

Royal Commission into the Management of Police Informants

The current use of specified human source information in the criminal justice system — Victoria Police further response to Royal Commission Consultation Paper

- 1 On 20 January 2020, Victoria Police submitted its response to the Royal Commission's Consultation Paper (**Initial Response**) concerning 'the current use of specified human source information in the criminal justice system' (**Consultation Paper**). This further response to the Consultation Paper (**Further Response**) is provided in response to a letter from Ms Kylie Kilgour to Deputy Commissioner Wendy Steendam dated 23 March 2020 (**23 March Letter**).
- 2 It is noted that, as with the Initial Response, Victoria Police offers these observations in the spirit of consultation. Victoria Police understands the Royal Commission is intending to hold hearings relating to Terms of Reference 3 and 4, in which it is anticipated that representatives of Victoria Police may be asked to outline Victoria Police's position on a number of matters including disclosure. As such, Victoria Police reserves its right to clarify, modify and elaborate on the observations provided in this Further Response in future hearings and in submissions.

Introduction

- 3 The 23 March Letter poses three questions relating to summary matters. In particular, the Commission's questions relate to the proportion of summary matters that proceed by preliminary brief as opposed to full brief, and potential obstacles to the use of a disclosure certificate in summary matters.
- 4 Before providing Victoria Police's responses to these questions, we set out two covering observations. These observations concern:
 - (a) the sheer number of summary proceedings in Victoria that require disclosure from Victoria Police and the efficiency of the regime of progressive disclosure in summary matters; and
 - (b) the use of terminology relating to the different types of briefs provided under the *Criminal Procedure Act 2009* (Vic) (**CPA**).

Number of summary proceedings in Victoria annually

- 5 With regard to the number of summary proceedings initiated annually in the Magistrates' Court of Victoria, Victoria Police relies on the Magistrates' Court statistics. The *Magistrates' Court of Victoria Annual Report 2018–19* records that during the financial year 2018–19 there were 151,765 cases initiated in the Magistrates' Court criminal jurisdiction.¹ Victoria Police expects that it would have been the prosecuting agency for a substantial majority of those matters. During the same time period, Victoria Police also managed around 100,000 other matters, including 50,000 applications for family

¹ *Magistrates' Court of Victoria Annual Report 2018-19*, 7.

violence orders and 50,000 other matters such as bail hearings, licence restorations and alcohol interlock device applications.²

- 6 Given the sheer number of summary proceedings commenced annually in Victoria, Victoria Police considers that the progressive and continuous disclosure regime under the CPA is working efficiently, providing early disclosure to accused people and minimising delays between offence date and finalisation. In addition to early disclosure of briefs, the regime provides for timely disclosure of potentially exculpatory material to an accused. By way of contrast, prior to the introduction of the CPA, there were more onerous disclosure requirements on informants to compile and disclose voluminous materials to an accused. A regular feature of the pre-CPA disclosure regime was briefs of evidence not being prepared in a timely way. As a result, summary charges were sometimes withdrawn for failure to comply with statutory time limits (12 months for summary matters).
- 7 Given the number of summary proceedings annually, and the concordant disclosure obligations on Victoria Police, any recommendations about disclosure in summary proceedings should take into account necessary resourcing requirements. An apparently small increase in the requirements for each summary matter will result in a very large resource burden.
- 8 These considerations should include:
- (a) potential increased workloads for police officers and police prosecutors in effectively discharging their disclosure obligations;
 - (b) the need for additional staffing requirements;
 - (c) the need for improvements to document management systems to facilitate effective disclosure; and
 - (d) the need for access to specialist advice and representation in relation to disclosure and public interest immunity where it arises in summary proceedings.

Terminology relating to different types of briefs

- 9 The CPA provides definitions for:
- (a) a 'preliminary brief', in section 37;
 - (b) a 'full brief'; in section 41;
 - (c) a 'hand-up' brief in section 110; and
 - (d) a 'plea' brief in section 117.
- 10 In the context of summary proceedings, the relevant provisions of the CPA list the information required to be included in a preliminary brief and a full brief.
- 11 Prior to the CPA, many of these terms were commonly used in an informal sense by police prosecutors, police officers and lawyers. There remains legacy usage of these terms with different intended meanings to the definitions in the CPA. Similarly, there is continuing usage of the terms 'mention briefs' and 'summary and priors' notwithstanding that these terms are not defined in the CPA.

² Victoria Police Initial Response, [68].

12 In this Further Response, in referring to different types of briefs the CPA definitions are used rather than the more informal use of the terms.

