Commission notes that special hearings are resource intensive and time consuming.⁹⁹ The effects of amending section 123 and implementing section 198A have not been formally evaluated. Without knowing how these changes have affected efficiency or the experience of victims, the Commission does not recommend any further expansion of special hearings at this time, beyond its recommendation to include family violence cases.
- 11.80 Even the Commission's limited recommendation to expand section 123 to include family violence offences will require more special hearings and likely result in more section 198A applications.
- 11.81 Before any additional expansion of section 123 is considered, the Commission recommends a formal evaluation of its operation in conjunction with section 198A. The evaluation should assess if the changes are reducing trauma for complainants and other witnesses while also reducing delay and using resources efficiently.
- 11.82 If the Commission's recommendation to extend section 123 to include family violence offences is adopted, it should be accompanied by increased funding for the courts, the Office of Public Prosecutions and Victoria Legal Aid.

Recommendations

- 42 Section 123 of the *Criminal Procedure Act 2009 (Vic)* should be amended to prohibit cross-examination in the lower courts of any witnesses in cases where the complainant was a child or person with a cognitive impairment when the proceedings commenced and where the conduct constituting the offence involves family violence within the meaning of the *Family Violence Protection Act 2008 (Vic)*.
- 43 Any amendments to expand section 123 to include family violence offences should be accompanied by appropriate resourcing of the Courts, the Office of Public Prosecutions, Victoria Police and Victoria Legal Aid.
- 44 There should be a formal evaluation of the operation of the scheme created by sections 123 and 198A of the *Criminal Procedure Act 2009 (Vic)* to determine if it is operating in the best interests of victims and witnesses, and its broader resource implications.

97
98
99

Ibid s 372.
Ibid s 374.
Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 196–226.

Should the test for leave to cross-examine witnesses in the lower courts be strengthened?

- 11.83 As discussed earlier, the test in section 124 of the CPA for leave to cross-examine witnesses at a committal hearing requires an accused to:
- identify an issue to which the proposed questioning relates¹⁰⁰
 - provide a reason why the evidence of the witness is relevant to that issue¹⁰¹
 - satisfy the Magistrates' Court that cross-examination of the witness on that issue is justified.¹⁰²
- 11.84 In determining whether cross-examination is justified, the court must have regard to several factors, including the need to ensure the case is adequately disclosed.¹⁰³
- 11.85 Section 124(5) lists additional criteria the court must have regard to if the witness is a child, including the need to minimise the trauma that might be experienced by the witness in giving evidence. The supervising magistrates of the Sexual Offences and Family Violence Lists suggest the Magistrates' Court should also be required to have regard to the criteria in section 124(5) if an application for leave to cross-examine relates to a witness who has a cognitive impairment.¹⁰⁴
- 11.86 Having regard to communication and comprehension difficulties faced by witnesses with cognitive impairments, and without opposition from any other stakeholders, the Commission supports this approach.
- 11.87 The DPP proposed strengthening the test for leave to cross-examine to require that the Magistrates' Court is satisfied there are substantial reasons why, in the interests of justice, the witness should attend to give oral evidence ('substantial reasons' test).¹⁰⁵ In the DPP's view consideration of the 'interests of justice' should include 'whether the cross-examination of a witness is central to resolution discussions or likely to inform what charges are included on an indictment'.¹⁰⁶
- 11.88 Changing the test was also considered in *The Role of Victims of Crime in the Criminal Trial Process: Report*. The Commission recommended introducing a test restricting cross-examination to matters that relate 'directly and substantially to the decision to commit for trial'.¹⁰⁷ In response to the current terms of reference, the Commission now recommends that the test for committal be abolished (see Chapter 4). While reference to the test for committal as part of the test for cross-examination in the lower courts is no longer appropriate, the substance of the recommendation in *The Role of Victims of Crime in the Criminal Trial Process: Report* aligns with the DPP's 'substantial reasons' test.
- 11.89 Some stakeholders defended the current test for leave to cross-examine but said there was a need for greater consistency in its application. The Commission was told during consultations that some magistrates apply the test appropriately, but in some courts leave to cross-examine is granted almost automatically.

100 *Criminal Procedure Act 2009* (Vic) s 124(3)(a).

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

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

103 *Ibid* s 124.

104 Submission 14a (Magistrates' Court of Victoria – additional submission).

105 Submission 4 (Director of Public Prosecutions (Victoria)).

106 *Ibid*.

107 Recommendation 39: Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 209 [8.79].

Commission's conclusions: expand application of section 124(5) and better apply the test for leave to cross-examine

- 11.90 Section 124(5) should be expanded so that the additional criteria listed must also be considered in relation to applications for leave to cross-examine:
- witnesses who have cognitive impairments
 - victims in cases involving sexual or family violence.
- 11.91 The main problem identified by the Commission concerning the test for leave to cross-examine is that in some cases the test is not properly applied according to its terms but rather that leave is granted almost as a matter of course. The solution to this problem is not to alter the test, but rather to ensure that magistrates apply the test according to its terms.
- 11.92 One way of promoting this change is to require magistrates to give written reasons, even if brief, for a decision to grant leave. The requirement to provide written reasons is a significant discipline likely to improve the proper application of the test and obviate the need to recast it.
- 11.93 Combined with rigorous judicial oversight, the enhanced range of protective measures now available in the lower courts (see below), not all of which were available when the Commission made its recommendation in *The Role of Victims in the Criminal Trial Process: Report* to strengthen the test for cross-examination,¹⁰⁸ should ensure that witnesses are not exposed to unnecessary harm or trauma during cross-examination.

Recommendations

- 45 Section 124(5) of the *Criminal Procedure Act 2009 (Vic)* should be amended to require that the considerations in the section also apply to applications for leave to cross-examine witnesses with a cognitive impairment, and victims in cases involving sexual or family violence.
- 46 Section 124 of the *Criminal Procedure Act 2009 (Vic)* should be amended to require a magistrate to provide written reasons why, with reference to sections 124(3) – (5), leave was granted to cross-examine witnesses.

Reducing trauma during cross-examination

- 11.94 Giving evidence and being cross-examined is a confronting and challenging experience for many victims and witnesses. For some, it is distressing and even traumatising. It is now recognised that the present system does not sufficiently protect victims and the culture around cross-examination of victims in the lower courts needs to change. A range of recent initiatives seek to improve victims' experience and to protect them from harm. These initiatives are described below, followed by discussion of the use of intermediaries and alternative arrangements for giving evidence. The Commission recommends making intermediaries more widely available and promoting the use of alternative arrangements. Together with the other initiatives described here, and the Commission's recommendations in relation to sections 123 and 124, this will promote a culture of respect for victims and help protect them from harm.

