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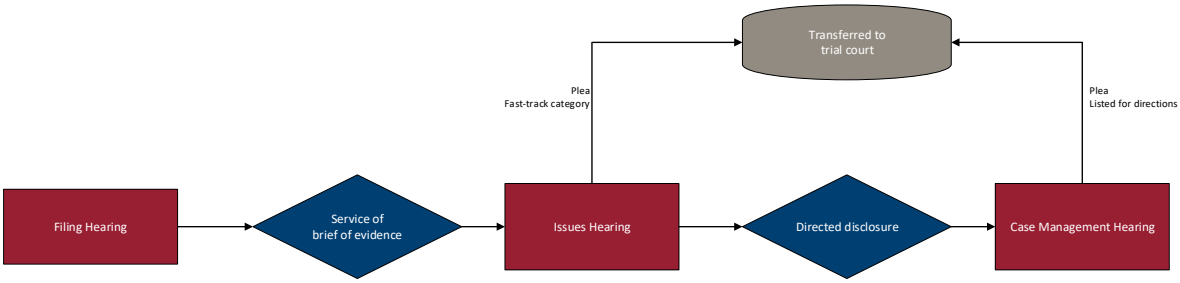
PROPOSED REFORMS TO REDUCE FURTHER TRAUMA TO VICTIMS AND WITNESSES

THE PROPOSAL

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

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

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



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

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

- requires the prosecution to give an indication at the Case Management Hearing of which charges it considers have reasonable prospects of conviction (and are likely to appear on an indictment), to ensure the parties are properly engaging with issues in dispute at the Case Management Hearing;
- requires police to provide a more complete hand-up brief (brief of evidence) which will contain content normally sought to be disclosed to facilitate earlier pleas of guilty; and
- provides for the fast-tracking of certain criminal cases into the trial courts.

This proposal is designed to deliver quicker outcomes and reduce the trauma experienced by victims. It is fast-tracking the criminal justice process to deliver fair and efficient justice to victims and accused persons. It does so while retaining key trigger points for early resolutions.

The biggest departure of the model from the current system is the 'Case Management Hearing'. Currently, this is a 'Committal Hearing' where defence can cross-examine witnesses and a magistrate determines whether there is sufficient evidence to support a finding of guilt on each of the charges. If there is sufficient evidence, the magistrate 'commits' the accused on that charge. If not, the magistrate 'discharges' the accused. Committal hearings can take days or even weeks for defence to cross-examine all the witnesses it wants to and for the magistrate to make the committal decision. This model limits that appearance to less than a day in most cases, creates a presumption against cross-examination of witnesses and removes the 'committal' discretion from magistrates.

WHAT WILL HAPPEN AT EACH STAGE UNDER THE PROPOSAL?

FILING HEARING

Filing hearings will be largely unchanged. The magistrate will set directions for:

a) service of the hand-up brief;
b) defence to provide a list of issues, any requests for cross-examination of witnesses and any requests for disclosure;
c) the date for the Issues Hearing.

SERVICE OF HAND UP BRIEF

The hand-up brief will need to be served in the same way as is currently the case.[1] The brief is expected to contain all material then in existence regarding the matter, including disclosure material commonly requested by defence (e.g. police notes, criminal records of witnesses). It should reflect 'full disclosure' (unless the accused has accepted a plea brief).[2] The hand-up brief will continue to include the police summary which sets out the manner in which the case is put.

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1 See Part 4.4 of the *Criminal Procedure Act 2009*.

2 This is in contrast to the current process where the informant serves a hand-up brief and then weeks later defence request disclosure material, which inevitably includes requests for police notes and criminal records. It has turned into an unnecessary formality.

PREPARATION FOR ISSUES HEARING

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

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

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

ISSUES HEARING

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

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

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

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

DIRECTED DISCLOSURE

The prosecution will be required to comply with its legal obligations for disclosure at all times following service of the hand-up brief, meaning that relevant material must be provided once it becomes available.