Question 1 — How many summary matters proceed by way of full brief annually, compared with the number of summary matters that proceed by way of preliminary brief?

13 The information below relates to preparation and disclosure of briefs by Victoria Police only; it is acknowledged that other agencies may have different policies or practices with respect to disclosure of briefs in summary matters.

14 Section 24 of the CPA provides that a preliminary brief must be served on the accused within 21 days of filing a charge-sheet following a notice to appear. A substantial majority of summary matters initiated by Victoria Police proceed at this early stage with a preliminary brief. It is very unusual for a full brief to be prepared at the outset of a proceeding.

15 According to data collected and maintained by the Victoria Police Legal Services Department, in the financial year 2018–19, 4,752 cases were listed for a contested hearing, of which 1,277 (26%) actually proceeded to hearing during the same period. This figure provides an indication of the overall number of matters that proceed by way of a full brief. However, it is not necessarily the case that a full brief will be served in *all* contested hearings.³ Conversely, there are circumstances where a full brief will be served in a matter that does not proceed to a contested hearing, for example, when a plea of guilty is entered following receipt of the full brief. However, it can confidently be said that a full brief is served in a small minority of cases because the vast majority of summary matters resolve at an early stage before the trigger point for a full brief is reached.

16 It should be recalled that, while the duty of disclosure required in summary proceedings is not materially different to the duty in indictable proceedings,⁴ the majority of matters listed in the summary jurisdiction are relatively simple, requiring statements from relatively few witnesses and very limited investigation. For example, Victoria Police may hold very limited potentially disclosable material in investigations resulting in charges relating to the use of motor vehicles (drink-driving, speeding etc). These are presented as a preliminary brief, but are very unlikely to have any further evidence added or disclosed as the investigation and brief preparation is fully complete by the first mention of the matter. This is an example of what prosecutors and informants would describe as a 'full brief' in the non-CPA definition sense as being a complete brief containing all relevant evidence.

17 The fact that the proportion of matters in which a full brief is served is low is an indication of the success of a system that provides for progressive disclosure intended to be fit for purpose. Common examples of when a full brief is not sought by the defence are:

- (a) an accused may decide to plead guilty without seeking any further information from the information provided in the preliminary brief;
- (b) during out of court negotiations between the parties an accused may request, or Victoria Police may proactively disclose to an accused,⁵ specific information

³ CPA s 39.

⁴ See, eg, *R v Garofalo* [999] 2 VR 625. For a recent case from New South Wales concerning the duty of disclosure in summary proceedings, see *Bradley v Senior Constable Chilby* [2020] NSWSC 145.

⁵ Pursuant to the continuing obligation of disclosure: CPA s 42.

which does not amount to all of the documentation to amount to a full brief under section 41 of the CPA; and

- (c) an investigator may prepare a hand-up brief, which is substantially similar to a full brief, in anticipation of a matter proceeding indictably, in circumstances where the accused requests and the Office of Public Prosecutions agrees the case should proceed summarily .

18 These circumstances are explained in further detail below.

Accused pleads guilty based on information in the preliminary brief

19 In the 2018–19 financial year, data collected by the Victoria Police Legal Services Department indicates that:

- (a) 79,138 summary case conferences were held across Victoria, and of these, approximately 45% of defendants proceeded to enter a plea of guilty on the same day;
- (b) The remainder were distributed as follows:
- (i) 16,188 matters were adjourned to a further mention;
 - (ii) 9,730 were adjourned to a contest mention; and
 - (iii) 1,595 were adjourned for a contested hearing.⁶

20 By comparing Victoria Police’s data against the *Magistrates’ Court Annual Report 2018–19*, Victoria Police estimates that between 72–73,000 cases are disposed of at the first mention without the need for summary case conference negotiation. This number would represent approximately 48% of matters initiated in the Magistrates’ Court criminal jurisdiction.

21 Victoria Police estimates that cases that resolve on first mention without prosecution intervention, combined with the number of cases that resolve at the first summary case conference, equal approximately 108,200, or approximately 71% of all listed criminal cases. Importantly, in almost all of these cases, the accused will be served with a preliminary brief only.

22 These figures suggest that the majority of criminal matters resolve at the first listing, either by an early guilty plea by an accused (who may obtain a sentencing benefit) or by negotiation between the parties (as explained below), in circumstances where it is unlikely that Victoria Police would be required to disclose a full brief.