- 11.95 The Judicial College of Victoria's 2019 guide *Victims of Crime in the Courtroom* explains that victims and witnesses who have been exposed to traumatic events can experience:
- difficulties discussing or recounting the traumatic event/s in detail
 - impaired recollection of events due to fragmented memory or emotional arousal that interferes with encoding and recollection of memory
 - fear of going to court and seeing the accused or people associated with the accused
 - fear of possible credibility issues if they are unable to present a coherent narrative of events and/or advocate for themselves
 - fear of being blamed by the community, family members and/or legal professionals
 - lack of trust in, and sense of safety around, authority figures in the legal system.¹⁰⁹
- 11.96 A trauma-informed approach should be adopted to tackle these challenges.¹¹⁰ This requires that:
- judicial officers, court staff, investigators and prosecutors are informed about the nature of trauma and equipped to manage its impact on participation in legal processes
 - victims and witnesses are provided with appropriate information about the need for and process of pre-trial cross-examination
 - victims and witnesses are provided with effective support and facilities before, during and after cross-examination.¹¹¹
- 11.97 *Victims of Crime in the Courtroom* is a useful tool for educating judicial officers, court staff and other justice system workers about trauma and its effects within criminal proceedings. The Judicial College also provides training to judges and magistrates on how trauma manifests in court environments.¹¹²
- 11.98 In addition to community organisations like Court Network,¹¹³ a range of government services provide information to victims and witnesses and support them to give their best evidence without being further traumatised. These include:
- The OPP's Victims and Witness Assistance Service (VWAS), staffed by social workers who provide information and support to adult victims and witnesses
 - The Child Witness Service, which aims to reduce trauma and stress experienced by child witnesses by familiarising them with the court process and personnel; supporting them and their families throughout the criminal proceeding; and providing debriefing and referrals to community agencies¹¹⁴
 - The Intermediaries Pilot Program, which assesses and makes recommendations regarding the communication style and needs of complainants in sexual offence cases and witnesses in homicide cases who are children or persons with cognitive impairments¹¹⁵
 - The OPP's Victim Support Dog Program, which uses trained support dogs to comfort vulnerable witnesses when they are giving evidence.¹¹⁶

109 Judicial College of Victoria, *Victims of Crime in the Courtroom: A Guide for Judicial Officers* (2019) 4.
110 Submissions 4 (Director of Public Prosecutions (Victoria)), 6 (Office of the Public Advocate), 7 (knowmore), 9 (Australian Lawyers for Human Rights), 10 (Rape and Domestic Violence Services), 13 (Victoria Legal Aid), 16 (Ari Wigdorowitz), 19 (Victorian Aboriginal Legal Service), 23 (Victims of Crime Commissioner), 24 (Law Institute of Victoria), 25 (Victoria Police).
111 See Judicial College of Victoria, *Victims of Crime in the Courtroom: A Guide for Judicial Officers* (2019) 4.
112 Judicial College of Victoria, 'Insight into Trauma Event', *Programs and Events* (Web Page, 2019) <<https://www.judicialcollege.vic.edu.au/programs-and-events/insight-trauma>>.
113 Court Network is a community organisation that provides support, information and referral to people attending court and advocates for the needs of all court users. See Court Network, 'About Us', *What We Do* (Web Page, 2020) <<https://courtnetwork.com.au/about/what-we-do/>>.
114 Victims Support Agency, 'Child Witness Service', *Victims of Crime* (Web Page, 23 August 2019) <<https://www.victimsofcrime.vic.gov.au/going-to-court/child-witness-service>>.
115 County Court of Victoria, *Multi-Jurisdictional Court Guide for the Intermediary Pilot Program: Intermediaries and Ground Rules Hearings* (Guide, 28 June 2018) <[https://www.countycourt.vic.gov.au/practice-notes?filters\[division\]=2](https://www.countycourt.vic.gov.au/practice-notes?filters[division]=2)>.
116 'Program Overview', *Court Dogs Victoria* (Web Page, 2020) <<https://www.courtdogsvictoria.org.au/program>>.

- 11.99 The CPA also expressly provides that the court may make directions for alternative arrangements for taking the evidence of witnesses in cases involving a charge for:
- a sexual offence
 - a family violence offence
 - obscene, indecent, or threatening language or behaviour in public
 - sexual exposure.¹¹⁷

The OPP's Victims and Witness Assistance Service

- 11.100 The Victims and Witness Assistance Service (VWAS) is staffed by social workers who operate within a trauma-centred framework.¹¹⁸ It provides adult victims and witnesses of serious crime with information and support.¹¹⁹ It prioritises assistance and support to families who have lost loved ones; victims and witnesses in sexual assault and family violence matters; and vulnerable victims.¹²⁰ VWAS provides information about giving evidence and discusses with victims and witnesses any concerns they may have about it, gives tours of the courtroom, and provides referrals to other support agencies.¹²¹
- 11.101 Since 2019, teams of four social workers from VWAS have worked in each of the four trial divisions at the OPP to develop victim engagement plans and to provide advice on how best to support victims and witnesses throughout the course of indictable prosecutions.¹²²
- 11.102 During its 2016 inquiry, *The Role of Victims of Crime in the Criminal Trial Process*, the Commission was told that victim support services, including the Witness Assistance Service—as VWAS was then called—were underfunded. This underfunding was particularly severe in regional Victoria.¹²³ In response to a recommendation from the Commission for better regional services and more effective victim support services generally,¹²⁴ the OPP received funding to strengthen its support services. It has now established a 'Victims and Witnesses' website, in consultation with the Victims of Crime Consultative Committee, which provides information about the court process and giving evidence and is accessible throughout Victoria.¹²⁵
- 11.103 The OPP has redesigned its regional prosecution process to ensure consistency with matters dealt with in Melbourne.¹²⁶ This redesign should 'allow for more consistent delivery of services to victims and witnesses' but the OPP notes that:
- While in principle we endeavour to provide equal access to our services in every matter, whether regional or metro-based, this is always subject to the challenge of funding.¹²⁷
- 11.104 The Commission reiterates that the VWAS should have a strong presence in regional Victoria.

Expanding the use of intermediaries

- 11.105 In 2018, the CPA was amended to provide that intermediaries may be appointed to assess the communication style and needs of child witnesses and witnesses who have cognitive impairments and make recommendations for how to help these witnesses give their best evidence.¹²⁸

117 *Criminal Procedure Act 2009* (Vic) s 359.

118 Email from the Office of Public Prosecutions to the Victorian Law Reform Commission, 28 January 2020.

119 Office of Public Prosecutions Victoria, *Witness Assistance Service* (Brochure, 2014).

120 Ibid.

121 Ibid.

122 Letter from Office of Public Prosecutions to Victorian Law Reform Commission, 19 December 2019.

123 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 117 [6.72].

124 Recommendation 22: Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 118.

125 Letter from Office of Public Prosecutions to Victorian Law Reform Commission, 19 December 2019.

126 Ibid.

127 Ibid.

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

- 11.106 An Intermediaries Pilot Program was established in July 2018 and will continue until June 2020¹²⁹ in courts in metropolitan Melbourne.¹³⁰ It is limited to:
- complainants in sexual offences cases who are children or persons with a cognitive impairment
 - witnesses in homicide cases who are children or persons with a cognitive impairment.
- 11.107 Intermediaries are appointed by the court on its own motion or following an application by a party.¹³¹ This may occur at any stage in proceedings, including before committal hearings.¹³² Intermediaries are officers of the court and have a duty to act impartially.¹³³
- 11.108 If an intermediary is appointed, a ‘ground rules hearing’ must be held before the hearing at which the witness gives evidence.¹³⁴ At the ground rules hearing, the court considers the intermediary’s assessment report and recommendations and may make directions for the fair and effective conduct of the proceeding, including:
- how the witness may be questioned
 - the duration of questioning
 - questions that may or may not be put to a witness
 - the use of aids to help communicate a question or an answer.¹³⁵
- 11.109 The intermediary must be present when the witness gives evidence.¹³⁶ Where necessary, they can facilitate communication between the witness and other parties to prevent or overcome a communication breakdown.¹³⁷
- 11.110 Several stakeholders supported an expansion of the Intermediaries Pilot Program.
- 11.111 The Office of the Public Advocate (OPA) ‘looks forward to the evaluation of the pilot and a state-wide roll-out’.¹³⁸ In the meantime, given that:
- Intermediaries ... can promote one of the purposes of the committals hearing—of full disclosure of the prosecution case—and reduce the need for cross-examination of witnesses, by better enabling people to tell their stories ... the program [should] be expanded to support people with cognitive impairment in a broader range of offence categories than is currently offered.¹³⁹
- 11.112 Echoing the Final Report of the Royal Commission into Institutional Sexual Abuse, knowmore proposed expanding the intermediary scheme to, ‘at a minimum’, adult complainants in child sexual abuse cases. It added that, ‘pending positive outcomes from the Intermediary Pilot Program’, and acknowledging potential resource constraints, intermediaries should eventually be available to ‘any prosecution witness with a communication difficulty’.¹⁴⁰