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

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

Where a magistrate at the Issues Hearing has ordered that particular material be disclosed, the prosecution must disclose that material by the date directed. Magistrates will be expected to set a date in all cases to ensure material is disclosed well in advance of hearings to facilitate resolution discussions.

PREPARATION FOR CASE MANAGEMENT HEARING

In advance of the Case Management Hearing, the prosecution will be required to indicate the charges it considers have reasonable prospects of conviction (and are likely to appear on a trial indictment). This is designed to confine the issues in dispute and facilitate resolution.

CASE MANAGEMENT HEARING

If leave was granted for pre-trial examination of a witness, that pre-trial examination is to occur at the Case Management Hearing. Any cross-examination of witnesses at the Case Management Hearing must be strictly limited to the issues upon which the magistrate gives leave to cross-examine.

The parties are to engage in meaningful resolution discussions at the Case Management Hearing and counsel should be properly instructed about the issues in dispute. From this hearing, the matter is listed either for a plea or directions in the proper trial court.

Irrespective of whether cross-examination occurs, counsel appearing at the Case Management Hearing will be expected to appear at the initial directions hearing of this matter in the trial court.[5]

Things said, done or tendered at a Case Management Hearing, other than cross-examination of witnesses, will be inadmissible as evidence against the accused unless the parties otherwise agree.[6]

INITIAL DIRECTIONS HEARING

At the initial directions hearing, the court can make directions for when the indictment, prosecution opening and defence response must be served, and can arrange a timetable for hearing pre-trial issues. Because the parties are engaging with the issues in dispute at an earlier stage, the time between directions hearings can be shortened if the trial court can accommodate it.

A trial date should be set at the initial directions hearing to allow the parties to have continuity of briefing for both preparing and conducting the trial.

WHERE DOES CROSS-EXAMINATION OF WITNESSES FIT IN?

The culture of extensively cross-examining all substantive witnesses on a brief before trial will be dispensed with. It will be replaced with the following model:

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5 As is currently requested for counsel appearing at a committal hearing under Supreme Court and County Court practice directions.

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

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

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

WHY DO THIS?

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

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

[8] OPP Annual Report 2016/17.

proceedings by encouraging better disclosure (leading to earlier resolutions), providing fast-tracking procedures and reducing the delay caused by obtaining committal court dates that suit the parties, the court and all the witnesses that are sought to be cross-examined.

- **More early resolutions:** Both prosecutors and defence are required to undertake a more thorough analysis of the brief at an early stage. Prosecutors will be required to assess the sufficiency of evidence and interests of justice in a prosecution at an earlier stage. Defence practitioners will likewise be expected to more meaningfully engage in the substance of an issue at an earlier stage and identify the issues in dispute.
- **Reducing workload of magistrates:** Magistrates are under strain from ever-increasing work pressures. Committal hearings can last for as long as a month. They are a contributor to fatigue and burnout for magistrates.
- **Better using the skills of magistrates:** Magistrates have particular expertise in case management, issue identification and early resolution. This proposal puts those functions at the centre of their role and will enhance the specialisation of magistrates.
- **Reduced expense:** Committal hearings are expensive, where counsel for both prosecution and defence is frequently briefed. This has led to a cynical view that committals continue to exist for the economic benefit of legal practitioners. Whether or not there is force in that view, abolishing committals will significantly reduce the expense associated with conducting a criminal proceeding with minimal interference to the effectiveness and fairness of the system.
- **Better prioritisation of public money:** The expenses involved in criminal proceedings will be appropriately focused on resolution, case management and the conduct of a trial, rather than on unnecessary cross-examination of witnesses and a committal decision that has limited legal significance.
- **Fairness to accused persons:** Less time in pre-sentence custody or simply having charges hanging over their heads. Long delay is an accepted matter of forensic disadvantage to an accused at trial and an accepted matter in mitigation at sentence. The right of a person 'to be tried without unreasonable delay' is recognised in s 25(c) of the Victorian Charter of Human Rights and Responsibilities. The right is in fact much stronger in other jurisdictions, such as the United States and Canada, where an alleged offender has the positive right to a 'speedy' trial.[9]
- **Public safety:** Quicker resolution of prosecutions and, if relevant, sentence improve public safety. It means less time for an accused spent on bail while their criminality is still undetermined.