Information disclosed in negotiations between the parties

23 It is common for Victoria Police to disclose information to an accused in addition to a preliminary brief, during out of court negotiations between the parties. This further disclosure by Victoria Police is often made in the context of a summary case conference.⁷ While the additional information disclosed by Victoria Police usually would not amount to a full brief, it is typically information that is either specifically requested by an accused or information particularly relevant to the accused’s case. Disclosure of this kind of information is effective in bringing about an early resolution of the matter,

⁶ It should be noted that not all cases are adjourned from a summary case conference to a contested hearing. Many proceed to contest mention, at which, failing to reach agreement for resolution, the case proceeds to a contested hearing.

⁷ CPA s 54.

potentially saving substantial resources on the justice system. This practice is also endorsed by the objectives of the CPA.

24 The Legislative Guide to the CPA provides that:⁸

Having [the preliminary brief] available early in the proceedings will give an accused more information about the charges they face. As a result, it should encourage early resolution of charges and, where early resolution is not possible, early decisions to be made about how to proceed to a hearing.

The preliminary brief is designed to tie in with the new summary case conference in section 54. This is an out of court discussion between the parties with the goal of either identifying a resolution to the charge or planning for a summary hearing. One of the main purposes of a summary case conference is to facilitate the provision of extra material that may be required before a case will be resolved. The preliminary brief will provide basic information to enable that sort of material to be identified.

25 Furthermore, according to the Explanatory Memorandum to the CPA:⁹

The conference is intended to be a flexible, out of court, case management tool designed to encourage discussion between the parties at an early stage in a summary proceeding. An express purpose of the conference is to allow the accused to identify material that may be useful in resolving the case (for example the statement of a key witness or a copy of an interview with the accused), and for the prosecution to provide such material.

26 It is common during a summary case conference for an accused to request further information or materials from Victoria Police. In fact, Victoria Police recognises that this is a key function of the summary case conference. For example, the accused may wish to see certain issues clarified in a further statement, or for the provision of video evidence obtained by the informant since the service of the preliminary brief.

27 There are also occasions where the defence requests a full brief following a summary case conference.¹⁰ The defence may request a full brief even in circumstances where the defence in actual fact seeks disclosure of specific pieces of evidence (such as copies of witness statements or CCTV footage). In these circumstances, notwithstanding that the accused has made a request for a full brief, it is common in practice for the accused's lawyer and the prosecution to negotiate to provide specific documents rather than a full brief.¹¹

28 Victoria Police considers that this process is considerably more efficient to all parties than disclosure of a full brief in all cases. Victoria Police saves resources as informants are not required to compile what can be voluminous full briefs. Similarly, the accused and/or the accused's legal representative can focus on key aspects of the evidence rather than reviewing extensive amounts of material which may not be of primary relevance to the matter. Given the large proportion of self-represented accused persons

⁸ Department of Justice, *Criminal Procedure Act 2009 Legislative Guide* (February 2010), 71.

⁹ Explanatory Memorandum, Criminal Procedure Bill 2008 (Vic), 24.

¹⁰ CPA s 39.

¹¹ As provided in CPA s 39(4).

in summary matters, Victoria Police considers that there are additional benefits to streamlining the disclosure process to an accused in summary matters.¹²

- 29 Further, upon obtaining additional information, as outlined by the data in paragraph 19 above, in many cases it is common for the accused to plead guilty either to the charges as laid or to negotiated charges.
- 30 The circumstances outlined above provide for an efficient and streamlined process for disclosure in most summary proceedings. In almost all cases, the process of negotiating disclosure of specific pieces of evidence is less resource intensive than compiling and disclosing all the material required for a full brief. In these circumstances, notwithstanding that a full brief is not served on the accused, Victoria Police discloses and the accused obtains copies of the key evidence, and the accused has an opportunity to make an informed decision regarding his or her plea.

Disclosure of a 'hand-up brief' in indictable matters triable summarily that proceed summarily

- 31 Where a matter involving an indictable offence triable summarily proceeds as a summary matter in the Magistrates' Court, Victoria Police will often disclose to the accused a brief of evidence that is comparable to a hand-up brief. However, given that the information required in a full brief is not the same as the information required in a hand-up brief, notwithstanding that Victoria Police has disclosed a substantial amount of information to the accused, the matter will not 'proceed by way of full brief'. Victoria Police anticipates that the frequency with which this occurs annually is relatively low. Victoria Police considers that this disclosure is not effectively captured by the phrasing of Question 1 in the 23 March Letter.
- 32 In proceedings where the accused is charged with an offence that is an indictable matter triable summarily, where the informant forms a view that the matter is likely to proceed to trial indictably, the informant will prepare a hand-up brief. The information required in a hand-up brief is set out in section 110 of the CPA. The hand-up brief contains all of the information that is contained in a preliminary brief. In addition, while there is a substantial overlap between the information in a hand-up brief and a full brief, the two are not identical.
- 33 In these circumstances, if the matter ultimately proceeds summarily rather than indictably, the informant will typically disclose to the accused the materials contained in the draft hand-up brief. Consequently, while the accused will have received substantially the same materials as they would receive via a full brief, the accused would not have received a full brief within the meaning of the CPA.