129 County Court of Victoria, *Multi-Jurisdictional Court Guide for the Intermediary Pilot Program: Intermediaries and Ground Rules Hearings* (Guide, 28 June 2018) 1.

130 As well as some police sexual offence and child investigative team sites: County Court of Victoria, *Multi-Jurisdictional Court Guide for the Intermediary Pilot Program: Intermediaries and Ground Rules Hearings* (Guide, 28 June 2018) 1–3 [1]–[11].

131 *Criminal Procedure Act 2009* (Vic) ss 337(1), 389J.

132 *Ibid* s 389F.

133 *Ibid* s 389I(2).

134 *Ibid* ss 389B, 389C.

135 *Ibid* s 389E.

136 *Ibid* s 389K.

137 Department of Justice and Community Safety (Vic), ‘Victorian Intermediaries Pilot Program,’ *Justice System* (Web Page, 26 April 2019) <<https://www.justice.vic.gov.au/justice-system/courts-and-tribunals/victorian-intermediaries-pilot-program>>.

138 Submission 6 (Office of the Public Advocate).

139 *Ibid*.

140 Submission 7 (knowmore).

- 11.113 Victoria Legal Aid proposed that intermediaries and ground rules hearings be made available at all court locations and for more victims and witnesses, potentially including all:
- complainants with vulnerabilities
 - complainants in family violence matters
 - witnesses with significant cognitive disabilities or mental health issues
 - witnesses with limited English or from a vulnerable community
 - witnesses in cases where the offending is likely to cause particular trauma.¹⁴¹
- 11.114 Expanding the intermediary program to all victims and witnesses with communication difficulties would advance fair trial rights. Improved communication helps witnesses give their best evidence. This promotes better disclosure to the accused, which supports a fair trial. Expansion of the program could also help minimise trauma for victims and witnesses by allowing them to feel supported, and confident that their voice is heard and their meaning understood.

Recommendation

- 47 The *Criminal Procedure Act 2009 (Vic)* should be amended to allow for an intermediary to be appointed to assess any witness with communication difficulties following an application by a party or on the court's own motion.

Alternative arrangements

- 11.115 Under the CPA, a court may direct that alternative arrangements be made for a witness, including a complainant, to give evidence in proceedings that relate to a charge for:
- a sexual offence
 - a family violence offence
 - obscene, indecent, or threatening language or behaviour in public
 - sexual exposure.¹⁴²
- 11.116 Alternative arrangements include:
- using remote witness facilities
 - using screens in the courtroom to remove the accused from the victim's line of vision when the victim is giving evidence
 - having a support person beside the victim to provide emotional support when the victim is giving evidence
 - allowing only specified people to be present in court
 - prohibiting lawyers from wearing robes and requiring them to be seated rather than standing when questioning the victim.¹⁴³

141
142
143

Submission 13 (Victoria Legal Aid).
Criminal Procedure Act 2009 (Vic) s 359.
Ibid ss 360–365.

- 11.117 In *The Role of Victims in the Criminal Trial Process: Report* the Commission noted that it consulted with victims who used alternative arrangements when giving evidence, some of whom found the experience positive.¹⁴⁴ During its consultations, there was support for expanding the availability of alternative arrangements to a broader group of victims.¹⁴⁵ The Commission recommended that all child victims should be eligible to use alternative arrangements should they wish to do so, as well as victims who fell within the Commission's proposed definition of 'protected victim'.¹⁴⁶ At the time of this reference, that recommendation has not been implemented.
- 11.118 Submissions to the current reference focussed on whether cross-examination during pre-trial committal proceedings should be abolished altogether or retained, rather than whether alternative arrangements should be used more widely. Victoria Legal Aid noted, however, that 'distress can be minimised by giving evidence under alternative arrangements' and it supported the Commission's previous recommendation to make alternative arrangements available to a wider group.¹⁴⁷
- 11.119 Magistrates already have a general power to make directions for how witnesses give evidence, including making special arrangements if the circumstances so require, as part of the necessary authority to control proceedings and ensure fair trials. The CPA power to direct the making of alternative arrangements in proceedings involving certain offences is the statutory recognition of one aspect of the general power. The court's general power should be explicitly recognised in the CPA in order to encourage the use of alternative arrangements for all victims and witnesses who require them as a measure to reduce potential trauma.

Recommendation

- 48** Division 4 of part 8.2 of the *Criminal Procedure Act 2009 (Vic)* should be amended to provide that the court may make directions for alternative arrangements for taking the evidence of any witness where the interests of justice so require, and taking into account the need to minimise trauma for victims and witnesses.

The Children's Court

138 Introduction

139 Committals in the Children's Court: the present system

140 Removing committals from the Children's Court

141 Children accused of Supreme Court offences

141 Areas of reform specific to the Children's Court

12. The Children's Court

Introduction

- 12.1 The specialist jurisdiction of the Children's Court deals with cases involving children accused of criminal offending.¹ The Court's Criminal Division has jurisdiction to hear and determine:
- all charges against children for summary offences²
 - all charges against children for indictable offences triable summarily, other than six 'death-related' offences, which must be determined in the higher courts.³
- 12.2 The Children's Court conducts committal proceedings for cases that it cannot hear and determine. In addition to the six death-related offences,⁴ the *Children, Youth and Families Act 2005* (Vic) (CYFA) prescribes several other offences that are presumed too serious to be dealt with summarily by the Children's Court.⁵ These are referred to as 'Category A Serious Youth Offences',⁶ and they can only be heard and determined in the Children's Court if the child or prosecution requests it, the court is satisfied that the sentencing options available to it are adequate to respond to the child's offending, and:
- it is in the interests of the victim or victims that the charge be heard and determined summarily, or
 - the accused is particularly vulnerable because of cognitive impairment or mental illness, or
 - there is a substantial and compelling reason why the charge should be heard and determined summarily.⁷
- 12.3 If a case involves a 'Category B Serious Youth Offence',⁸ before dealing with the case summarily, the Children's Court must consider whether the charge is suitable to be heard and determined summarily.⁹

1 *Children, Youth and Families Act 2005* (Vic) s 8(1).

2 *Ibid* s 516(1)(a).

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

4 Murder, attempted murder, manslaughter, child homicide, arson causing death and culpable driving causing death: *Ibid* s 516(1)(b).