WHAT ABOUT…?

- **The check and balance of a magistrate reviewing the charges:** In reality, the DPP can still directly indict an accused even if a magistrate refuses to commit. The existence of the judicial committal decision pre-dates the introduction of an independent Director of Public Prosecutions and was a much more important safeguard at that time. But today, the Director imposes a higher standard when assessing sufficiency of evidence compared to the Magistrates' Court. As a consequence, far more matters are filtered out by the Director than

[9] See, e.g., United States Constitution, Sixth Amendment. In the State of Florida, for example, an offender has a right for charges brought against them to be brought to trial within 175 days of arrest.

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

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

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

HOW WE COMPARE TO OTHER STATES

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

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

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

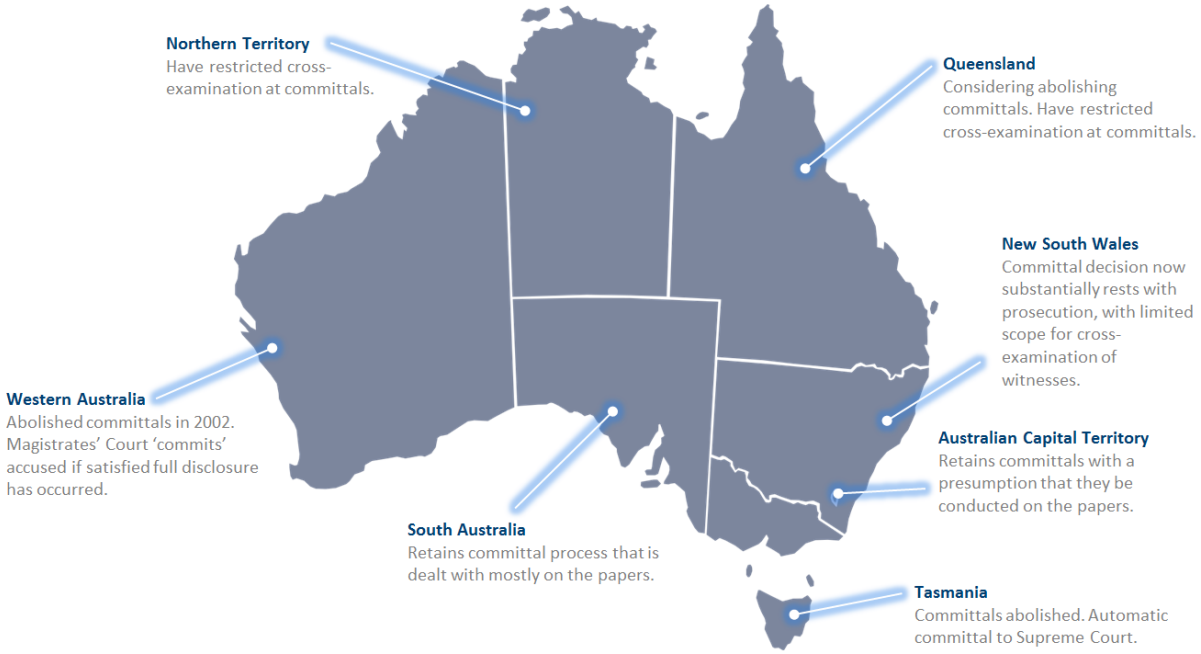


Figure 1 The state of committals in Australia

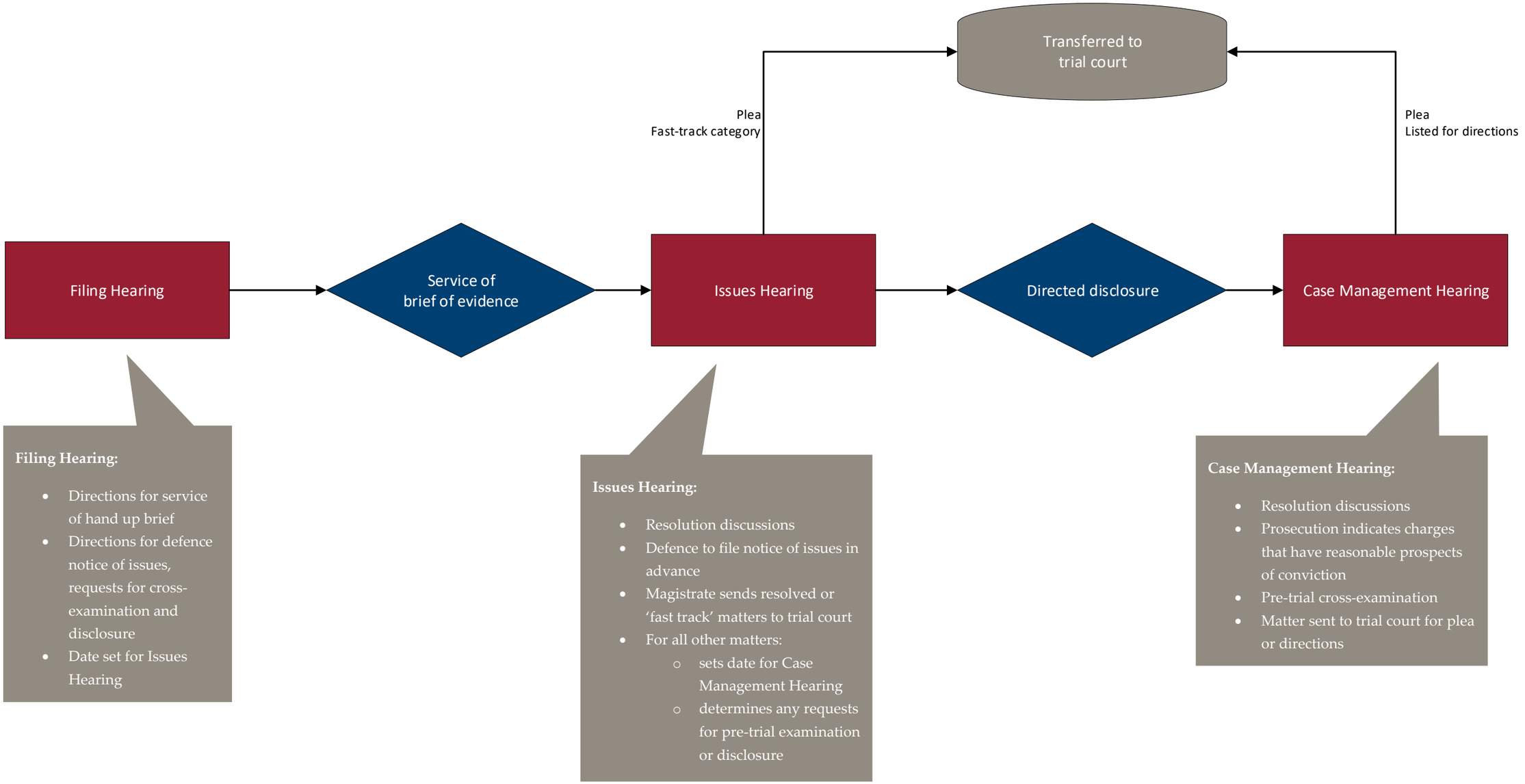
In addition, New Zealand, England and Wales have abolished committal proceedings. New Zealand introduced paper-based committals in 2008 and in 2011 these were formally abolished. In place is case management followed by adjournment to trial date. In England and Wales, indictable-only offences automatically are transferred to the Crown Court.[12]

We have the benefit of learning from the different approaches from other jurisdictions to develop the most suitable model for Victoria.

READING MATERIAL

- Victorian Law Reform Commission, 'Victims of Crime in the Criminal Trial Process' (Report 22 November 2016)
- NSW Law Reform Commission, 'Encouraging appropriate early guilty pleas' (Report 141, December 2014)

[12] *Crimes and Disorder Act 1998* (UK) ss 51-52.


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