Question 2 — Whether there are any obstacles, from Victoria Police's perspective, to the use of a disclosure certificate in summary proceedings when the informant is required to serve a full brief.

- 34 In the Initial Response, Victoria Police indicated that while a disclosure certificate could be considered in matters that proceed indictably, it was not necessary for summary matters. The Initial Response noted the sheer volume of summary matters and the strain that would be placed on Victoria Police resources and the criminal justice system

¹² Victoria Police estimates approximately 25% of accused persons in summary matters are self-represented. It is noted that other studies of the proportion of self-represented accused persons in summary matters have provided similarly high estimates. See, eg, Department of Justice and Regulation, *Access to Justice Review* (August 2016), 472–3.

should certification be required in every matter. Having considered the matter further, Victoria Police considers that there appear to be limited benefits of certification in summary prosecutions and the risk of interfering with the efficiency of a system which appears to be working well.

35 This position in no way seeks to downplay the importance of key material being disclosed, nor of the need for Victoria Police to continue to improve its disclosure training, expertise and supervision. Rather, it reflects the way in which summary crime must be managed given the volume of cases involved.

36 Section 41 of the CPA already contains a comprehensive list of the material that must be included in a full brief. That obligation is put, as a matter of law, onto the informant. There would seem to be little, if any, value in requiring certification of compliance with a statutory obligation.

37 In New South Wales (NSW), the disclosure certificate provisions relate only to matters where the Director of Public Prosecutions (DPP) is involved. The form of the NSW disclosure certificate provides that the informant must certify that the informant is:¹³

aware that as a law enforcement officer investigating an alleged indictable or summary offence I have a duty, under section 15A of the Director of Public Prosecutions Act 1986, to disclose to the Director of Public Prosecutions (the DPP) all relevant material if the DPP is involved in the prosecution of the offence

38 The NSW certification makes sense given that the process of the police providing material to the DPP is not one which the court is likely to have visibility over.

39 For the reasons noted above in response to Question 1, the reforms to summary procedure since 2008 have been successful in improving the timeliness of the court process and encouraging progressive and targeted disclosure. Additional administrative steps carry the risk of undermining those reforms. Victoria Police is not aware of any material that has come to light during the Royal Commission hearings that suggests that certification of the content of a full brief in a summary case would have alleviated any issues that otherwise arose.

40 There are also specific issues in relation to possible reforms in this area that may have unintended consequences in the Children's Court and in relation to family violence related cases. These are dealt with in a separate section at the end of this Further Response.

Question 3 — Whether Victoria Police has any additional views on the potential use of a disclosure certificate when a preliminary brief is used.

41 Victoria Police has formed a preliminary view that it would not be appropriate to use a disclosure certificate in summary matters when a preliminary brief is used.

42 The main reason is that the CPA already provides for informants to provide a statement accompanying the preliminary brief that is sworn or affirmed, signed or attested. This statement by the informant is disclosed to an accused with the preliminary brief.

43 Section 37(2) of the CPA provides that:

¹³ Director of Public Prosecutions Regulation 2015, Schedule 1.

[a] *statement by the informant in a preliminary brief must be a complete and accurate statement of the material available to the prosecution at the time the statement is sworn or affirmed, signed or attested . . .*

- 44 Section 38 of the CPA provides that the statement by the informant must be:
- (a) in the form of an affidavit; or
 - (b) signed by the informant and witnessed by an authorised person with an acknowledgement that the statement is true and correct and is made in the belief that a person making a false statement in the circumstances is liable to penalties of perjury.
- 45 The current distinction between preliminary and full briefs was introduced in the CPA in a successful attempt to provide a mechanism for early disclosure of important information to facilitate the expeditious resolution of summary matters.¹⁴ Prior to the introduction of preliminary briefs, the time from initial charge to preparation of a brief was often at least six months, and it was not uncommon for cases to be dismissed for being outside the statutory limitation period of 12 months for summary matters.
- 46 The benefits of a disclosure certificate in summary proceedings are already achieved by the s 37(2) and s 38 process. If a more onerous requirement than that contained in s 37 is envisaged then that risks undermining the efficiencies achieved by the mechanism of the preliminary brief. The data provided in this Further Response suggests that the preliminary brief provides sufficient information to an accused to decide the nature of the case against them and if they should enter a plea. In circumstances where a not guilty plea is entered, then the fulsome disclosure process provided for in section 41 can apply.
- 47 There are also specific issues in relation to possible reforms in this area that may have unintended consequences in the Children’s Court and in relation to family violence related cases. These are dealt with below.