5 This presumption only applies if the accused is 16 years or older: *Ibid* s 3(1).

6 *Ibid* s 3(1). The offences are murder; attempted murder; manslaughter; child homicide; intentionally causing serious injury (*Crimes Act 1958* (Vic) s 15A); aggravated home invasion (*Crimes Act 1958* (Vic) s 77B); aggravated carjacking (*Crimes Act 1958* (Vic) s 79B); arson causing death (*Crimes Act 1958* (Vic) s 197A); culpable driving causing death (*Crimes Act 1958* (Vic) s 318); an offence against section 4B of the *Terrorism (Community Protection) Act 2003* (Vic); a provision of Subdivision A of Division 72 of Chapter 4 of the Criminal Code of the Commonwealth; a provision of Part 5.3 or 5.5 of the Criminal Code of the Commonwealth; a provision of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) as in force before its repeal.

7 *Children, Youth and Families Act 2005* (Vic) s 356(6).

8 *Ibid* ss 3(1), 356(8). The offences are recklessly causing injury in circumstances of gross violence (*Crimes Act 1958* (Vic) s 15B); rape (*Crimes Act 1958* (Vic) s 38); rape by compelling sexual penetration (*Crimes Act 1958* (Vic) s 39); home invasion (*Crimes Act 1958* (Vic) s 77A); carjacking (*Crimes Act 1958* (Vic) s 79). See s 356(8) for a list of the court's mandatory considerations when making this determination.

9 *Children, Youth and Families Act 2005* (Vic) s 356(8).

- 12.4 This chapter considers how the Commission’s recommendations will operate in the Children’s Court and makes additional recommendations that apply only in this jurisdiction.

Committals in the Children’s Court: the present system

The role of the Children’s Court

- 12.5 The purpose of the Criminal Division of the Children’s Court is to:
- divert children away from the criminal justice system where possible and appropriate
 - reduce the stigma caused to a child by contact with the criminal justice system
 - encourage a child to accept responsibility for unlawful behaviour
 - respond to a child’s offending behaviour in a manner that acknowledges the child’s needs and assists with rehabilitation
 - provide children with opportunities to strengthen and preserve relationships with family and other persons of importance in the child’s life
 - provide children with ongoing pathways to connect with education, training and employment.¹⁰
- 12.6 Children charged with serious indictable offences often present with complex and multifaceted issues. These include:
- child protection involvement
 - a history of, or being victims of, abuse, trauma and neglect
 - neuro-disabilities
 - a history of, or current, drug and alcohol abuse issues and poor mental health
 - other characteristics that underscore the complexity of offending by children and young people.¹¹
- 12.7 Accordingly, a ‘very different approach to both the ascertainment of and response to criminality on the part of young persons’ is required. As Justice Frank Vincent observed:
- It is only where very special, unusual, or exceptional, circumstances exist of a kind which render unsuitable the determination of a case in the jurisdiction specifically established with this difference in mind, that the matter should be removed from that jurisdiction to the adult courts.¹²
- 12.8 The *Charter of Human Rights and Responsibilities Act 2006* (Vic) also recognises:
- A child charged with a criminal offence has the right to a procedure that takes account of his or her age and the desirability of promoting the child’s rehabilitation.¹³

Current committal process in the Children’s Court

- 12.9 Prior to the introduction of Category A and B Serious Youth Offences in 2018, the six death-related offences were the only offences the Children’s Court did not have jurisdiction to determine. Cases involving other serious offences could be uplifted to the higher courts for determination following application by the prosecution.

10 Ibid s 356C.

11 Submission 17 (Children’s Court of Victoria).

12 *DL v Reynolds* [1994] (Supreme Court of Victoria, Vincent JA, 9 August 1994) in *OPP v BW* [2010] VChC 2, 5.

13 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(3).

- 12.10 In cases it cannot or will not hear and determine, the Children’s Court conducts committal proceedings, following the procedure prescribed in the *Criminal Procedure Act 2009 (Vic)* (CPA),¹⁴ before the case is heard and determined in the County or Supreme Courts.
- 12.11 As it is presumed that cases involving Category A Serious Youth Offences should be heard and determined by the higher courts, the Children’s Court is now managing a greater number of committal proceedings. In 2014–15 there were nine cases in the Children’s Court committal stream.
- 12.12 In 2018–19 there were 52 cases.¹⁵ Of these:
- 24 were dealt with summarily in the Children’s Court¹⁶
 - 10 were committed to the high courts, four following a plea of guilty and six following a plea of not guilty
 - 18 remain pending in the Children’s Court.¹⁷

Removing committals from the Children’s Court

- 12.13 The Children’s Court and Victoria Legal Aid are ‘strongly opposed’¹⁸ to removing committal proceedings from the Children’s Court.
- 12.14 The Children’s Court submitted that the risks and disadvantages far outweigh any perceived advantages for several reasons:
- The Court’s judicial officers have specialist expertise in determining matters involving children and young people.
 - Its courtrooms, facilities, processes and procedures are child-centric and/or have been modified for the jurisdiction of the Court.
 - As a specialist court, it has greater scope to hear and determine indictable matters summarily.
 - Transferring the committal process to the higher courts will risk delaying proceedings involving child accused and reverse the status quo, namely that child accused should be tried in the Children’s Court unless a statutory exception arises.¹⁹
- 12.15 Victoria Legal Aid submitted:
- Removing committals in the children’s jurisdiction will undermine the longstanding specialist framework under the CYFA, which has been designed to respond to criminal offending by children and young people. [The CYFA] demands more effort and rehabilitative innovation, to secure a reduction in harm and recidivism for these young people who will almost certainly re-enter the community.²⁰
- 12.16 Consistent with the recommendations made in this report to keep committal proceedings in the Magistrates’ Court, the Commission does not propose any changes that would reduce the involvement of the Children’s Court in cases where a child is accused of a serious criminal offence.

14 *Children’s, Youth and Families Act 2005 (Vic)* ss 356(3), 516(1)(c), 528(2)(b).

15 Submission 17 (Children’s Court of Victoria).

16 Of these cases, the indictable charge was ‘struck out’ in 12 cases, the Children’s Court granted summary jurisdiction in five, in five all charges were struck out, one was dealt with summarily as the accused was under 16 and it was erroneously commenced in the committal stream, and one case was transferred to the Magistrates’ Court due to the accused’s age: Submission 17 (Children’s Court of Victoria).

17 As at 6 September 2019: Submission 17 (Children’s Court of Victoria).

18 Submission 17 (Children’s Court of Victoria).

19 Ibid.

20 Submission 13 (Victoria Legal Aid).

Children accused of Supreme Court offences

- 12.17 In Chapter 5, the Commission recommends that all cases involving offences within the exclusive jurisdiction of the Supreme Court should be filed in the Supreme Court, aside from Children’s Court cases.
- 12.18 The current framework for managing inherent jurisdiction matters in the Children’s Court should be maintained. This will allow the Children’s Court, with its appropriate facilities and specialised judicial officers, to initially manage the case.
- 12.19 The new case management approach recommended in Chapter 6, including court-supervised case conferencing, replacement of committal mention and committal hearings with an issues hearing and the availability of cross-examination, should similarly apply to all cases managed by the Children’s Court that are then transferred to the County or Supreme Court for hearing and determination.