Other Issues

Matters in the Children’s Court of Victoria

- 48 Criminal matters listed in the Children’s Court jurisdiction differ significantly from other summary matters listed in the Magistrates’ Court, given the complexity and more serious types of offences over which the Children’s Court has jurisdiction. In practice, many matters in the Children’s Court resolve well before having to be adjourned for a contested hearing. This is in part a result of a consistent developed practice of ongoing disclosure being provided to the accused, with the focus to avoid delays for the prosecution of children in matters relating to the *Children, Youth and Families Act 2005* (Vic).
- 49 Requirements for Victoria Police to provide timely and ongoing disclosure to an accused and their legal representatives are also promoted by the *Children’s Court of Victoria Practice Direction 7 of 2018*,¹⁵ which encourages a focus on achieving early resolution for all Children’s Court matters as soon as possible.
- 50 There is a high early resolution rate for matters in the Children’s Court at first mention where matters resolve by way of a diversion recommendation, plea of guilty or

¹⁴ See statement of Findlay McRae dated 13 November 2019: VPL.0014.0089.0003 at .0010.

¹⁵ Children’s Court of Victoria, *Practice Direction No 7 of 2018 — Fast Track Remand Court*, 19 September 2018.

withdrawal. Typically, where specific further disclosure is required (quite often CCTV footage, body worn camera footage, records of interviews, additional key witness statements) they are requested by the accused prior to or at the first mention of the matter, which may be adjourned to second mention within two to four weeks (or if a more complex matter to contest mention) to receive the additional disclosure. The further disclosure is typically provided prior, at first mention or at the second mention date where many matters resolve with the additional specific disclosure request being completed and the matter settled prior to being adjourned off to either a contest mention or a contested hearing.

- 51 In the Children’s Court, similar to the Magistrates’ Court (for even the most complex and serious Children’s Court charges), Victoria Police again considers the process of negotiating disclosure of specific pieces of evidence to be more effective and efficient, as well as less resource intensive than compiling and disclosing all the material required for a full brief. In these circumstances, notwithstanding that a full brief is not served on the accused, Victoria Police in Children’s Court matters disclose and the accused obtains copies of the key evidence, and the accused has an opportunity to make an informed decision regarding his or her plea, which occurs for the vast majority of cases without the need to adjourn to a contested hearing.

Family violence matters

- 52 Family Violence-related criminal matters at Melbourne Magistrates’ Court are subject to *Practice Direction 13 of 2016*,¹⁶ which provides that at the time of release on bail or when served with summons, the accused person must be given a document entitled “Family violence related criminal proceedings”. This document advises accused persons they are able to obtain a copy of the preliminary brief (if not already provided at first listing) prior to leaving the court.
- 53 As with other matters listed at the Magistrates’ Court, Victoria Police again considers the process of negotiating disclosure of specific pieces of evidence to be more effective and efficient, as well as less resource intensive than compiling and disclosing all the material required for a full brief. There are, however, a number of further issues specific to the family violence-related criminal matters which would likely impact on Victoria Police’s ability to provide more fulsome disclosure at an earlier stage:
- (a) given the nature of family violence-related crime, there is often not a more fulsome brief available at an early stage as the matters often require further investigation by informants where matters involve affected family member/s who may be reluctant to assist Victoria Police in their inquiries;
 - (b) injuries to involved parties are not always clear in the early stages of investigation, particularly where there are issues relating to mental harm; and
 - (c) the overlap in criminal and civil proceedings in family violence matters should be noted; the same set of materials held by Victoria Police can be subject to the disclosure process in the criminal proceedings and disclosure at a later stage in the civil proceedings by way of an order for service of further and better particulars usually at directions hearing stage or later.

Date: 16 April 2020

¹⁶ Magistrates’ Court of Victoria, *Practice Direction No 13 of 2016 — Expansion of the fast tracked listing process to the Court at Heidelberg and Melbourne*, 30 October 2016.