Areas of reform specific to the Children’s Court

- 12.20 The Children’s Court asked the Commission to consider recommending reform in relation to:
- the timing of applications for summary jurisdiction
 - management of cases involving adult and child co-accused
 - transfer to the trial court of related indictable offences.²¹

Timing of applications for summary jurisdiction

- 12.21 In cases involving a Category A Serious Youth Offence (except in those involving a death-related offence) a child accused can make an application for summary jurisdiction.²² The Children’s Court must be satisfied the sentencing options available to it are adequate to respond to the child’s alleged offending, and either:
- it is in the interests of the victim that the charge be heard and determined summarily
 - the child accused is particularly vulnerable because of cognitive impairment or mental illness
 - there is a substantial and compelling reason why the charge should be heard and determined summarily.²³
- 12.22 The CYFA does not prescribe when an application for summary jurisdiction should be made.
- 12.23 In the view of the Children’s Court, summary jurisdiction applications create delay as they require it to make a detailed assessment as to jurisdiction. This takes the focus away from the resolution of charges:²⁴
- [Lawyers] are turning their minds to argue jurisdiction and preparing arguments to establish/contest substantial and compelling reason to enable the charges to be heard summarily in the Children’s Court away from other procedural aspects of the case.²⁵
- 12.24 The Children’s Court submitted that ‘it is essential for the issue of jurisdiction to be resolved as soon as possible’, and accordingly supported a recommendation that applications for summary jurisdiction should only be made after committal mention in exceptional circumstances.²⁶

21 Submission 17 (Children’s Court of Victoria).
 22 *Children’s, Youth and Families Act 2005 (Vic)* s 356(6).
 23 *Ibid* s 356(6)(b).
 24 Consultation 23 (Children’s Court of Victoria).
 25 *Ibid*.
 26 *Ibid*, Submission 17 (Children’s Court of Victoria).

Recommendation

- 49 The *Children, Youth and Families Act 2005* (Vic) should be amended to require applications for summary jurisdiction be made prior to, or at, the issues hearing. Applications for summary jurisdiction should only be made after an issues hearing in exceptional circumstances.

Management of cases involving adult and child co-accused

- 12.25 Currently in cases involving adult and child²⁷ co-accused charged with a death-related offence,²⁸ a joint committal proceeding may occur.²⁹ In doing so, victims and witnesses are only required to participate in one committal proceeding. There is no equivalent mechanism available in relation to other Category A Serious Youth Offences.
- 12.26 The Children's Court submitted that the Commission consider addressing this. In its view, allowing joint committal proceedings in cases involving the other Category A Serious Youth Offences will:
- promote efficiency in the use of court time and resources, avoid the duplication of witness evidence and cross-examination across the jurisdictions, reduce delay and allow streamlined processes where co-accused are being prosecuted across two jurisdictions.³⁰

Recommendation

- 50 The *Children, Youth and Families Act 2005* (Vic) and the *Criminal Procedure Act 2009* (Vic) should be amended to permit issues hearings to be held jointly in cases involving child and adult co-accused.

Transfer of related indictable offences to trial court

- 12.27 If a child accused is committed for trial, all related summary offences³¹ are transferred to the trial court along with the indictable offence on which the accused was committed.³²
- 12.28 There is no legislative mechanism by which the Children's Court can transfer related indictable offences where a child—aged 16 years or older at the time of the alleged offence—is also charged with a Category A (or B) serious youth offence and is committed to stand trial. The Court can only transfer related indictable offences if it finds that 'exceptional circumstances' exist.³³
- 12.29 According to the Children's Court, 'the potential consequence of this procedural limitation is that separate jurisdictions may be determining charges/sentencing the child for related offending'.³⁴

27 This only applies to children over the age of 15 at the time the proceeding commenced: *Children, Youth and Families Act 2005* (Vic) s 516A(1)(b)(i).

28 Murder, attempted murder, manslaughter, child homicide, arson causing death or culpable driving causing death: *Children, Youth and Families Act 2005* (Vic) s 516A(1)(b)(ii).

29 *Children, Youth and Families Act 2005* (Vic) s 516A.

30 Submission 17 (Children's Court of Victoria).

31 'Related offences' are those that are 'founded on the same facts or form... a series of offences of the same or a similar character': *Criminal Procedure Act 2009* (Vic) s 3.

32 *Criminal Procedure Act 2009* (Vic) s 145(1); *Children, Youth and Families Act 2005* (Vic) s 528.

33 *Children, Youth and Families Act 2005* (Vic) s 356(3).

34 Submission 17 (Children's Court of Victoria).

- 12.30 To address this, the Children’s Court recommends that where cases are uplifted from its jurisdiction, the CYFA should allow for related indictable offences to be transferred to the higher court without the need for a finding that exceptional circumstances exist.³⁵

Recommendation

- 51 The *Children, Youth and Families Act 2005 (Vic)* should be amended to allow the Children’s Court to transfer related indictable offences for hearing and determination in the County or Supreme Courts, in cases that are uplifted from its jurisdiction.

Appendices

- 146** Appendix A: Submissions
- 147** Appendix B: Consultations
- 148** Appendix C: Standard Disclosure Material

Appendix A: Submissions

- 1 Michael Lillas
- 2 Name withheld
- 3 Name withheld
- 4 Director of Public Prosecutions (Victoria)
- 5 Thomas Gillick
- 6 Office of the Public Advocate
- 7 knowmore
- 8 Confidential
- 9 Australian Lawyers for Human Rights
- 10 Rape and Domestic Violence Services Australia
- 11 Criminal Bar Association (Victoria)
- 12 Neville Rudston
- 13 Victoria Legal Aid
- 14 Magistrates' Court of Victoria
- 14a Magistrates' Court of Victoria – additional submission
- 15 Liberty Victoria
- 16 Ari Wigdorowitz
- 17 Children's Court of Victoria
- 18 Name withheld
- 19 Victorian Aboriginal Legal Service
- 20 County Court of Victoria
- 21 Name withheld
- 22 Supreme Court of Victoria
- 23 Victims of Crime Commissioner
- 24 Law Institute of Victoria
- 25 Victoria Police
- 26 Name withheld
- 27 Roger Wu

Appendix B: Consultations

- 1 Victorian Aboriginal Legal Service
- 2 Victims of Crime Consultative Committee
- 3 CASA Forum
- 4 Child Witness Service
- 5 Victims of Crime Commissioner
- 6 Criminal Bar Association (Victoria)
- 7 Commonwealth Director of Public Prosecutions
- 8 Victoria Legal Aid
- 9 Women's Housing Ltd
- 10 Law Institute of Victoria
- 11 Director of Public Prosecutions
- 12 Shepparton Magistrates' Court
- 13 Goulburn Valley practitioners
- 14 Domestic Violence Victoria
- 15 Magistrates' Court of Victoria
- 16 La Trobe Valley practitioners
- 17 Victorian Institute of Forensic Medicine
- 18 Academic roundtable: Professor Gideon Boas, Professor Arie Freiberg, Professor Jeremy Gans, Professor Felicity Gerry, Associate Professor Peter Rush, Dr Jamie Walvisch
- 19 Victoria Police
- 20 Geelong Magistrates' Court
- 21 Geelong practitioners
- 22 The Hon. Justice Mark Ierace
- 23 Children's Court of Victoria
- 24 Australian Federal Police
- 25 Victorian intermediaries pilot program
- 26 Representatives of Victims Assistance Programs
- 27 Office of Public Advocate
- 28 South Australia Major Indictable Review
- 29 Bendigo Magistrates' Court
- 30 County Court of Victoria
- 31 Supreme Court of Victoria
- 32 Local Court of New South Wales
- 33 Director of Public Prosecutions (New South Wales)
- 34 Legal Aid New South Wales
- 35 Confidential
- 36 Police Prosecution Command New South Wales
- 37 Victoria Police Forensic Services Department
- 38 Victoria Legal Aid regional practitioners

Appendix C: Standard Disclosure Material¹

The Accused seeks the production of the following items to be served with the hand-up brief:

- 1 Copies of all crime reports, attendance registers, police notes, diary and day book entries (whether official or otherwise), Form 501/502 (running sheets) in relation to the investigation of the Accused and/or the subject of the allegations against the Accused, which were made or created by any member of Victoria Police during the course of the investigation of the Accused.
- 2 A copy of any notes (whether in written, printed, or in electronic form) made or created by any civilian witness (including any complainant) if in the possession of the Informant.
- 3 Copies of all relevant INTERPOSE database entries made in relation to the subject matter of this investigation and/or the allegations against the Accused, including but not limited to the Full Response Report.
- 4 Copies of all relevant Victoria Police LEAP database entries made in relation to the subject matter of this investigation and/or the allegations against the Accused, including but not limited to the Incident Report and Case Progress information, inclusive of sub-heading:
Incident Report & Case Progress
 - a. Persons Involved
 - b. Accused Details
 - c. Case Progress
- 5 Copies of any audio or video recordings or transcripts thereof, and other notes or documents (whether in written, printed, or electronic form) concerning any interviews, discussions, debriefings, or conversations conducted during the course of the investigation of the Accused, between any member of Victoria Police and:
 - a. any witnesses in this proceeding
 - b. any person who could or might be called as witnesses for the prosecution, and
 - c. any person suspected of or investigated in relation to the commission of an offence or offences the subject of this investigation.
- 6 Copy of all covert recordings (video and/or audio) between any member of Victoria Police and any other person, made in the course of the investigation of the Accused.
- 7 Copies of any statements (including drafts of such statements) obtained from any person during the course of the investigation of the Accused which are not contained in the hand-up brief (whether or not those statements were finalised and/or signed).
- 8 A copy of any notes or documents used by any prosecution witness relied upon in any way to assist them with drafting/preparing their witness statement.
- 9 Copies of all warrants obtained by police during the course of this investigation.
- 10 Complete copy of all photographs and video footage taken by any member of Victoria Police in the course of this investigation (digital copies on a CD/DVD are sufficient).
- 11 Copies of any audio, visual, or audio-visual material (such as photographs, audio recordings or video recordings) made or created by any civilian witness in relation to the subject matter of the allegations against the Accused, irrespective of whether such witness is to be called.

- 12 Copies of all exhibit logs, property receipts, property book entries, and other similar documentation relating to all exhibits and property obtained or seized during the course of the investigation of the Accused.
- 13 All prior convictions and findings of guilt from all Australian states of any witnesses (including for any alias of any witness) who is or may be called to give evidence for the prosecution save for Police or expert witnesses.

Notes:

These documents are to be served on defence and prosecution at the same time as the hand-up brief is served.

The documents must be appropriately redacted by the informant prior to being served on the parties.

While the material is to be served at the same time as the hand-up brief, it does not form part of the hand-up brief and should be clearly identified as disclosure material.

As soon as possible after the Filing Hearing, the Informant and OPP solicitor will discuss the production of these standard disclosure items including issues of relevance and any grounds for objection.

The order to produce these standard disclosure items does not preclude the Informant from objecting to provision of any items if appropriate. Reasons for any objection should be given.

Where there is objection to the production of any standard disclosure item(s), notice should be given to the accused as soon as possible. The parties are encouraged to discuss the nature of the objection.



Bibliography

Bibliography

- Attorney-General (SA), 'About the Reforms', *Major Indictable Reform Review* (Web Page, 2019) <<https://www.agd.sa.gov.au/major-indictable-reform-review>>
- Australian Bureau of Statistics, *Criminal Courts, Australia* (Catalogue No 4513.0, 27 February 2019)
- Australian Psychological Society, 'Trauma', *Psychology Topics* (Web Page, 2020) <<https://www.psychology.org.au/for-the-public/Psychology-topics/Trauma>>
- Blackstone, Sir William, *Commentaries on the Laws of England* (Clarendon Press, 1769, 1966 reprint) bk 4
- Brereton, David and John Willis, 'Evaluating the Committal' in Julia Vernon (ed), *The Future of Committals—Proceedings of a Conference Held 1-2 May 1990* (Australian Institute of Criminology, January 1991)
- Bugg, Damian, 'The Role of the DPP in the 20th Century' (Speech, Judicial College of Australia Colloquium, 1999)
- Centre for Innovative Justice, RMIT University, *Communicating with Victims about Resolution Decisions: A Study of Victims' Experiences and Communication Needs* (Report, April 2019)
- Coldrey, John,
- 'Committal Proceedings: The Victorian Perspective' in Julia Vernon (ed), *The Future of Committals—Proceedings of a Conference Held 1-2 May 1990* (Australian Institute of Criminology, January 1991)
 - *Report of Advisory Committee on Committal Proceedings* (Victorian Government Printer, February 1986)
- Corns, Chris, 'Police Prosecutions in Australia and New Zealand: Some Comparisons' (2000) 19(2) *University of Tasmania Law Review* 280
- Corns, Christopher, *Public Prosecutions in Australia: Law, Policy and Practice* (Thomson Reuters, 2014)
- County Court of Victoria,
- *Annual Report 2018-19* (Report, 2019)
 - 'Circuit Courts', *Court Divisions* (Web Page, 27 November 2019) <<https://www.countycourt.vic.gov.au/learn-about-court/court-divisions/circuit-courts>>
 - 'Criminal Division', *Court Divisions* (Web Page, 27 November 2019) <<https://www.countycourt.vic.gov.au/learn-about-court/court-divisions/criminal-division>>
 - *Multi-Jurisdictional Court Guide for the Intermediary Pilot Program: Intermediaries and Ground Rules Hearings* (Guide, 28 June 2018) <[https://www.countycourt.vic.gov.au/practice-notes?filters\[division\]=2](https://www.countycourt.vic.gov.au/practice-notes?filters[division]=2)>
- Court Network, 'About Us', *What We Do* (Web Page, 2020) <<https://courtnetwork.com.au/about/what-we-do/>>

Court Services Victoria,

- 'Case Management System Project', *Projects* (Web Page, 23 July 2019) <<https://www.courts.vic.gov.au/projects/case-management-system-project>>
- *Strategic Asset Plan 2016-2031* (Report, 2016)

Crown Prosecution Service (England and Wales),

- 'Joint National Disclosure Improvement Plan—June update', *Publications* (Web Page, 2019) <<https://www.cps.gov.uk/publication/joint-national-disclosure-improvement-plan-june-update>>
- 'The Code for Crown Prosecutors', *Publications* (Web Page, 26 October 2018) <<https://www.cps.gov.uk/publication/code-crown-prosecutors>>.
- *Disclosure Manual* (Report, 14 December 2018)

Department of Justice and Attorney-General (Qld), *Reform of the Committal Proceedings Process* (Discussion Paper, 2008)

Department of Justice and Community Safety (Vic), 'Victorian Intermediaries Pilot Program,' *Justice System* (Web Page, 26 April 2019) <<https://www.justice.vic.gov.au/justice-system/courts-and-tribunals/victorian-intermediaries-pilot-program>>

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)

Devlin, Patrick, *The Criminal Prosecution in England* (Oxford University Press, 1960)

Director of Public Prosecutions, Office of Public Prosecutions Victoria,

- *Discontinuance Review Framework* (Guide, 26 March 2019) <<http://www.opp.vic.gov.au/Resources/Discontinuance-Review-Framework>>
- *Policy of the Director of Public Prosecutions for Victoria* (17 December 2019) <<http://www.opp.vic.gov.au/Resources/Policies>>
- *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>>

Eades, Diana, 'Telling and Retelling Your Story in Court: Questions, Assumptions and Intercultural Implications' (2008) 20(2) *Current Issues in Criminal Justice* 209

Fair Work Ombudsman, Australian Government, 'Minimum Wages', *Pay* (Web Page, 2020) <<https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/minimum-workplace-entitlements/minimum-wages#what-is-the-national-minimum-wage-order>>

Flynn, Asher, 'A Committal Waste of Time? Reforming Victoria's Pre-trial Process: Lessons from Other Jurisdictions' (2013) 37 *Criminal Law Journal* 175

House of Commons Justice Committee, Parliament of the United Kingdom, *Disclosure of Evidence in Criminal Cases* (Final Report, 17 July 2018)

Ierace, Mark, *Early Guilty Pleas: A New Ball Game* (Report, 28 April 2018) <https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_EAGP.aspx>

Johnson, John, 'A Case for Abolition' in Julia Vernon (ed), *The Future of Committals—Proceedings of a Conference Held 1-2 May 1990* (Australian Institute of Criminology, January 1991)

Judicial College of Victoria,

- '2.1 Charge Sheet and Indictment', *Victorian Criminal Proceedings Manual* (Online Manual, 1 March 2017) <<https://www.judicialcollege.vic.edu.au/eManuals/VCPM/indexpage.htm#27318.htm>>
- '2.5 Summary and Indictable Offences', *Victorian Criminal Proceedings Manual* (Online Manual, 1 November 2019) <<https://www.judicialcollege.vic.edu.au/eManuals/VCPM/indexpage.htm#27318.htm>>

- '4.4.5 Determination of Committal Proceedings', *Victorian Criminal Proceedings Manual* (Online Manual, 1 November 2019) <<https://www.judicialcollege.vic.edu.au/eManuals/VCPM/indexpage.htm#27318.htm>>
 - '17 Voir Dire', *Victorian Criminal Proceedings Manual* (Online Manual, 1 April 2011) <<https://www.judicialcollege.vic.edu.au/eManuals/VCPM/indexpage.htm#27318.htm>>
 - 'Insight into Trauma Event', *Programs and Events* (2019) <<https://www.judicialcollege.vic.edu.au/programs-and-events/insight-trauma>>
 - *Victims of Crime in the Courtroom: A Guide for Judicial Officers* (2019)
- Law Council of Australia, *The Justice Project Final Report* (Report, August 2018)
- Leclerc, Marie-Eve et al, *Assessing and Treating Traumatic Stress in Crime Victims* (Research Brief, February 2017)
- Magistrates' Court of Victoria,
- 'Bail Support (CISP)', *Find Support* (Web Page, 4 July 2019) <<https://www.mcv.vic.gov.au/find-support/bail-support-cisp>>
- Martin, Brian Ross, *Review of the Major Indictable Reforms—Criminal Procedure Act 1921 (As Amended by the Summary Procedure (Indictable Offences) Amendment Act 2017)* (Report, 13 September 2019)
- Martin, Chief Justice Wayne 'The Law Reform Commission of WA: Review of the Civil and Criminal Justice System—10 Years On' (Speech, Supreme Court of Western Australia, 13 October 2009) <https://www.supremecourt.wa.gov.au/_files/Law_Reform_Commission_20091013.pdf>
- Ministry of Justice (UK), *Criminal Procedure and Investigations Act 1996 (section 23(1))* (Code of Practice, March 2015)
- Moloney, Susan, 'A New Approach to Civil Litigation? The Implementation of the "Woolf Reforms" and Judicial Case Management' (2001) 2(1) *Judicial Studies Institute Journal* 98
- National Institute of Forensic Science, 'What is Forensic Science?' *Forensic Sciences* (Web Page) <<http://www.anzpa.org.au/forensic-science/forensic-sciences>>
- National Police Chiefs' Council, College of Policing and Crown Prosecution Service (UK)
- *National Disclosure Improvement Plan* (Report, January 2018)
 - *National Disclosure Improvement Plan—Progress Update* (Report, Spring 2019)
- Naylor, Bronwyn, 'Justiciability of Decisions in the Criminal Process: Review of Committal Proceedings in the Federal Court' (1990) 19 *Federal Law Review* 352
- New South Wales Bureau of Crime Statistics and Research, *Early Appropriate Guilty Plea Reform Program: The First 13 Months of Implementation* (Report, September 2019)
- New South Wales Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas* (Report No 141, December 2014)
- Office of Public Prosecutions Victoria,
- 'Our Role in Prosecutions', *About Us* (Web Page, 2016) <<http://www.opp.vic.gov.au/About-Us/Our-Legal-Practice/Our-role-in-prosecutions>>
 - *Witness Assistance Service* (Brochure, 2014)
- Payne, Jason, *Criminal Trial Delays in Australia: Trial Listing Outcomes* (Research and Public Policy Series No 74, Australian Institute of Criminology, 2007)
- Productivity Commission, Australian Government, *Report on Government Services 2020* (Report, 2020) <<https://www.pc.gov.au/research/ongoing/report-on-government-services/2020/justice/courts>>
- 'Program Overview', *Court Dogs Victoria* (Web Page, 2020) <<https://www.courtdogsvictoria.org.au/program>>

Royal Commission into Institutional Responses to Child Sexual Abuse,

- *Criminal Justice Report* (Report, August 2017) <<https://www.childabuseroyalcommission.gov.au/criminal-justice>>
- *Criminal Justice* (Consultation Paper, September 2016)

Royal Commission into the Management of Police Informants (Web Page, 21 February 2020) <<https://www.rcmpi.vic.gov.au/>>

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

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

'Stirling Gardens Magistrates Court', *Supreme Court of Western Australia* (Web Page, 1 March 2019) <https://www.supremecourt.wa.gov.au/M/magistrates_court_stirling_gardens.aspx?uid=4946-0149-8167-1518>

Victims Support Agency, '*Child Witness Service*', *Victims of Crime* (Web Page, 23 August 2019) <<https://www.victimsofcrime.vic.gov.au/going-to-court/child-witness-service>>

Victoria Legal Aid,

- '12 Means Test', *VLA Handbook for Lawyers* (Online Handbook, 2 January 2020) <<https://handbook.vla.vic.gov.au/handbook/12-means-test>>
- '24 Payments to Lawyers and Service Providers', *VLA Handbook for Lawyers* (Online Handbook, 15 January 2020) <<https://handbook.vla.vic.gov.au/handbook/24-payments-to-lawyers-and-service-providers>>

Victoria Police,

- 'Areas of Forensic Science', *Forensic Services* (Web Page, 13 March 2019) <<https://www.police.vic.gov.au/forensic-services>>
- *Victoria Police Manual* (CD-Rom, 29 April 2019)

Victoria Police Forensic Services Department, *Turnaround Times and Backlogs for Forensic Units* (Report, 1 October 2019) <<https://www.police.vic.gov.au/turn-around-times-and-backlogs>>

Victorian Institute of Forensic Medicine, 'Supporting Victoria Police', *Forensic Services* (Web Page) <<https://www.vifm.org/forensic-services/overview/victoria-police/>>

Victorian Law Reform Commission,

- *Committals* (Issues Paper, June 2019)
- *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Consultation Paper, May 2013)
- *The Role of Victims of Crime in the Criminal Trial Process* (Consultation Paper, July 2015)
- *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016)

Victorian Office of Public Prosecutions, *Annual Report 2017-18* (Report, 2018)

Wemmers, Jo-Anne, 'Victims' Experiences in the Criminal Justice System and Their Recovery from Crime' (2013) 19(3) *International Review of Victimology* 221

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

Legislation

Victoria

Bail Act 1977 (Vic)

Charter of Human Rights and Responsibilities Act 2006 (Vic)

Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017 (Vic)

Children, Youth and Families Act 2005 (Vic)

Constitution Act 1975 (Vic)

County Court Act 1958 (Vic)

Crimes Act 1958 (Vic)

Criminal Procedure Act 2009 (Vic)

Evidence (Miscellaneous Provisions) Act 1958 (Vic)

Evidence Act 2008 (Vic)

Family Violence Protection Act 2008 (Vic)

Justice Legislation Miscellaneous Amendment Act 2018 (Vic)

Magistrates' Court (Committal Proceedings) Act 2000 (Vic)

Magistrates' Court Act 1989 (Vic)

Public Prosecutions Act 1994 (Vic)

Sentencing Act 1991 (Vic)

Summary Offences Act 1966 (Vic)

Victims and Other Legislation Amendment Act 2018 (Vic)

Victims' Charter Act 2006 (Vic)

Victims of Crime Commissioner Act 2015 (Vic)

Victorian Institute of Forensic Medicine Act 1985 (Vic)

Wrongs Act 1958 (Vic)

Commonwealth

Judiciary Act 1903 (Cth)

Other Australian Jurisdictions

Criminal Procedure Act 1921 (SA)

Criminal Procedure Act 1986 (NSW)

Director of Public Prosecutions Act 1986 (NSW)

Justices Act 1886 (Qld)

Summary Procedure (Indictable Offences) Amendment Act 2017 (SA)

International

Criminal Procedure and Investigations Act 1996 (UK)

International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)

United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res 40/34, UN Doc A/Res/40/34 (29 November 1985)

Case Law

Victoria

AJ v The Queen [2011] VSCA 215, (2011) 32 VR 614
Anile v The Queen [2018] VSCA 235
BA v Attorney-General [2017] VSC 259; 319 FLR 329
Cannon v Tahche [2002] VSCA 84; (2002) 5 VR 317
Cook v The Queen [2019] VSCA 87
DL v Reynolds [1994] (Supreme Court of Victoria, Vincent JA, 9 August 1994)
Edebone v Allen [1991] 2 VR 659
Gild v The Queen [2018] VSCA 317
Metro Trains Melbourne Pty Ltd v Paciocco [2017] VSC 778
OPP v BW [2010] VChC 2
R v Evans [2003] VSCA 223
R v Farquharson [2009] VSCA 307, (2009) 26 VR 410
R v Dupas [2006] VSC 481, (2006) 14 VR 228
R v Walker [2004] VSC 411
Ragg v Magistrates' Court of Victoria [2008] VSC 1, (2008) 18 VR 300

Commonwealth

Alister v The Queen (1984) 154 CLR 404
Barton v The Queen (1980) 147 CLR 75
Director of Public Prosecutions Reference No 1 of 2017 [2019] HCA 9, (2019) 364 ALR 407
Dupas v The Queen [2010] HCA 20, (2010) 241 CLR 237
Forsyth v Rodda (1988) 37 A Crim R 50
Forsyth v Rodda (1989) 87 ALR 699
Grassby v The Queen (1989) 168 CLR 1
Jago v District Court of New South Wales (1989) 168 CLR 23
Latoudis v Casey (1990) 170 CLR 534
Mallard v The Queen [2005] HCA 68, (2005) 224 CLR 125
Maxwell v The Queen (1996) 184 CLR 501
R v Carrol [2002] HCA 55, (2002) 213 CLR 635
R v Glennon (1992) 173 CLR 592
Thorp v Abbotto (1992) 34 FCR 366
Walton v Gardiner (1993) 177 CLR 378
Williams v Spautz (1992) 174 CLR 509

Other Australian Jurisdictions

R v Spiteri (2004) 61 NSWLR 369, [2004] 61 NSWCCA 321

International

R v Ward [1993] 2 All ER 577

Reports published by the Victorian Law Reform Commission

- | | | | |
|----|---|----|---|
| 1 | Criminal Liability for Workplace Death and Serious Injury in the Public Sector (2002) | 24 | Guardianship (2012) |
| 2 | Disputes between Co-owners (2002) | 25 | Birth Registration and Birth Certificates (2013)* |
| 3 | Failure to Appear in Court in Response to Bail (2002)* | 26 | Succession Laws (2013) |
| 4 | People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care (2003) | 27 | Jury Empanelment (2014) |
| 5 | Sexual Offences (2004) | 28 | Review of the <i>Crimes (Mental Impairment and Unfitness to be Tried) Act 1997</i> (2014) |
| 6 | Defences to Homicide (2004) | 29 | The Forfeiture Rule (2014) |
| 7 | Workplace Privacy (2005) | 30 | Trading Trusts—Oppression Remedies (2015) |
| 8 | Implementing the <i>Uniform Evidence Act 1995</i> (2006) | 31 | Photographing and Filming Tenants' Possessions for Advertising Purposes (2015)* |
| 9 | Uniform Evidence Law (2006) | 32 | Medicinal Cannabis (2015) |
| 10 | Review of Family Violence Laws (2006) | 33 | Use of Regulatory Regimes in Preventing the Infiltration of Organised Crime into Lawful Occupations and Industries (2016) |
| 11 | Residential Tenancy Databases (2006)* | 34 | The Role of Victims of Crime in the Criminal Trial Process (2016) |
| 12 | Assisted Reproductive Technology and Adoption (2007) | 35 | Funeral and Burial Instructions (2016)* |
| 13 | Review of the <i>Bail Act 1997</i> (2007) | 36 | Review of the <i>Adoption Act 1984</i> (2017) |
| 14 | Civil Justice Review (2008) | 37 | Access to Justice—Litigation Funding and Group Proceedings (2018) |
| 15 | Law of Abortion (2008) | 38 | Review of the <i>Victims of Crime Assistance Act 1996</i> (2018) |
| 16 | Assistance Animals (2008)* | 39 | Neighbourhood Tree Disputes (2019)* |
| 17 | Jury Directions (2009) | 40 | Contempt of Court (2020) |
| 18 | Surveillance in Public Places (2010) | 41 | Committals (2020) |
| 19 | Protection Applications in the Children's Court (2010) | | |
| 20 | Review of the <i>Property Law Act 1958</i> (2010) | | |
| 21 | Supporting Young People in Police Interviews (2010)* | | |
| 22 | Easements and Covenants (2010) | | |
| 23 | Sex Offenders Registration (2011) | | |

* Community law reform project.

For a full list of publications, and to access the above reports, see www.lawreform.vic.gov.au



Victorian
Law Reform
Commission

Committals

REPORT

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

www.lawreform.vic.gov.au